

ESSAY

THE FEDERAL COURT OF AUSTRALIA: THE FIRST 30 YEARS — A SURVEY ON THE OCCASION OF TWO ANNIVERSARIES

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[In this essay the Chief Justice of the Federal Court of Australia reviews the Court's first 30 years. His Honour traces the origins of the Court, arguing that since Federation the Commonwealth has always sought to keep matters of special federal concern within the exclusive or near exclusive jurisdiction of federal courts. His Honour outlines the events leading to the establishment of the Federal Court and its subsequent growth and development as a national trial and appellate court of general jurisdiction in civil matters arising under federal law. His Honour discusses the Court's procedural reforms, its distinctive model of self-administration, and the growth of its jurisdiction consequent upon the large expansion of areas of Commonwealth legislative interest.]

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I INTRODUCTION

An invitation to survey the first 30 years of the Federal Court of Australia — for nearly half of which I was a practitioner before the Court and the remainder its Chief Justice — presents something of a challenge, particularly if appropriate deference is given to the usual limits for articles in the *Melbourne University Law Review*. So, the following consideration of the creation of the Federal Court of Australia and its first 30 years must necessarily be selective and, in parts, very

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general. Given that an entirely new court was created and that its jurisdiction has continued to expand with the expansion of Commonwealth legislative activity, it is hardly surprising that there is much to be said. The dynamic legal, economic, political and social environment in which the Court has exercised its jurisdiction over the past 30 years has ensured that the period has been one of continuous development and great change.

To keep this essay within manageable limits I have not attempted to examine the Court's jurisprudence either generally or in its areas of specialist jurisprudence. This may be found in the standard texts in fields such as administrative, tax, intellectual property, workplace relations, native title, trade practices and corporations law. In areas of international law, notably the law with respect to the *Convention Relating to the Status of Refugees* ('*Refugees Convention*'),¹ the Court's jurisprudence appears in international works, reflecting its substantial contribution, along with the High Court, to the development of this important area of law.

II AN HISTORICAL OVERVIEW

There is an interesting coincidence between the 30th Anniversary of the Federal Court of Australia, which first sat on 7 February 1977, and the 50th Anniversary of the *Melbourne University Law Review*, which was first published in July 1957. As the passage of time has shown, the first publication of the *Melbourne University Law Review* was an important event in Australian legal scholarship and legal publishing. Another important event occurred at the University of Melbourne that month. Edward Gough Whitlam, a backbench member of federal Parliament, delivered a lecture in which he proposed the establishment of a federal circuit court.² This was one of the earliest, if not the first, public proposals for a federal superior court of broad, non-specialist jurisdiction.

The world of Australian law and lawyers in which the first issue of the *Melbourne University Law Review* was published was remarkably different in many respects, particularly in relation to the content of federal jurisdiction, to the world as it had come to be only 20 years later when the Federal Court of Australia was created by the Parliament in the exercise of its powers under Chapter III of the *Constitution*.

In 1957 the nature and content of federal jurisdiction would not have been seen, as it should be seen today, as an indispensable element of any practitioner's understanding of Australian law. It was seen then as a dry and arid field of study, not least by the law students of that time. Sir Zelman Cowen's great work on the subject, *Federal Jurisdiction in Australia*, had yet to be published.³

¹ *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 January 1954), as amended by *Protocol Relating to the Status of Refugees*, opened for signature 16 December 1966, 606 UNTS 267 (entered into force 4 October 1967).

² Gough Whitlam, 'Whitlam Era' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 708, 709.

³ For the first edition: see Zelman Cowen and Leslie Zines, *Federal Jurisdiction in Australia* (1959). For the most recent edition: see Leslie Zines, *Cowen and Zines's Federal Jurisdiction in Australia* (3rd ed, 2002).

Federal jurisdiction was of course exercised routinely and frequently by the courts of the states, as it still is. Under the well-known arrangements contemplated by Chapter III of the *Constitution*, the Parliament had, in 1903, invested state courts with an almost complete measure of federal jurisdiction. The so-called 'autochthonous expedient'⁴ served well a country that, even in 1957, had a population of less than 10 million people and in which communications were still relatively slow and expensive. An articulated clerk in a solicitor's office in those days, for example, would have required the authorisation of a principal to make what was called a 'trunk call' and such a call would, most likely, have been arranged, for clerk and principal alike, by a telephonist. Travel between Melbourne and Sydney was still mostly by rail, with the need to change trains at the border.

The practice of the law, whether at the Bar or as a solicitor, was state-based. National practice was virtually unknown and generally quite impossible. At the very highest levels of the Bar counsel could appear before the High Court of Australia, a federal court, wherever it sat and there was also the possibility of interstate practice for a somewhat larger number of practitioners in the specialised field of federal industrial law before the Commonwealth Industrial Court and the Commonwealth Conciliation and Arbitration Commission. Another specialist federal court, the Federal Court of Bankruptcy, offered some possibility of interstate practice but since its work was confined largely to New South Wales and Victoria that possibility was very limited.

Although the exercise of power by the Parliament of the Commonwealth had expanded into new fields during and after the Second World War and there had been a fundamental rearrangement of the financial relationships between the Commonwealth and the states,⁵ the extent of federal civil jurisdiction in 1957 remained quite limited. Whilst the Commonwealth had entered the field of matrimonial causes, its laws in that area were still limited in scope. There was no general Commonwealth law with respect to corporations or consumer protection and there was certainly no contemplation in 1957 of any federal legislation for the protection of human rights by, for example, prohibiting discrimination on the grounds of sex, marital status, race or disability, or for the protection of the natural environment or Australia's heritage.

Federal administrative law was essentially within the exclusive original jurisdiction of the High Court. The actions of officers of the Commonwealth could be challenged in the High Court in its original jurisdiction under s 75(v) of the *Constitution* but the process was seen as difficult, expensive and, as a practical matter, rarely available to the ordinary citizen. There was only limited provision for merits review of administrative decisions.

In 1957 there was some recognition of the fact that the roles of the High Court of Australia as a federal court of original jurisdiction and as the court of first appeal from trial courts of the territories were inappropriate and an undue burden

⁴ *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 268 (Dixon CJ, McTiernan, Fullagar and Kitto JJ) ('*Boilermakers' Case*').

⁵ *South Australia v Commonwealth* (1942) 65 CLR 373; *Victoria v Commonwealth* (1957) 99 CLR 575.

upon it, and that these roles detracted from its primary functions as interpreter of the *Constitution* and final court of appeal. Nevertheless, Whitlam's proposal for a new federal court was no doubt seen as very farsighted and possibly even radical at the time. He recounts that he later 'developed the idea on two occasions in the House, and at the Eleventh Australian Legal Convention in 1959.'⁶

By 1963, the idea of a new Federal Court had gained some ground. At the 13th Australian Legal Convention, Maurice Byers QC⁷ and Paul Toose presented a paper advocating a new federal superior court to relieve the High Court of the burden of its original jurisdiction, to reduce the volume of its appellate work, and also — radically — to remove federal matters from state courts. It was part of the federal bargain, they said, that in the early years the state courts would accommodate the increasing load of federal work but that, equally, the

federal legislature should, when necessary, set up federal courts other than the High Court to do federal work. It was never intended that one or two of the methods provided by the *Constitution* for the exercise of federal judicial power should be used virtually to the exclusion of the third.⁸

During the discussion of the paper,⁹ the Commonwealth Solicitor-General, Sir Kenneth Bailey, announced on behalf of the Commonwealth Attorney-General, Sir Garfield Barwick QC, that the latter had Cabinet authority 'to design a new federal Court with a view to consideration by Cabinet for approval for legislative action'.¹⁰ Sir Garfield subsequently prepared a paper developing the proposal for a new federal superior court.¹¹ As the paper was going to print, as the first article in the first edition of the *Federal Law Review*, Sir Garfield was appointed Chief Justice of the High Court.

By the early 1970s the creation of a new federal superior court had gained general support from both sides of politics. Three Bills for the establishment of such a court were, however, unsuccessful. This result was, it would seem, attributable to differences over the content of the jurisdiction of the proposed court and its size, rather than the merit of establishing a new federal court at all.

The first Bill, proposed by the then Commonwealth Attorney-General, Sir Nigel Bowen QC, lapsed when the Parliament was dissolved in 1969 for the general election held that year. In 1972, the Australian government announced that it had decided that the proposal 'should not be proceeded with'.¹² The idea

⁶ Whitlam, above n 2, 709.

⁷ Later Sir Maurice Byers QC, Solicitor-General of the Commonwealth from 1973 to 1983.

⁸ M H Byers and P B Toose, 'The Necessity for a New Federal Court' (1963) 36 *Australian Law Journal* 308, 309. For a more recent affirmation of this view: see *Stack v Coast Securities (No 9) Pty Ltd* (1983) 154 CLR 261, 293 (Mason, Brennan and Deane JJ), cited by Justice Robert French, 'Federal Courts Created by Parliament' in Brian Opeskin and Fiona Wheeler (eds), *The Australian Federal Judicial System* (2000) 123, 131. For an opposing view: see Commonwealth, *Parliamentary Debates*, House of Representatives, 24 July 1974, 598 (Robert Ellicott).

⁹ The discussion of the paper is recorded immediately after its publication: see Byers and Toose, above n 8, 320.

¹⁰ *Ibid* 325.

¹¹ Sir Garfield Barwick, 'The Australian Judicial System: The Proposed New Federal Superior Court' (1964) 1 *Federal Law Review* 1.

¹² Commonwealth, *Parliamentary Debates*, Senate, 27 October 1972, 2086 (Ivor Greenwood, Attorney-General).

was revived with the change of government and in 1973, the Superior Court of Australia Bill 1973 (Cth) was introduced by the new Attorney-General, Senator Lionel Murphy QC. This Bill was opposed by the Opposition on various grounds and defeated in the Senate. A subsequent Bill to the same effect was also defeated. These rejections of the government's Bills prompted Prime Minister Whitlam to ask whether he might 'congratulate the State Supreme Court Judges on their unparalleled skill as lobbyists'.¹³

In 1976, the government having changed again, the Federal Court of Australia Bill 1976 (Cth) was introduced by the Commonwealth Attorney-General, Robert Ellicott QC. Ellicott had been a critic of the earlier Superior Court of Australia Bill 1973 (Cth) but now advocated support for a not dissimilar Bill on the primary ground that the new court would relieve the High Court of some of its non-constitutional workload.¹⁴ Sir Garfield Barwick held serious concerns about the workload of the High Court, which he expressed in his State of the Australian Judicature address in 1977, reporting that it 'had become too heavy' and observing that, in any case, much of the work of the Court in its original jurisdiction was inappropriate for a final court of appeal.¹⁵

In the second reading speech for the Federal Court of Australia Bill 1976 (Cth), Ellicott said that the earlier Bills 'would have removed from the State courts the bulk of the federal jurisdiction exercised by those courts and greatly weakened the status of those courts and the quality of the work dealt with by them.'¹⁶ He said that, by contrast, this Bill would restructure the federal judiciary by consolidating the Australian Industrial Court and Federal Court of Bankruptcy and would relieve the High Court of some of its workload. It would not have the significant impact on the state Supreme Courts that the previous proposals would have had. This was because the proposed jurisdiction was much narrower, restricted to 'well-defined fields of federal and Territory law' and not entering 'any field of original jurisdiction now exercised by State courts.'¹⁷

The Bill was passed and so the Federal Court of Australia was created as a 'superior court of record and ... a court of law and equity'¹⁸ by the *Federal Court of Australia Act 1976* (Cth). The Act received royal assent on 9 December 1976.

¹³ E G Whitlam, 'Untitled Speech' (Speech delivered at the 18th Australian Legal Convention of the Law Council of Australia, Canberra, 2 July 1975). This speech was published in: (1975) 49 *Australian Law Journal* 310.

¹⁴ Commonwealth, *Parliamentary Debates*, House of Representatives, 21 October 1976, 2110ff (Robert Ellicott, Attorney-General).

¹⁵ Sir Garfield Barwick, 'The State of the Australian Judicature' (1977) 51 *Australian Law Journal* 480, 488.

¹⁶ Commonwealth, *Parliamentary Debates*, House of Representatives, 21 October 1976, 2110 (Robert Ellicott, Attorney-General).

¹⁷ *Ibid* 2111.

¹⁸ *Federal Court of Australia Act 1976* (Cth) s 5(2).

III WHY A FEDERAL COURT?

What were the circumstances under which the then novel ideas of Whitlam, Byers and Toose in the late 1950s and early 1960s became the accepted reality of the late 1970s?

There are several important factors which seem to me to be essential to an understanding of the history and development of federal courts in Australia. That history commences in 1903 with the establishment of the High Court of Australia, as mandated by Chapter III of the *Constitution*, and continues in 1904 with Parliament's creation of the Commonwealth Court of Conciliation and Arbitration.

The first point is one that seems to have been overlooked by those who questioned the necessity for the new Federal Court. The point is that there have always been matters of special federal concern that the Parliament has determined should remain within the exclusive jurisdiction of a federal court, whether the High Court of Australia or a court created by the Parliament under Chapter III.

The earliest and most obvious area of special federal interest and concern was the prevention and settlement, by conciliation and arbitration, of industrial disputes extending beyond the limits of any one state.¹⁹ The Commonwealth Court of Conciliation and Arbitration, of which a judge of the High Court was the first President,²⁰ was given exclusive jurisdiction over matters calling for the exercise of judicial power in this field, namely the interpretation and enforcement of federal awards and the regulation of registered organisations.²¹

When, following the *Boilermakers' Case*²² in 1956, it became necessary to divide the judicial and arbitral functions in federal industrial law and the Commonwealth Industrial Court was established, the same pattern was continued. When the jurisdiction of the Australian Industrial Court, as it was then called, was transferred to the Federal Court of Australia in 1976, the core elements remained exclusively within the jurisdiction of the Federal Court. Indeed, the Federal Court was established with an industrial division — now long gone. Today, the *Workplace Relations Act 1996* (Cth) continues to confer jurisdiction upon the Federal Court and the Federal Magistrates Court, 'exclusive of the jurisdiction of any other court created by the Parliament or any court of a State or Territory', in relation to 'an act or omission for which an organisation or

¹⁹ *Constitution* s 51(xxxv).

²⁰ Justice O'Connor: see French, above n 8, 132.

²¹ The *Constitution* does not confer a general power on the Parliament to legislate with respect to industrial relations but it is an area in which the Parliament has consistently sought to maximise its legislative influence. On six occasions in the first half of the 20th century (1911, 1913, 1919, 1926, 1944 and 1946), the federal government made unsuccessful attempts to amend s 51(xxxv) of the *Constitution* to broaden its power in this field: see Breen Creighton and Andrew Stewart, *Labour Law* (4th ed, 2005) 124 fn 264. For much of the time since Federation, the Parliament has regarded industrial relations as sufficiently important to warrant its own specialised federal courts: see French, above n 8, 132–8; James Crawford and Brian Opeskin, *Australian Courts of Law* (4th ed, 2004) 234–6. In 2006, the High Court upheld the Parliament's reliance on the corporations power to legislate with respect to industrial relations: *New South Wales v Commonwealth* (2006) 229 CLR 1.

²² (1956) 94 CLR 254; affd *A-G (Cth) v The Queen* [1957] AC 288.

member of an organisation is liable to be sued, or to be proceeded against for a pecuniary penalty' under that Act.²³

Similarly, but less obviously, the Parliament of the Commonwealth has always seen certain elements of competition law as being matters of special federal concern. The *Australian Industries Preservation Act 1906* (Cth), an Act described in its preamble as for 'the Preservation of Australian Industries, and for the Repression of Destructive Monopolies' and based on the *Sherman Act* of the United States,²⁴ appears to have conferred exclusive jurisdiction, including a criminal jurisdiction, upon the High Court.²⁵ Recovery was by way of an action for treble damages before a Justice of the High Court.²⁶ The Attorney-General might seek an injunction in the High Court²⁷ and offences, not being indictable offences, were to be tried before a Justice of the High Court without a jury.²⁸ The provisions concerned with the prevention of dumping and unfair competition purported to confer an investigative jurisdiction upon Justices of the High Court.²⁹

In 1957, the *Australian Industries Preservation Act 1906* (Cth) was essentially a dead letter,³⁰ but the interest of the Commonwealth Parliament in the field was revived with the passing of the *Trade Practices Act 1965* (Cth), which conferred exclusive jurisdiction upon the Commonwealth Industrial Court.³¹ Under its successor, the *Trade Practices Act 1974* (Cth) ('*TPA*'), exclusive jurisdiction was conferred upon the 'Superior Court of Australia',³² with the Australian Industrial Court exercising this jurisdiction³³ until 1977 when it was transferred to the Federal Court of Australia. The historical concern to have federal matters of this nature dealt with in one of the Commonwealth's courts thus continued. Indeed, initially, the Federal Court had exclusive jurisdiction not only in respect of the competition law provisions in Part IV of the *TPA* but also in respect of the new consumer protection provisions, including s 52, a provision of considerable importance in the history of the Federal Court and the growth of its jurisdiction, to which I will need to return.

It was, of course, something of an oddity that an important new area of specialised non-industrial Commonwealth law should be placed within the jurisdiction of an industrial court. Having said this, however, it is immediately necessary to note that there were some very distinguished members of that Court who laid the

²³ *Workplace Relations Act 1996* (Cth) s 850(1).

²⁴ *Sherman Act*, c 647, 26 Stat 209 (1890). For the current version: see 15 USC §§ 1–7 (2000 & Supp IV, 2004).

²⁵ Query, however, whether s 39(2) of the *Judiciary Act 1903* (Cth) ('*Judiciary Act*') still operated to confer concurrent jurisdiction on the Supreme Courts of the states; it probably did not.

²⁶ *Australian Industries Preservation Act 1906* (Cth) s 11.

²⁷ *Australian Industries Preservation Act 1906* (Cth) s 10.

²⁸ *Australian Industries Preservation Act 1906* (Cth) s 13(1).

²⁹ *Australian Industries Preservation Act 1906* (Cth) s 21.

³⁰ It was eventually repealed by the *Trade Practices Act 1966* (Cth), which was enacted principally for the purpose of amending the *Trade Practices Act 1965* (Cth) with regard to carriage of goods by sea.

³¹ *Trade Practices Act 1965* (Cth) ss 5, 88.

³² See generally *TPA* s 86.

³³ *TPA* s 169, repealed by *Trade Practices Amendment Act 1977* (Cth) s 78.

foundations for much of the later law. The work of Sir Reginald Smithers was especially notable.

Another important field of special federal concern is in matters in which a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth — the original jurisdiction conferred on the High Court by s 75(v) of the *Constitution*. From 1903 to the present time, s 38 of the *Judiciary Act* has provided that the jurisdiction of the High Court is to be exclusive of the jurisdiction of the courts of the states in such matters. Judicial review jurisdiction under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (*ADJR Act*) was subsequently conferred upon the Federal Court in 1980³⁴ and in 1983, subject to some limitations, the Federal Court was given s 75(v) jurisdiction.³⁵

When enlarged provisions for the remittal of matters by the High Court were introduced into the *Judiciary Act*,³⁶ the power to remit pending matters to a court of a state or territory or the Federal Court was extended to all matters referred to in s 38 (a)–(d) of the Act, but not to the matters referred to in s 38(e), that is, the *Constitution* s 75(v) matters. These, however, can be remitted to the Federal Court.³⁷

The policy of keeping matters of special federal concern essentially within the exclusive jurisdiction of federal courts — particularly evident with respect to judicial review — found later expression in the provisions of the cross-vesting legislation relating to ‘special federal matters’³⁸ and the express exclusion of other federal matters from the scope of that scheme.³⁹ During the second reading speech for the *Jurisdiction of Courts (Cross-Vesting) Bill 1986* (Cth), Lionel Bowen, the Attorney-General, noted that ‘[p]rovision is made in the Bill to recognise the special role of the Federal Court in matters in which it now has, apart from the jurisdiction of the High Court, exclusive original or appellate jurisdiction.’⁴⁰ Later amendments to the cross-vesting scheme were passed by all participating legislatures⁴¹ which served to strengthen the position of the Federal Court with respect to special federal matters.

With the development of ‘the new administrative law’ in the 1970s there was a very substantial expansion of interest in another central area of special federal concern. The essential elements of the far-reaching reforms were the establishment of an Administrative Appeals Tribunal to provide independent merits review, judicial review on simplified grounds under the *ADJR Act*, the *Freedom of Information Act 1982* (Cth), an Ombudsman and an Administrative Review Council. Plainly enough, if the expected increase in judicial review were to be

³⁴ *ADJR Act* s 8. The Act came into effect on 1 October 1980.

³⁵ *Judiciary Act* s 39B(1).

³⁶ *Judiciary Act* s 44(2).

³⁷ *Judiciary Act* s 44(2A).

³⁸ *Jurisdiction of Courts (Cross-Vesting) Act 1987* (Cth) ss 3, 6.

³⁹ *Jurisdiction of Courts (Cross-Vesting) Act 1987* (Cth) s 4(4).

⁴⁰ Commonwealth, *Parliamentary Debates*, House of Representatives, 22 October 1986, 2556 (Lionel Bowen, Attorney-General).

⁴¹ In 1992 and 1993: see Brian Opeskin, ‘Cross-Vesting of Jurisdiction and the Federal Judicial System’ in Brian Opeskin and Fiona Wheeler (eds), *The Australian Federal Judicial System* (2000) 299, 329.

accommodated consistently with long-established policies, jurisdiction had to be conferred upon a federal court and if the High Court was to be relieved of the burden of such cases to enable it to fulfil its primary roles, it could not be the recipient. Accordingly, upon the establishment of the Administrative Appeals Tribunal in 1975, jurisdiction to hear appeals from the Tribunal on questions of law was conferred upon the Australian Industrial Court.⁴²

Reform of procedure was also a motivating factor for the establishment of the Federal Court. At the heart of the new administrative law were simplified and improved, and therefore more accessible, procedures. Without procedural reform these objects were liable to be frustrated.⁴³

It had become plain by the late 1960s and early 1970s that the High Court's growing original jurisdiction was increasingly burdensome, particularly in matters of tax and patents. It is within my own memory of practice at the Bar in the 1970s that single Justices of the High Court routinely heard applications for constitutional writs, applications for the extension of patents, tax appeals, and even personal injury actions. For the latter, all that was needed was an interstate plaintiff or defendant.⁴⁴

Then there were appeals from the Australian Capital Territory and the Northern Territory. Before the Federal Court was established these lay directly to the High Court. It was plainly inappropriate for the High Court of Australia, the ultimate court of appeal, to hear appeals as the first court of appeal and these appeals also added significantly to its workload. The volume of this work was substantial; in its first year the Full Court of the Federal Court heard 21 appeals from the Supreme Court of the Australian Capital Territory and from then until the creation of the Court of Appeal of the Australian Capital Territory in 2002, over 900 such appeals were disposed of.

The enactment of Commonwealth legislation conferring jurisdiction specifically upon federal courts was an emerging trend throughout the 1970s. This was reflected in the transfer to the Federal Court of miscellaneous areas of jurisdiction that had been conferred upon the Australian Industrial Court for want of a more appropriate federal court. As well as the *Administrative Appeals Tribunal Act 1975* (Cth) and the *TPA*, jurisdiction under several other Acts including the *Financial Corporations Act 1974* (Cth), the *Prices Justification Act 1973* (Cth), and the *Insurance Act 1973* (Cth) had to be transferred to the new court.⁴⁵

Against this background there seems, in retrospect, to have been an air of inevitability about the establishment of a new federal court. If areas of special Commonwealth interest or concern, now no longer predominantly 'industrial' but extending to the broad fields of public law, competition law, and consumer

⁴² *Administrative Appeals Tribunal Act 1975* (Cth) s 44. The Administrative Review Council was established by pt V of this Act.

⁴³ Personal communication from R J Ellicott QC to Justice Allsop, reported to the author. Senator Murphy had urged the need for Commonwealth involvement in procedural reform in his speech in support of the unsuccessful Superior Court of Australia Bill 1973 (Cth): Commonwealth, *Parliamentary Debates*, Senate, 12 December 1973, 2725 (Lionel Murphy, Attorney-General).

⁴⁴ *Constitution* s 75(iv).

⁴⁵ See also *Broadcasting and Television Act 1942* (Cth); *Health Insurance Act 1973* (Cth); *Navigation Act 1912* (Cth).

protection, were to be kept within the jurisdiction of a federal court, a new court had to be established. The Australian Industrial Court was, in essence, a court of industrial law, as its name and history suggest. The High Court was already over-burdened in its original jurisdiction and in any event was not an appropriate repository for an expanding trial jurisdiction. If matters of special concern were, consistently with a long-established policy, to be heard in a federal court and excluded from the 'autochthonous expedient',⁴⁶ a new federal court had to be created. Such a court could also function as an intermediate appellate court in specific areas of federal law and also relieve the High Court of the burden of the territory appeals. As well as absorbing the jurisdiction of the Australian Industrial Court, it was sensible and convenient for a new court to absorb the jurisdiction of the Federal Court of Bankruptcy — an important and distinguished federal court of which Sir Harry Gibbs had been a member.

And so it was that the Federal Court of Australia came to be established.

IV THE NEW COURT AND ITS JUDGES

The Chief Justice⁴⁷ of the new Court was sworn in by the Governor-General, Sir John Kerr, on 20 December 1976. The other foundation judges were sworn in soon afterwards, at a ceremonial sitting of the Court — also its first sitting — in Sydney on 7 February 1977.

Of the 19 judges appointed, only two had not previously served as members of Commonwealth courts⁴⁸ — the Chief Justice had been the Chief Judge in Equity of the Supreme Court of New South Wales and Keely J was appointed directly from the Victorian Bar. Of the others, nine were members of the Australian Industrial Court,⁴⁹ three were members of the Supreme Court of the Australian Capital Territory,⁵⁰ two were members of the Federal Court of Bankruptcy⁵¹ and three were judges of the Supreme Court of the Northern Territory.⁵² The original 19 judges included some whose primary work continued to be as a judge of a territory Supreme Court.

A life appointee, Sir Nigel Bowen retired as Chief Justice on 31 December 1990 and my appointment took effect on the following day. By that time the Court had grown to 32 judges, of whom 27 had primary commissions as judges

⁴⁶ *Boilermakers' Case* (1956) 94 CLR 254, 268 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).

⁴⁷ The office was originally that of 'Chief Judge': *Federal Court of Australia Act 1976* (Cth) s 5(3). In 1987 the Act was amended to provide that the Chief Judge be called the 'Chief Justice of the Court': *Statute Law (Miscellaneous Provisions) Act 1987* (Cth) sch 1, amending *Federal Court of Australia Act 1976* (Cth). In 1996 the Act was again amended so that the title of the office was formally changed to 'Chief Justice': *Workplace Relations and Other Legislation Amendment Act 1996* (Cth) sch 16, amending *Federal Court of Australia Act 1976* (Cth). To avoid confusion, the term 'Chief Justice' is used in this essay for the entire period since 1977.

⁴⁸ 'Current Topics' (1977) 51 *Australian Law Journal* 55, 57.

⁴⁹ Smithers, Nimmo, Woodward, Franki, J B Sweeney, Evatt, St John, Northrop and Brennan JJ: see *ibid*.

⁵⁰ Fox, Blackburn and Connor JJ: see *ibid*.

⁵¹ C A Sweeney and Riley JJ: see *ibid*.

⁵² Forster, Muirhead and Ward JJ: see *ibid*.

of the Federal Court.⁵³ The Court has continued to grow to a present membership of 47 judges with primary Federal Court commissions.

Since the foundation appointments to the Federal Court in February 1977, there have been a further 88,⁵⁴ the first of the additional appointments having been made as early as April 1977 — Deane and Toohey JJ, the former from the Supreme Court of New South Wales.

The professional backgrounds of the judges have generally been as leaders of the independent Bars of the various states. The Court has also been enriched by some of Australia's earliest judicial appointments of distinguished academic lawyers and solicitors. Many of the other judges have also had experience as teachers of law and quite a few continue to have a teaching role. At least ten of the present judges have, at one time, been full-time teachers of law and four have been Deans of Australian law schools. At least six have, at one time, held the academic rank of Professor.

Of the judges appointed since February 1977, 15 had been members of the Supreme Courts of the states, one a member of the District Court of New South Wales, and one a member of the Land and Environment Court of New South Wales. There have been three resignations to become members of state courts of appeal (the last in 1996), and six judges have resigned their commissions as judges of the Federal Court upon their appointment as Justices of the High Court of Australia — Brennan, Deane, Toohey, Gummow, Crennan and Kiefel JJ.⁵⁵ Ten women have held office as judges of the Federal Court, the first having been appointed in 1990.

In 2005, four judges died in office and another, Beaumont J, who had recently retired also passed away. Lockhart J, another of the strengths of the early Court, who had retired in 1999 and who had then given distinguished public service internationally, passed away in January the following year. It was a dark period in the Court's history.

The geographical spread of resident judges has changed over time. The Court has been national in character from the outset but in the early days its membership was concentrated in Sydney and Melbourne. Judges are now much more evenly distributed. Whilst there are 18 resident judges in Sydney and 15 (including the Chief Justice) in Melbourne, there are now five judges resident in Brisbane, four in Adelaide, four in Perth and (very recently) one in Darwin. The business of the Court in the Australian Capital Territory is served by a panel of judges resident in Sydney, Hobart is served by a panel in Melbourne and Darwin has been served from Adelaide.

Although the Court has grown substantially during its 30 years, it has not exceeded 50 judges and I would not like to see it grow much beyond this. For

⁵³ At that time it was still the practice for judges of the Supreme Court of the Australian Capital Territory to be given commissions as judges of the Federal Court. The three resident judges of the Supreme Court of the ACT, including the Chief Justice, held such commissions. The Chief Justice of the Family Court and the President of the Administrative Appeals Tribunal also held Federal Court commissions.

⁵⁴ Primary Federal Court commissions.

⁵⁵ Kirby J was also a member of the Federal Court between 1983 and 1984. His Honour was, however, the President of the New South Wales Court of Appeal at the time of his appointment to the High Court: see High Court of Australia, *Annual Report 2005–2006* (2006) 5.

one thing, it would be difficult to maintain the present strongly collegiate culture of our widely dispersed national court if it were to be significantly larger. A significantly larger court would also put strains upon the Court's presently successful model of governance.

The large increase in the size of the Federal Court since 1977 has been mainly the consequence of additional appointments being made to allow the Court to respond to the conferral of new jurisdiction or an expected increase in the workload within an existing area of jurisdiction. Three additional judges were appointed on account of the conferral of jurisdiction under the *Corporations Law* in 1991, and more were appointed as a consequence of the conferral of native title jurisdiction in 1993.⁵⁶ The transfer of an increased industrial relations jurisdiction from the former Industrial Relations Court of Australia in 1996 and four additional appointments in 2006 on account of an anticipated increase in workplace relations cases further enlarged the Court. Although appointments have been made in anticipation of, or in response to, particular conferrals of jurisdiction, the judges appointed in these circumstances have always shared the general body of the Court's work.

V THE EARLY YEARS

To a barrister appearing regularly before the newly established Federal Court of Australia, some distinctive characteristics were apparent from the outset. Evidently, the Chief Justice and the foundation judges had determined that theirs should be a court of excellence, innovation and courtesy. With the advantage of being a new court, and apparently reasonably well-resourced, cases could be brought on for hearing very quickly.

Cases were not allowed to languish in the lists; there were new procedures to prevent this. Soon after an application had been filed, there was a directions hearing, and judicial case management from then until trial. Applications for interlocutory injunctions were met with the then unusual offer of a final hearing within a few weeks instead. Many such cases then settled. The new Court seemed determined to get on with its work and to identify and focus upon the central issues. The Court was noteworthy for the courtesy of its judges and its staff.

The existence of a new Court also encouraged interstate practice. Then, as now, judges would sit where it was most convenient for the efficient conduct of the litigation. Those of us appearing in federal jurisdictions at the time soon found ourselves appearing before Federal Court judges who were resident in other states and against counsel from other Bars. The large benefits and stimulations of national practice were now no longer confined to practitioners in the field of industrial law.

My impression is that the development of the national profession that we see today dates from about this period. It was given a boost by the movement of the Principal Registry of the High Court to Canberra in 1980 and by the practice of

⁵⁶ *Native Title Act 1993* (Cth) ss 81, 213(2).

the High Court to have motion days in Canberra at which applications for special leave to appeal and motions from all over the country would be heard.

The Court seemed to have a familiar federal element. Many of us had earlier had the privilege of appearing before Sir Harry Gibbs as a judge of the Federal Court of Bankruptcy in Court One or Court Two of the 'old' High Court at 450 Little Bourke Street, Melbourne. Those who had appeared from time to time in the High Court, or who had attended its circuit sittings in Melbourne as young barristers keen to see the great cases, had absorbed the remarkable atmosphere of the building which seemed, somehow, to be quintessentially 'federal'. When the Federal Court was established it too sat at 450 Little Bourke Street and it did so more frequently when the High Court building in Canberra was opened in 1980. There were other aspects of the Court's practices and procedures which seemed distinctly 'federal': these included its robes, its ceremonial sittings and even the way in which the Court was formally opened and closed. Given the background of nearly all the foundation judges as members of the 'Commonwealth' courts, this federal flavour is hardly surprising.

VI AN EVOLVING JURISDICTION

The Court's foundational jurisdiction was conferred upon it by about 10 Acts. Today, there are more than 170 such Acts covering greatly expanded areas of Commonwealth interest, many of which could not have been imagined in 1977. Some of the legislation that has led to the enlargement of the Court's jurisdiction rests upon the powers, largely untested in 1977, to make laws with respect to external affairs and with respect to trading corporations. In the subsequent exercise by the Parliament of these and other powers, the Federal Court has, for example, been conferred with jurisdiction under wide-ranging Commonwealth legislation concerning the environment (including aspects of the Antarctic environment) and human rights. Whilst there was federal human rights legislation in 1977 it certainly seems safe to say that the most recent Act conferring jurisdiction on the Court, the *Water Act 2007* (Cth), which makes provision for the management of the water resources of the Murray-Darling Basin and gives the Federal Court jurisdiction to hear claims for compensation, would not have been contemplated as a possibility in 1977.

In fact, however, the jurisdiction originally conferred upon the Federal Court was more extensive than many at the time might have anticipated. Obviously, it was not the *number* of Acts that mattered but their content. In this respect the *TPA*, under which the Court assumed exclusive jurisdiction, had great potential. The *TPA* brought to the Federal Court a large and important area of competition law — still a nationally important area of the Court's jurisdiction. Of more importance, perhaps, to the early development of the Court were the consumer protection provisions of the Act, especially the apparently simple provision of s 52(1) that makes it unlawful, 'in trade or commerce, [to] engage in conduct that is misleading or deceptive or is likely to mislead or deceive.'

Section 52 introduced a fundamental new element into commercial litigation in Australia. Many commercial disputes centre upon allegations of conduct that is said to have been misleading or deceptive but before the enactment of s 52

counsel in such cases would feel the need to resort to imaginative express or implied terms or elaborately constructed collateral warranties. All that changed with the enactment of s 52 and the Federal Court had exclusive jurisdiction.

As a consequence, the Federal Court soon developed a substantial jurisdiction in cases of a commercial nature, many of them far removed from the field of 'consumer protection'. Many, if not most, of these cases might also have given rise to causes of action under state legislation or at common law. Unsurprisingly, given the novelty of the new provisions and the exclusivity of the jurisdiction of the new Court, there were jurisdictional challenges. Far from limiting the new Court's jurisdiction, however, these challenges confirmed its breadth and the potential reach of federal jurisdiction.

In the early 1980s, the High Court confirmed that the Federal Court — and all other federal courts — had an accrued or pendent jurisdiction to hear and determine the whole controversy between the parties once a federal issue had been raised.⁵⁷ It mattered not whether the federal issue was raised as part of the claim, or by way of a cross-claim or defence, or even if the federal issue was decided against the party raising it, unless its assertion was merely 'colourable'.⁵⁸ It had been predicted that the creation of the Federal Court would lead to 'arid jurisdictional disputes' and much unnecessary complexity and uncertainty. But then, as now, disputes of this nature are generally revealed to be without substance once the nature and extent of the accrued or pendent jurisdiction of a federal court is understood.⁵⁹ There is also the associated jurisdiction of the Federal Court deriving from s 32(1) of the *Federal Court of Australia Act 1976* (Cth), which confers jurisdiction '[t]o the extent that the *Constitution* permits ... on the [Federal] Court in respect of matters not otherwise within its jurisdiction that are associated with matters in which the jurisdiction of the Court is invoked.'

The enactment, cooperatively, of state, federal and territory legislation cross-vesting the jurisdiction of state, territory and federal courts effectively put an end to the jurisdictional disputes. These revived for a while after the decision of the High Court in *Re Wakim; Ex parte McNally* ('*Re Wakim*'),⁶⁰ which held the vesting of state jurisdiction in federal courts to be unconstitutional, but they largely disappeared once more when the nature and practical extent of the accrued jurisdiction of the Federal Court began to be fully understood.

There was however an important and immediate impact of *Re Wakim* — it removed the cross-vesting underpinning of the Federal Court's jurisdiction under

⁵⁷ 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 Justice R S French, 'Legal Retail Therapy: Is Forum Shopping a Necessary Evil?' (Summer 2001–02) *Bar News* 44, 47–9. See also *Philip Morris Inc v Adam P Brown Male Fashions Pty Ltd* (1981) 148 CLR 457; *Fencott v Muller* (1983) 152 CLR 570; *Burgundy Royale Investments Pty Ltd v Westpac Banking Corporation* (1987) 18 FCR 212.

⁵⁸ See the important paper by Justice Allsop, 'Federal Jurisdiction and the Jurisdiction of the Federal Court of Australia in 2002' (2003) 23 *Australian Bar Review* 29, 42.

⁵⁹ In contrast, the existence of 'accrued' or 'pendent' jurisdiction has been denied in Canada: see *R v Thomas Fuller Construction Co (1958) Ltd* [1980] 1 SCR 695, 713 (Pigeon J); *Roberts v Canada* [1989] 1 SCR 322, 333–4 (Wilson J); *Peter G White Management Ltd v Canada (Minister of Canadian Heritage)* [2007] 2 FC 475, 499, 506 (Evans JA).

⁶⁰ (1999) 198 CLR 511.

the *Corporations Law*. The Court had possessed this jurisdiction, concurrently with the Supreme Courts of the states and territories, since 1 January 1991 and had developed a substantial corporations law caseload. For a while this virtually disappeared. Then in 2001 these cases returned to the Federal Court when, relying on power referred to the Commonwealth by the states under s 51(xxxvii) of the *Constitution*, the Commonwealth Parliament enacted the *Corporations Act 2001* (Cth) ('*Corporations Act*') to establish a uniform corporations law for Australia. Cases under the *Corporations Act* once again form an important part of the Federal Court's commercial work. Concurrent trial and appellate jurisdiction under the *Corporations Act* is shared by the Federal Court and the Supreme Courts.

The cross-vesting scheme upon which the earlier jurisdiction in corporations matters had rested continues to serve a useful function and cases are transferred between the Supreme Courts and to and from the Federal Court in much the same numbers as prior to the decision in *Re Wakim*. Although the Federal Court cannot receive state jurisdiction, the principles of accrued federal jurisdiction mean that many civil matters in the Supreme Courts that involve state or territory law are nevertheless matters of federal jurisdiction and which can be, and sometimes are, transferred to the Federal Court under the provisions of the cross-vesting scheme that were unaffected by *Re Wakim*.⁶¹

The 1980s and early 1990s saw many specific conferrals of jurisdiction upon the Federal Court commensurate with the expansion of the fields of federal legislative activity. For example, the Court's commercial jurisdiction was enlarged by the enactment of the *Admiralty Act 1988* (Cth) and later in this essay I outline the development of a national approach to the Court's expanding admiralty and maritime work.⁶²

In 1983, the Court's important public law jurisdiction under the *ADJR Act* and the *Administrative Appeals Tribunal Act 1975* (Cth) to hear appeals on points of law was enhanced by the enactment of s 39B of the *Judiciary Act*, the effect of which was to give the Court much the same jurisdiction with respect to the constitutional writs as the High Court possesses. This jurisdiction remains exclusive of that of the state courts.

Possibly the most important single enlargement of the Court's jurisdiction occurred in 1997 when the *Judiciary Act* was amended to confer upon the Court original jurisdiction in any matter in which the Commonwealth seeks an injunction or a declaration,⁶³ in any matter 'arising under the *Constitution*, or involving its interpretation'⁶⁴ and in any matter 'arising under any laws made by the [Commonwealth] Parliament'.⁶⁵ It is difficult to overestimate the importance of

⁶¹ Chief Justice M E J Black, 'An Integrated Judicial System for Australia: Cross-Vesting and Co-Operation after *Re Wakim*' (Brad Selway Memorial Lecture 2007, The University of Adelaide, 28 June 2007). This lecture was reproduced in an abridged form in: (2007) 29(7) *The Law Society of South Australia Bulletin* 30.

⁶² Jurisdiction is concurrent with that of the Supreme Courts of the states and territories: *Admiralty Act 1988* (Cth) ss 9–10.

⁶³ *Judiciary Act* s 39B(1A)(a).

⁶⁴ *Judiciary Act* s 39B(1A)(b).

⁶⁵ *Judiciary Act* s 39B(1A)(c).

this amendment. In conferring jurisdiction in any matter arising under the *Constitution* or involving its interpretation and in any civil⁶⁶ matter arising under any laws made by the Commonwealth Parliament, the scope of the Federal Court's jurisdiction was increased such that it became, and remains, a court of general jurisdiction in civil matters arising under federal law.

With general federal jurisdiction in civil cases and the now developed jurisprudence of accrued and associated jurisdiction as applied in the context of Commonwealth legislation relating to corporations, banking, insurance and superannuation, as well as the competition law and consumer protection provisions of the *TPA*, it would be a rare commercial dispute indeed that does not, today, attract federal jurisdiction and thus the jurisdiction of the Federal Court in its role as a commercial court.

The importance of the other limb of the 1997 amendments, the conferral of jurisdiction in 'matters arising under the *Constitution* or involving its interpretation'⁶⁷ should not be overlooked, for the Court has since decided many such cases and, in recent years, more than any other Australian court. In some years the Federal Court's constitutional workload appears to have exceeded that of the High Court as well. In 2005, for example, the Federal Court decided 20 constitutional cases, the High Court eight, the Supreme Court of New South Wales 11 and the Supreme Court of Western Australia four. No other Australian court decided more than two.⁶⁸ The Federal Court is therefore properly seen as an important constitutional court both for its direct contribution to the development of Australian constitutional law and for the supporting role it plays in cases that proceed to the High Court.

The Court's workload now also includes a substantial caseload in matters concerning administrative, corporations, competition, consumer protection, intellectual property, human rights, taxation and workplace relations law. Bankruptcy matters, formerly a large area of the Court's work, are now mostly heard by the Federal Magistrates Court although the Federal Court's appellate jurisdiction in these cases remains important.

Two areas of the Court's evolving jurisdiction now deserve special mention: native title and migration. One of them, native title, could scarcely have been imagined in 1977. The other, migration, could have been anticipated as squarely within the reforms of the new administrative law, but it seems unlikely that the huge increase in the number of these cases could have been anticipated, nor their impact upon the development of Australian administrative and constitutional law.

⁶⁶ *Judiciary Act* s 39B(1A)(c) was amended in 1999, by *Law and Justice Legislation Amendment Act 1999* (Cth) sch 10 item 1, to exclude criminal matters.

⁶⁷ *Judiciary Act* s 30(a).

⁶⁸ Andrew Lynch and George Williams, 'The High Court on Constitutional Law: The 2005 Statistics' (Paper presented at the 2006 Constitutional Law Conference, Sydney, 24 February 2006). Cf Justice Susan Kiefel, 'The Federal and State Courts on Constitutional Law: The 2005 Term' (Paper presented at the 2006 Constitutional Law Conference, Sydney, 24 February 2006) 20-3.

VII NATIVE TITLE

The enactment of the *Native Title Act 1993* (Cth) added an entirely new dimension to the Court's work. When it came into force on 1 January 1994,⁶⁹ the Federal Court acquired jurisdiction to hear and determine applications that relate to native title and that jurisdiction was (and remains) exclusive of the jurisdiction of all other courts except the High Court of Australia.⁷⁰

The conferral of native title jurisdiction upon the Federal Court presented the Court with a challenge of an unusual character. There were many cases to be heard. The jurisdiction was entirely new and founded essentially upon one decision, albeit of the highest authority: *Mabo v Queensland [No 2]* ('*Mabo*').⁷¹

The determination of native title disputes over the past 15 years by single judges of the Federal Court, the Full Court of the Federal Court and, on appeal in some of these cases by the High Court of Australia, has resulted in a substantial body of new jurisprudence. Over 100 decisions about the existence of native title have been made by the Federal Court and 450 or so have been delivered concerning interlocutory aspects of the process. There have been 10 major decisions by the High Court on appeal from the Federal Court in addition to the *Mabo* litigation which, of course, predated the *Native Title Act 1993* (Cth) and was brought in the High Court's original jurisdiction.

The Federal Court has made native title determinations following lengthy hearings in 25 cases. In 11 litigated matters it has declined to make a determination. Encouragingly, 62 native title determinations (including a determination that native title exists in the remaining two of the three 'Mabo' Islands)⁷² have been achieved by agreement and hundreds of ancillary agreements have been reached. Some of these have resulted in applications for the determination of native title being discontinued since the agreements have not involved its recognition.

A full understanding of the process requires a close study of the relationship between the Federal Court and the National Native Title Tribunal, where claims are mediated. It is sufficient to note here that there are some 560 matters presently outstanding before the Federal Court, of which many are with the Tribunal for mediation. Of the outstanding cases, some may be discontinued, others may be resolved through the making of an Indigenous Land Use Agreement but, undoubtedly, many remain to be litigated.

Putting the growing jurisprudence of native title to one side as a large study in itself, the point of relevance to a survey of the Federal Court's first 30 years is

⁶⁹ The main provisions of the *Native Title Act 1993* (Cth) commenced on 1 January 1994: at s 2. The provision relating to prescribed bodies corporate commenced on 1 July 1994: at s 2.

⁷⁰ *Native Title Act 1993* (Cth) ss 81, 213(2). The exclusive jurisdiction of the Federal Court and the High Court is not, however, exhaustive, and it remains limited to applications made pursuant to pt 3 of the *Native Title Act 1993* (Cth). Even s 81 does not deprive state Supreme Courts of jurisdiction in relation to some aspects of native title. Nevertheless, most applications under the *Native Title Act 1993* (Cth) and all applications for a determination of native title have been commenced in the Federal Court.

⁷¹ (1992) 175 CLR 1.

⁷² *Passi on behalf of the Meriam People v Queensland* [2001] FCA 697 (Unreported, Black CJ, 14 June 2001).

how the Court has developed its rules and procedures to respond to the unique requirements of these cases. To manage this work efficiently, the Court has had to consider regional case management, directions hearings held jointly by judges responsible for the hearing of different claims in the same region, encouraging the progress of claims that might establish points of principle to assist in the resolution of other claims, and the complex question of how to deal with claims that overlap in the same geographical area. Unfortunately, in some regions, there are many such overlapping claims to be case-managed and resolved.

As well as developing an entirely new field of jurisprudence, in a field that has the rare characteristic of being concerned with traditional laws and customs having their roots in the deep past, the exercise of the Court's native title jurisdiction required it to develop entirely new procedures and concepts for the hearing of cases.

It soon became apparent that, to be fair — and indeed to obtain the evidence at all in many instances — the Court could not proceed in the normal way of hearing evidence in a courtroom with, perhaps, occasional inspections or 'views' out of court. It became apparent that if the taking of much of the evidence about traditional laws and customs was to be a meaningful exercise, the Court had to sit 'on country'. This involved travel to remote areas and over vast distances.

As I have noted elsewhere,⁷³ it would once have been unthinkable for judges to sit in remote country under trees, or in tents and, for four to six weeks at a time to hear evidence with limited facilities and very few formalities. That has become commonplace in the Federal Court in native title cases. The practice the Court has developed recognises that, for many claimants, their relationship to country is not able to be explained in the abstract and that it is necessary to be on country to gain a true appreciation and understanding of the relationship and the claimants' evidence about it. It is also an acknowledgement that, under traditional law, some evidence can *only* be given on country and that there will be many cases in which it would be quite wrong to expect claimants to talk about their relationship to country by reference to maps — maps that may have no meaning to the claimants and which cannot reflect their relationship to the country.⁷⁴

Substantial logistical and procedural problems have had to be overcome. The problems have been as diverse as recording of evidence for the transcript outdoors in windy conditions, satellite communication, the ascertainment of precise localities using Global Positioning System equipment and the general logistical challenges of conducting public hearings hundreds of kilometres from the nearest substantial settlement. By way of brief example, in the first native title case to be conducted on country, *Ward v Western Australia*,⁷⁵ some 80 days of evidence were taken in remote locations. In a later case in the western Kimberley region, the Court's remote hearing coordinators and other staff covered over 5000 kilometres in 14 days making the arrangements needed before

⁷³ Chief Justice Michael Black, 'Developments in Practice and Procedure in Native Title Cases' (2002) 13 *Public Law Review* 16.

⁷⁴ *Ibid* 18.

⁷⁵ (1998) 159 ALR 483.

on country hearings could take place. The shortest distance they travelled in a day was 124 kilometres, and the longest over 700.

New procedures have had to be developed and the *Federal Court Rules 1979* (Cth) revised to accommodate the requirements of these cases. The Rules now provide, for example, that the Court may take evidence by way of dance or song, or in groups.⁷⁶ Special consideration has had to be given, and case law developed, for the giving of evidence about matters that, according to traditional laws and customs, are highly secret and also about matters that may be spoken about only by men to other men, or by women to other women.⁷⁷

In developing these practices and procedures, the Court had the great advantage of being able to build upon the experience of former and present Federal Court judges who had been Aboriginal Land Commissioners under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) — Toohey, Gray and Olney JJ.⁷⁸

VIII MIGRATION CASES

For many years a significant part of the Federal Court's workload, as measured in numerical terms, has been migration cases. Initially, these came before the Court primarily as applications under the *ADJR Act*. Later, they became the subject of a special regime under the *Migration Act 1958* (Cth).⁷⁹

The volume of these cases has tended to obscure their general importance. From the early days of the Federal Court, migration cases have contributed greatly to the development of federal administrative law in Australia, either through decisions at first instance and on appeal in the Federal Court or through decisions on appeal from the Full Court of the Federal Court to the High Court of Australia. More recently, cases such as *Plaintiff S157/2002 v Commonwealth*⁸⁰ have decided questions of immense importance to Australian administrative law and to Australian constitutional law, especially in the exploration of the en-

⁷⁶ *Federal Court Rules 1979* (Cth) O 78 r 32. Where a party intends to present this type of evidence, it must inform the Court within a reasonable time of where, when and in what form the evidence is to be given and whether there are issues of confidentiality and secrecy relating to the whole, or any part of, the evidence.

⁷⁷ Black, 'Developments in Practice and Procedure in Native Title Cases', above n 73, 23–4.

⁷⁸ Also Sir Edward Woodward, who headed the Commission of Inquiry into Aboriginal Land Rights in the Northern Territory in 1973–74 and was a Federal Court judge from 1977–90.

⁷⁹ In 1994, the *Migration Act 1958* (Cth) was amended to restrict judicial review of migration decisions in the Federal Court: see *Migration Reform Act 1992* (Cth) s 33 (commencement deferred to 1 September 1994 by *Migration Laws Amendment Act 1993* (Cth) s 5), amending *Migration Act 1958* (Cth). Since then, a regime of privative and restrictive clauses has been introduced, further limiting the availability of review. The scope of such clauses has been narrowly construed: *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476. The High Court has confirmed the constitutional validity of privative clauses as long as 'whether directly or as a matter of practical effect, [they do] not so curtail or limit the right or ability of applicants to seek relief under s 75(v) [of the Constitution] as to be inconsistent with the place of that provision in the constitutional structure': *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651, 671 (Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ).

⁸⁰ (2003) 211 CLR 476.

trenched jurisdiction of the High Court under s 75(v) of the *Constitution* and the limits of executive power.⁸¹

As well as developing Australian administrative and constitutional law jurisprudence, the Federal Court's decisions in migration cases, both directly as expositions of the law and as the subjects of appeals to the High Court, have made an important contribution to the international jurisprudence of the *Refugees Convention*.⁸² Federal Court and High Court decisions on the interpretation of the *Refugees Convention* are regularly cited by senior courts in the United Kingdom, New Zealand and Canada.

These cases provide a good example of the evolving jurisdiction of the Federal Court and illustrate that the evolution has taken some unexpected turns. In 2001, the Federal Magistrates Court of Australia was given jurisdiction to hear and determine applications for judicial review under the *Migration Act 1958* (Cth),⁸³ and soon developed a large workload. Then, in 2005, the Act was amended to restrict the Federal Court's jurisdiction in these matters, with the effect that most such cases have to be commenced in the Federal Magistrates Court.⁸⁴ The jurisdiction of the Federal Court in applications for judicial review of decisions of the Refugee Review Tribunal was henceforth largely to be appellate only and, moreover, to be exercised by a single judge unless otherwise ordered. The result is that the Federal Court's migration case workload has changed in character. It remains, however, an important source of national and international jurisprudence on the *Refugees Convention*.

The large and still growing Federal Magistrates Court, with the capacity to undertake the less complex cases that would otherwise have come to the Federal Court, and the capacity to absorb entire areas of work as in the instance of migration cases, will unquestionably continue to play an important role in the evolution of the jurisdiction of the Federal Court as a superior court of general federal trial and appellate jurisdiction in civil matters of federal jurisdiction.

The anticipated conferral of criminal jurisdiction to try the proposed new federal offence of serious cartel behaviour will likely be the next step in the continuing evolution of the jurisdiction of the Federal Court of Australia.⁸⁵ The conferral of more general federal criminal appellate jurisdiction is another possible step in the evolutionary process.

⁸¹ *Haneef v Minister for Immigration and Citizenship* (2007) 161 FCR 40; *NAAV v Minister for Immigration and Multicultural and Indigenous Affairs* (2002) 123 FCR 298; *Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri* (2003) 126 FCR 54.

⁸² Opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 January 1954), as amended by *Protocol Relating to the Status of Refugees*, opened for signature 16 December 1966, 606 UNTS 267 (entered into force 4 October 1967).

⁸³ *Jurisdiction of the Federal Magistrates Service Legislation Amendment Act 2001* (Cth), amending *Migration Act 1958* (Cth).

⁸⁴ The *Migration Litigation Reform Act 2005* (Cth) sch 1 pt 1 added, inter alia, ss 476A and 476B to the *Migration Act 1958* (Cth). These provisions limit the Federal Court's jurisdiction in migration matters and prevent the High Court from remitting applications for judicial review of migration decisions to any court, other than the Federal Magistrates Court, respectively.

⁸⁵ See, eg, Peter Costello, Treasurer of Australia, 'Additional Funding for the ACCC: Criminal Cartel Enforcement' (Press Release, 9 May 2006); see also Trade Practices Act Review Committee, *Review of the Competition Provisions of the Trade Practices Act* (2003) 153. The Court has established a Criminal Procedure Committee to establish new procedures for the efficient conduct of criminal cases in the Federal Court.

IX THE FEDERAL COURT AND THE DEVELOPMENT OF FEDERAL LAW

The history of the Federal Court and the nature of the jurisdiction conferred upon it, points to the conclusion that one object of its establishment was the uniform development of federal law. At times this object has been expressly stated.⁸⁶

From a structural viewpoint, below the level of the High Court, the object of uniformity in the development of federal law is best promoted by the conferral of exclusive jurisdiction, or at least exclusive appellate jurisdiction, upon a federal court, and by that court's close adherence to the principles of precedent. These principles are clearly established in the Federal Court and follow the common law rules. At the trial level, a judge follows the decision of another judge of the Court unless convinced that the earlier decision is plainly wrong. Likewise at the appellate level, a Full Court follows the decision of an earlier Full Court unless convinced that it is plainly wrong. The same principle now applies to the decisions of another Australian intermediate appellate court.⁸⁷

A concern for the uniform interpretation of national law led to the suggestion in 1989 that the Federal Court should have exclusive appellate jurisdiction in matters arising under the proposed *Corporations Law*. This suggestion, which was not novel,⁸⁸ was not adopted. Nine superior courts (the eight Supreme Courts of the states and territories and the Federal Court) began to interpret the new law and by 1992 there was already a divergence of interpretation at the intermediate appellate level. In the important case of *Australian Securities Commission v Marlborough Gold Mines Ltd* ('*Marlborough Gold Mines*')⁸⁹ it emerged that there had been conflicting interpretations of s 411 of the *Corporations Law* and of the corresponding previous provision. A single judge of the Supreme Court of Victoria had decided one way, following an unreported decision of a judge of the Supreme Court of the Northern Territory.⁹⁰ A judge of the Supreme Court of South Australia had however disagreed and declined to follow the earlier decisions.⁹¹ The Full Court of the Federal Court in *Win-*

⁸⁶ See, eg, the second reading speech for the Superior Court of Australia Bill 1973 (Cth): Commonwealth, *Parliamentary Debates*, Senate, 12 December 1973, 2725 (Lionel Murphy, Attorney-General); the second reading speech for the Jurisdiction of Courts (Miscellaneous Amendments) Bill 1986 (Cth): Commonwealth, *Parliamentary Debates*, House of Representatives, 22 October 1986, 2557 (Lionel Bowen, Attorney-General). See also Byers and Toose, above n 8, 314.

⁸⁷ This states the general principles. For a fuller formulation: see, eg, *Bank of Western Australia Ltd v Commissioner of Taxation* (1994) 55 FCR 233, 255 (Lindgren J); *Transurban City Link Ltd v Allan* (1999) 95 FCR 553, 560–1 (Black CJ, Hill, Sundberg, Marshall and Kenny JJ); *Nezovic v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 133 FCR 190, 206 (French J); *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, 151–2 (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ).

⁸⁸ In 1980, a majority of the commissioners of the Law Reform Commission had recommended that, in the interests of consistency, the jurisdiction of the Federal Court should be expanded to cover appeals against conviction and sentence in federal criminal matters: Law Reform Commission, *Sentencing of Federal Offenders*, Report No 15 (1980) recommendation 65.

⁸⁹ (1993) 177 CLR 485.

⁹⁰ *Re Bamboo Gold Mines Ltd* (1986) 10 ACLR 513, following *Re Plenty River Mining Co NT Ltd* (Unreported, Supreme Court of Northern Territory, Nader J, 26 March 1984).

⁹¹ *Re Insight Mining Pty Ltd and the Companies (SA) Code* (1987) 44 SASR 495.

dsor v National Mutual Life Association of Australasia Ltd ('Windsor')⁹² had agreed, rightly as events were to show, with the decision of the Supreme Court of South Australia. The approach of the Full Court was followed by Brooking J in the Supreme Court of Victoria in *Re Kakadu Resources Ltd*.⁹³

In *Marlborough Gold Mines*, however, a Commissioner of the Supreme Court of Western Australia declined to follow the Full Court of the Federal Court in *Windsor* and the Full Court of the Supreme Court of Western Australia affirmed the Commissioner's decision. The law in Victoria, South Australia, and nationally if the matter were before the Federal Court, therefore differed from the law on the same section in the Northern Territory and Western Australia.

On appeal to the High Court of Australia in *Marlborough Gold Mines*, the Court, noting the conflicting decisions, said:

Although the considerations applying are somewhat different from those applying in the case of Commonwealth legislation, uniformity of decision in the interpretation of uniform national legislation ... is a sufficiently important consideration to require that an intermediate appellate court — and all the more so a single judge — should not depart from an interpretation placed on such legislation by another Australian intermediate appellate court unless convinced that that interpretation is plainly wrong.⁹⁴

Adherence to this principle is, of course, necessary if uniform legislation is to be truly uniform in its practical application. This means that the decisive interpretation of federal law, in instances where the jurisdiction of a federal court is not exclusive, may not derive from a decision of any federal court. This is not to criticise the principle, the authority of which is of course undoubted but it points to the circumstance that the value placed upon uniformity overrides everything else unless the interpretation in question is 'plainly wrong'. It remains the case however that the best way to ensure consistency of interpretation of particular federal laws is by conferring exclusive (at least appellate) jurisdiction for their interpretation on a single court. For the *Corporations Act*, the obvious candidate is the Federal Court.⁹⁵

As we now know, there is a common law of Australia rather than a common law of each Australian jurisdiction, and so the principle emphasised in *Marlborough Gold Mines* applies also to the interpretation of the common law.⁹⁶

The preceding discussion about the uniform development of federal law jointly by state and federal courts should not distract attention from the very substantial contribution that the Federal Court has made to the development of federal law and the general body of Australian law as well.

⁹² (1992) 34 FCR 580. See especially: at 588–9 (Black CJ and Beaumont J).

⁹³ [1992] 2 VR 610.

⁹⁴ (1993) 177 CLR 485, 492 (Mason CJ, Brennan, Dawson, Toohey and Gaudron JJ).

⁹⁵ Concerns about inconsistency are not limited to corporations matters. Concerns remain about inconsistency in the sentencing of federal offenders and it remains an open question whether general appellate jurisdiction should be conferred on the Federal Court in federal criminal matters: Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report No 103 (2006) recommendation 20.1.

⁹⁶ *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, 152 (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ); *S v Boulton* (2006) 151 FCR 364, 369–70 (Black CJ).

Although it is difficult to be precise, it is clear that more than 35 000 judgments have been delivered by the Court in its first three decades and that a substantial proportion of these — on some measures about a third — have been reported. The cases reported in the Australian Law Reports number some 5100 to date and those reported in the Federal Court Reports (the Court's authorised reports) between the first publication in 1984 and the present number about 5800. The figures for specialist reports are as follows:

- Intellectual Property Reports: around 1200 to date;
- Industrial Reports: around 1000 to date; and
- Australian Tax Reports: around 1700 to date.

In general, reportage divides about 60:40 between first instance and Full Court decisions.

As a superior court of record and a penultimate court of appeal in the Australian federal hierarchy, it is unsurprising that the jurisprudence of the Federal Court of Australia is regularly cited by superior courts outside Australia. Federal Court decisions have been cited, discussed and applied by senior courts in New Zealand, Canada, the United States, England and Wales, Scotland, Ireland, South Africa, Hong Kong, Singapore, Malaysia, India and Sri Lanka. Citations in the smaller jurisdictions of the South Pacific are common. Many of these cases are in areas of law that have an international aspect such as patents, immigration or administrative law but Federal Court jurisprudence also contributes to the development of the common law more generally. A good recent example concerns the construction by the Privy Council of the word 'misbehaviour' as used in the *Constitution of Grenada*.⁹⁷ Examples can also be found in the development of international commercial law.⁹⁸

X APPELLATE JURISDICTION

Within a few years of its establishment the Federal Court had developed one of the largest civil appeal lists in Australia and that remains the position today. As well as hearing appeals from its own decisions at first instance, the Court has exclusive appellate jurisdiction to hear appeals from the Supreme Courts of the states and territories in matters of intellectual property, extradition, federal electoral law and federal workplace relations law. It also hears appeals from state magistrates in federal workplace relations cases.⁹⁹ Numerically, the largest single source of the Federal Court's appellate work is the Federal Magistrates Court. Most of these appeals are in migration cases in which appellate jurisdiction is usually exercised by a single judge. Other appeals from the Federal Magistrates

⁹⁷ *Lawrence v A-G (Grenada)* [2007] 1 WLR 1474, 1483–4 (Lord Scott), citing *Clark v Vanstone (in her capacity as Minister for Immigration and Multicultural and Indigenous Affairs)* (2004) 211 ALR 412, 439–41 (Gray J).

⁹⁸ *Fiona Trust & Holding Corporation v Privalov* [2007] 4 All ER 951, 962 (Lord Hope), citing *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* [2006] FCAFC 192 (Unreported, Finn, Finkelstein and Allsop JJ, 20 December 2006) [165] (Allsop J).

⁹⁹ *Workplace Relations Act 1996* (Cth) s 853.

Court, for example, in the fields of bankruptcy, consumer protection or human rights, are heard by a Full Court, unless the Chief Justice directs otherwise.

The Federal Court also hears appeals on points of law from the Administrative Appeals Tribunal and other Commonwealth tribunals. Although called 'appeals' these matters are heard in the original jurisdiction of the Court, sometimes by a Full Court, but usually by a single judge in which case a true appeal then lies to the Full Court.

The Court also has an appellate role in military law. The President of the Defence Force Discipline Appeals Tribunal is, by convention, a Federal Court judge and appeals from the Tribunal on questions of law lie to a Full Court of the Federal Court, usually constituted by five judges.

The Federal Court has maintained a Full Court system for the exercise of its appellate jurisdiction in cases in which a bench of three or more judges is required. The traditional Full Court system, as adapted to meet the Federal Court's particular circumstances, offers advantages over the appellate divisions or courts of appeal that have, mostly only recently, become widely popular in Australia and in some other common law countries. In the Federal Court, one special advantage of a Full Court is the capacity it gives for the constitution of benches of judges having specialist expertise to hear cases in specialist areas of the Court's jurisdiction. There is also a strong view, which I share, that frequent exposure of judges to both trial and appellate work promotes better informed judicial decision-making both at trial and on appeal.

To facilitate the conduct of its trial and appellate business the Federal Court sits as an appellate Court for four months of each year, February, May, August and November, and hears appeals in these months in each city in which there is appellate business. The Court aims for the speedy disposition of its appellate business, and in many cases appeals are disposed of within four months of filing. Special effort has been made in the case of migration appeals, where there is now an average disposition time of 100 days from filing to judgment.

As already mentioned, the Court's original function as an intermediate court of appeal for the territories has now been largely overtaken, but it nevertheless made a substantial contribution to the jurisprudence of the territories, including in the field of criminal law.¹⁰⁰ The Court continues to hear appeals from the Supreme Court of Norfolk Island.

For most litigants in the Australian federal hierarchy, the Full Court of the Federal Court is, for practical purposes, the final court of appeal. There is the possibility of a further appeal to the High Court of Australia but this is only with special leave of the High Court, which is rarely granted.¹⁰¹

¹⁰⁰ Appeals from the Supreme Court of the Northern Territory came to an end as early as 1986 and from the Supreme Court of the Australian Capital Territory in 2002. See *Statute Law (Miscellaneous Provisions) Act [No 1] 1985* (Cth) sch 1 (which commenced on 1 March 1986); *Jurisdiction of Courts Legislation Amendment Act 2002* (Cth) sch 1 (which commenced on 14 October 2002).

¹⁰¹ In 2005–06, the Federal Court decided more than 5000 matters at first instance and 1345 on appeal. In the same period, there were more than 400 applications for special leave to the High Court from decisions of the Federal Court of which just 17 were granted: see Federal Court of Australia, *Annual Report 2005–2006* (2006) 123–4; High Court of Australia, *Annual Report 2005–2006* (2006) 93–5.

XI PROCEDURAL REFORM: CASE MANAGEMENT, THE INDIVIDUAL DOCKET SYSTEM AND SPECIALIST PANELS

It is not widely recognised that one of the motivations for the establishment of a new federal court in the 1970s was a perceived need for the Commonwealth to become involved in reforms to court practice and procedure. Those responsible for the successful Federal Court of Australia Bill 1976 (Cth) were keen to ensure that the object of greater accessibility to the Commonwealth's 'new administrative law' could be advanced by a new Court that might implement such reforms.¹⁰²

As I have recalled earlier in this essay, the Federal Court began as a court that applied active case management practices and soon became known for its innovative procedures. At that time case management in other courts, to the extent that there was any, was generally confined to specific lists such as a commercial cases list or a building cases list. The importance of the Federal Court's reform was that all its cases were actively managed. The Court also encouraged assisted dispute resolution ('ADR') and was one of the pioneers of court-annexed ADR, offering the services of its own Registrars, trained in that specialty.¹⁰³

Beginning in 1995, and in response to substantial pressures upon its resources, the Court looked for a more efficient system of managing its caseload. After extensive consultation within the Court and within the legal profession, and the engagement of an American expert in court management, the Court adopted — and adapted — the system of individual dockets used by federal courts of the United States and also by some of the state courts in that country. The change from the traditional master calendar system to the new system began as a pilot project in Melbourne in January 1997 and was completed nationally within a year. Until the adoption by the Family Court of Australia of a similar system late in 2007, the Federal Court of Australia was the only Australian court to implement this reform.¹⁰⁴

The basic principle of the individual docket system is that each case is allocated, upon commencement, to a particular judge who is then responsible for managing it until its final disposition. Allocation is random, although subject now to some qualifications particularly in relation to the operation of the Federal Court's system of specialist panels. The individual docket system aims to save time and costs, as the docket judge's familiarity with the case eliminates the need to explain a case afresh each time it comes before a judge. The system also aims for consistency of approach throughout the progress of a case, as well as fewer management events with greater results from each one. It aims to discourage interlocutory disputes and, if they do occur, to resolve them swiftly.

¹⁰² See above n 43 and accompanying text.

¹⁰³ See Chief Justice M E J Black, 'The Courts, Tribunals and ADR: Assisted Dispute Resolution in the Federal Court of Australia' (1996) 7 *Australian Dispute Resolution Journal* 138; Jamie Wood, 'Federal Court-Annexed Mediation Seventeen Years on' (2004) 14 *Journal of Judicial Administration* 89.

¹⁰⁴ For a generally favourable assessment of the individual docket system: see Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, Report No 89 (2000) [7.4]–[7.24].

The system is intended to work consistently with the Court's continuing commitment to ADR by facilitating the early identification of cases suitable for ADR and promoting the ADR process.

The adaptation of the individual docket system to the needs of the Federal Court involved an important modification not found in the federal courts in the United States, namely the use of specialist panels.¹⁰⁵ Before the introduction of the individual docket system the profession had been accustomed to specialist lists in the Federal Court in Melbourne and Sydney for matters involving patents, tax and (after 1989) admiralty. Workplace relations cases (then called industrial cases) were also generally heard by judges with specialist knowledge in that area.¹⁰⁶ To maintain the advantages of speciality that had already been developed under the system of a master calendar with specialist lists, specialist panels of judges were established within the framework of the individual docket system. These panels were established in Melbourne and Sydney and, more recently, in Brisbane.¹⁰⁷ In these cities, judges with a particular interest and expertise in the fields of admiralty, corporations, workplace relations, competition, intellectual property and taxation law constitute panels¹⁰⁸ to the members of which such cases are allocated.

Membership of a panel is accepted on the understanding that the judge will undertake judicial studies in that specialty and will assume the obligation of conducting seminars and giving lectures in the specialist area to other panel members and to other interested members of the Court.¹⁰⁹ The important point to be made is that the specialist panels add to the Court's expertise generally, not only to the expertise of the panel members. More recently, the management of some of the panel work has been enhanced by the appointment of a Registry list judge before whom all cases in a particular specialty are listed before being allocated within that panel.

The Court's arrangements for the allocation of work to specialist panels of judges were taken an important step further in 2005 when the admiralty and maritime work of the Court was reorganised nationally. Nominated judges in each Registry now undertake all the admiralty and maritime work of the Court at first instance and, as far as practicable, on appeal. They are assisted by nominated Registry officers and Admiralty Marshals who have particular skills, interest and training in admiralty and maritime work. An admiralty judge in each Registry coordinates the work and ensures the consistency of practices and procedures across the country. The Court now has 14 admiralty and maritime

¹⁰⁵ The United States Court of Appeals for the Federal Circuit is of course a specialist federal appellate court (mainly dealing with patent cases).

¹⁰⁶ The Court had a separate industrial division until that was abolished by *Workplace Relations and Other Legislation Amendment Act 1996* (Cth) sch 16 div 8 item 84, which commenced on 26 May 1997.

¹⁰⁷ The Admiralty and Maritime Panel, discussed later, is national.

¹⁰⁸ The panels vary slightly from state to state.

¹⁰⁹ The division of work within the Court means that judges with specialist interests are not necessarily members of a particular panel and non-membership certainly does not imply an absence of specialist expertise in any area. Judges may, for example, rotate on and off panels. In Perth and Adelaide, where the only panel is in the field of admiralty and maritime law, the judges otherwise sit in all areas of the Court's jurisdiction but maintain specialist interests.

judges so that each Registry either has a resident admiralty and maritime judge, or immediate access to one.

Federal Court admiralty Registrars and Registry officers also provide assistance to the Federal Magistrates Court, which now has in personam jurisdiction in admiralty. The Court is thus able to offer litigants the advantage of shared expertise. An admiralty and maritime panel has recently been established within the Federal Magistrates Court, and the panel members attend the judicial studies sessions conducted by the Federal Court's panel. Cooperation between these two federal courts in the field of admiralty and maritime jurisdiction is a notable new development.

ADR is offered in admiralty and maritime matters and parties are actively encouraged to seek an early resolution of their dispute through court-annexed mediation or early neutral evaluation, or both. This is proving especially effective in small cargo claims. Another recent innovation is the Court's capacity to offer arbitration by Registrars with maritime qualifications.¹¹⁰

The Court offers a seven days a week, 24 hour service to the maritime community. Arrests can be, and are, made in any port in Australia, if necessary at any time of the day or night and at very short notice. Proceedings commenced in one part of Australia may provide the foundation for an arrest in any other part of Australia.

The admiralty and maritime jurisdiction of the Court is now surprisingly wide, there being over 20 Acts that confer such jurisdiction in addition to the *Admiralty Act 1988* (Cth).

The development of specialist panels has also assisted the Court's commitment to consistency in the development of other areas of federal law.

The combination of the individual docket system, specialist panels and the Full Court model for appeals facilitates the constitution of appellate benches of judges with specialist knowledge in any of the specialist areas of the Court's work. In this way, the Federal Court maximises the efficient use of its judicial expertise at trial and on appeal. At the appellate level, the system provides a facility for constituting appellate benches for specialist cases that permanent courts of appeal are unlikely to be able to match consistently.

The Court's workload in specialised areas of the law has led to procedural innovations in the taking of evidence. It has developed procedures for sequential or concurrent expert evidence — the so-called 'hot tub', which has since been adopted or viewed with interest elsewhere.¹¹¹

The strong tradition of procedural reform continues with the recent introduction of fast track procedures as a pilot project in the Melbourne Registry of the Court. Innovative features of the fast track procedure include limited or no discovery and 'chess clock' limitations upon times for oral argument. The fundamental revision of the *Federal Court Rules 1979* (Cth) is also well advanced.

¹¹⁰ *Federal Court of Australia Act 1976* (Cth) s 53A.

¹¹¹ Justice Peter Heerey, 'Recent Australian Developments' (2004) 23 *Civil Justice Quarterly* 386, 390–1; Caroline Edwards, Louise Anderson and Siobhan McKeering, 'Anthropologists, Lawyers and Native Title Cases in Australia' (2006) 16 *Anthropological Forum* 153; Lisa C Wood, 'Notes from the Field — Litigation Practice: Experts in the Tub' (2007) 21(3) *Antitrust* 95.

XII SELF-ADMINISTRATION

For a period corresponding almost exactly with the term of office of the first Chief Justice, the Commonwealth Attorney-General's Department had responsibility for the administration of the Federal Court under what is variously described as the 'traditional', 'departmental' or 'executive' model of court administration. It has been described as a model 'in which a multi-disciplinary department of State (usually the Attorney-General's Department) services an independent judiciary which, however, has no responsibility for or formal power over those who thereby provide support'.¹¹² This description, by a former Secretary of the Attorney-General's Department, contains within it an indication of one of the primary problems with that model.

In 1979, the High Court of Australia was given self-governance by s 17(1) of the *High Court of Australia Act 1979* (Cth), which provides: 'The High Court shall administer its own affairs subject to, and in accordance with, this Act.'

The introduction of this entirely new model of judicial administration in Australia reflected a desire to acknowledge the special position accorded to the High Court by the *Constitution*.

The success of self-administration in the High Court led to the conferral, as from 1 July 1990, of independent administration upon the Federal Court, the Family Court and the Administrative Appeals Tribunal. As the Attorney-General, Lionel Bowen, observed in his second reading speech for the Courts and Tribunals Administration Amendment Bill 1989 (Cth):

The effect ... is to transfer from the Attorney-General's Department to the courts ... responsibility for the supervision of their own financial management and practices and for the courts ... to take control over the management of their other administrative affairs. Self-management will mean that the courts ... will be free to make their own decisions in human and financial resource management. This will maximise the flexibility of the courts ... to cope with changing pressures and priorities throughout each year.¹¹³

The *Federal Court of Australia Act 1976* (Cth), as amended in 1989 to establish self-administration,¹¹⁴ provides that the Chief Justice is responsible for the administration of the Court and is assisted in that respect by the Registrar. The Act provides for the Registrar to be appointed by the Governor-General, on the recommendation of the Chief Justice. The appointment is for a period of up to five years but may be renewed. The Court's present Registrar, Warwick Soden, already a very experienced court administrator at the time of his appointment, has served the Court since 1995.

The statutory assignment of responsibility to the Chief Justice and the Registrar should not obscure the reality that the administration of the Federal Court is conducted within a collegiate framework. As the processes have evolved over the

¹¹² Stephen Skehill, 'Comment on Court Governance' (1994) 4 *Journal of Judicial Administration* 28, 28.

¹¹³ Commonwealth, *Parliamentary Debates*, House of Representatives, 1 November 1989, 2266 (Lionel Bowen, Attorney-General).

¹¹⁴ Sections 18A, 18B were added by *Courts and Tribunals Administration Amendment Act 1989* (Cth) s 15, amending *Federal Court of Australia Act 1976* (Cth).

years, judges' committees have played an increasingly important role in the management of the Court and judges have a shared responsibility for our administration. For the past five years, the Policy and Planning Committee, chaired by the Chief Justice but with a rotating membership, has added to the collegiate nature of the Court's administration and has performed important policy functions.

Writing four years after the introduction of self-administration, the Secretary of the Attorney-General's Department commented that he was convinced that the Federal Court, the Family Court and the Administrative Appeals Tribunal had all been greatly improved by the advent of self-administration. Specifically, he thought that the organisations were now 'better resourced, better managed, more efficient, and better able to meet the many demands of those having business before them.'¹¹⁵ Moreover, he believed that

the independence of the judiciary has been enhanced, and has been publicly perceived to have been enhanced, that the effectiveness of the proper relationship between the federal judiciary and the federal Executive is now far healthier than it was before the change, and that that effectiveness is still increasing.¹¹⁶

I agreed with those views at the time and consider that they still hold good. Self-administration has been a great success.

In introducing the reforms in 1989, the Attorney-General noted that they were consistent with the initiatives taken by the Chief Justices of the Federal Court and the Family Court and the President of the Administrative Appeals Tribunal in case management procedures and the reduction of delays.¹¹⁷ The Attorney-General had thus identified a fundamentally important potential consequence of self-administration. The concept of self-management and administrative independence created the climate which fostered the Court's important procedural and administrative reforms that have already been discussed.

Self-administration has created pressures and opportunities that have enabled the Court to be innovative in other areas as well, including information technology where it sees itself as having a leading role.

Perhaps most importantly, self-administration has created a continuing interest amongst judges and staff alike in administrative and procedural reforms, especially because these are seen as 'owned' by the Court and an aspect of the Court's own responsibility for the efficient and just discharge of its business.

It is true that self-administration is not without its challenges. The administration of a national court such as the Federal Court of Australia is a significant undertaking, with a budget of \$85 million¹¹⁸ for the maintenance of registries in all eight capital cities, the operation of Court properties in seven cities, and the employment of some 400 staff. Every aspect of the Court's administration, from the choice of stationery to large investments in computer technology, is within the Court's own field of responsibility.

¹¹⁵ Skehill, above n 112, 30.

¹¹⁶ *Ibid.*

¹¹⁷ Commonwealth, *Parliamentary Debates*, House of Representatives, 1 November 1989, 2266 (Lionel Bowen, Attorney-General).

¹¹⁸ Federal Court of Australia, *Annual Report 2006–2007* (2007) 37.

The financial management of the Court is the direct responsibility of the Registrar and ultimately, through another line of statutory responsibility, the Chief Justice.¹¹⁹ There is, however, judicial involvement in financial management through a Finance Committee of judges assisted by the Court's finance staff, which advises the Chief Justice. There is also an Audit Committee. The Court's accounts are subject to external audit and an annual report by the Australian Audit Office. The accounts are published. They are tabled in the Parliament by the Attorney-General and are subject to Parliamentary scrutiny.

Funding is, of course, a large and potentially controversial area. The Court has a responsibility for the efficient and expeditious management of its business and for this it needs adequate resources. Whilst, however, the Court has control over its expenditure (much of which is non-discretionary), it has limited or no control over its revenue, its caseload or the appointment of its judges. There are well-developed mechanisms by which the Court can make known its needs to the Department of Finance and Administration, with whom it may, and does, directly deal. The size of the Court's appropriation and its relationship to its needs is, however, ultimately a matter for the Executive and the Parliament through the annual budget and appropriation process. This is, of course, a two-way affair — the executive and legislative branches need to appreciate the Court's requirements for resources, whilst the Court needs to be conscious of its own responsibilities and overall budgetary limitations. To date, the process has worked and I have no apprehension that it will not work well in the future. The present arrangements do give the Court the substantial advantage — and responsibility — of being able to plan for the future with three-year forward estimates. It has to be said, however, that it would still be desirable to achieve agreement about a long-term formula to ensure that, under all circumstances, the Court has adequate resources to perform its constitutional functions. But since the same problems arise — often in a far more acute form — under other models of administration, this difficulty provides no reason to be wary of the self-administration model.

Accountability is a necessary accompaniment to judicial self-administration. As the then Attorney-General said in introducing the 1989 amendments:

An essential element of justice in this country has been the real separation of the powers of the judiciary from the powers of the Government. ... [I]n providing a statutory basis for independent administration and management, it does not follow that the courts ... will or should be free of the need to account for their operations. It is the Parliament which appropriates the funds to these bodies and it is to the Parliament that they will be answerable. ... Within the resources provided by the Parliament, the judicial system must ensure that it provides to all who use the courts impartial adjudication of issues which come before it without undue delay.¹²⁰

In the discharge of its obligation to account to the Parliament, the Court's administrative staff, under the general oversight of a judge, the Registrar and the

¹¹⁹ The Registrar's responsibilities arise under the *Financial Management and Accountability Act 1997* (Cth). The Chief Justice's responsibilities arise under s 18A of the *Federal Court of Australia Act 1976* (Cth).

¹²⁰ Commonwealth, *Parliamentary Debates*, House of Representatives, 1 November 1989, 2265 (Lionel Bowen, Attorney-General).

Deputy Registrar, produce an annual report of the management of its administrative and financial affairs. The report is submitted by me, as Chief Justice, to the Attorney-General, who in turn presents it to the Parliament.¹²¹ The report goes much further in content than the statutory requirements and contains detailed information about the Court, its composition, jurisdiction and workload. Its appendices include summaries of decisions of general interest during the year and an account of judges' participation in legal reform activities, conferences and committees.

The obligation to account should not be, and is not, seen as a burden but rather an essential element in the whole process of administration.

The annual report, and the Court's administrative affairs generally, are subject to scrutiny by the Parliament. In practice this is generally through the work of the Senate Estimates Committee. The Registrar, assisted by senior court officers, appears before the Committee to answer any questions the members may have. The legislative and executive branches observe the boundaries of administrative accountability and have not sought to enter inappropriately into the core areas of judicial accountability. The view taken by the Registrar, with which I agree, is that appearances before the Senate Estimates Committee should be seen as a valuable opportunity to explain any aspects of the Court's administration that may require clarification.

Supporters of the 'traditional' model of court administration often claim that judges are not administrators, either by training or experience. This is largely — although not invariably — true, but it is also true of Ministers and many other people who have administrative functions in both the public and private sectors. The answer to the implicit criticism is that a well-evolved judicial administration will bring judges into an appropriate working relationship with professional administrators. This is precisely what the Federal Court model of self-administration has done.

What I might call the 'Australian federal model of self-administration' continues to evolve. When the Federal Magistrates Court was created in 1999¹²² it too was granted self-administration. Cooperative arrangements now exist between the Federal Magistrates Court and the Federal Court, as well as between the Federal Court and the Family Court, in areas in which such arrangements will create efficiencies without impairing the administrative independence of the courts. Cooperation in the field of information technology is a good example. But whilst I support cooperation in areas where real efficiencies can be achieved, I remain steadfastly opposed to any form of central administration. The economies supposedly offered by an overarching system seem to me to be, on examination, largely illusory and easily achieved by the cooperative arrangements presently in place. Moreover, they would in any event be offset by the dilution, or perhaps the elimination, of the sense of 'ownership' that self-administration

¹²¹ *Federal Court of Australia Act 1976* (Cth) s 18S.

¹²² The Federal Magistrates Court of Australia was established by the Commonwealth Parliament: see *Federal Magistrates Act 1999* (Cth) s 8. Its first sitting was in July 2000: see Federal Magistrates Court of Australia, *Annual Report 2006–2007* (2007) 7.

gives to each court and the impetus that this gives to continuing procedural and administrative reforms.

The training of administrative staff might seem a long way removed from the natural concerns of the judicial branch but under the federal model it is a responsibility of the courts. In training its staff the Federal Court is keen to encourage the view that, whilst they are public servants, they serve the judicial branch of the Commonwealth. We are keen to ensure that they embrace the commitment of the Court to notions of service, excellence and courtesy, and that they understand the constitutional role that the Court performs. We take the obvious view that, to the general public, the counter clerk can be the face of the Court. The Court therefore regularly offers national training courses to staff at all levels. The content of the course covers some of the constitutional fundamentals, such as the separation of the judicial, executive and legislative branches, Chapter III of the *Constitution* and the independence of the judicial branch, as well as more detailed instruction about the role of federal courts, their jurisdiction and their administrative structures.

The Australian federal model of self-administration has made a large contribution to the international experience of judicial administration and has created substantial interest in other jurisdictions, especially in Canada where new models of judicial administration are presently being explored.

While self-administration alters the relationships between a court and the other branches of government,¹²³ it has the potential to improve these relationships.¹²⁴ With self-administration, the relationships can become more cooperative and constructive.

To my mind, the Federal Court's development of the Australian federal model of self-administration from its beginnings 17 years ago to its present highly-developed state, is one of the Court's most important and substantial achievements, particularly because as the model has evolved, it has acquired a strongly collegiate character which has led to a highly efficient administration.

XIII INNOVATIONS

The Court's innovations in practice and procedure have no doubt a good claim to be seen as the most important of its innovations in its first 30 years but brief mention should be made of innovations in other areas, particularly since innovation has been fostered by the administrative independence that the Court has been given. As noted earlier, administrative independence creates a climate within which innovation may flourish. Indeed, it creates a climate within which innovation may be *required* because with administrative independence comes the need to solve problems from within a court's own resources. Without an external agency to support it, a self-administered court must stand on its own two feet.

Information technology provides a good example for although it is expensive, properly managed, it can facilitate the efficient operation of a national court. The

¹²³ Justice Ronald Sackville, 'Courts in Transition: An Australian View' [2003] *New Zealand Law Review* 185, 193.

¹²⁴ Skehill, above n 112, 30.

Court's use of videoconferencing illustrates the point. As long ago as 1995, the Federal Court established a national videoconferencing network. It was then, I believe, the first court in the world to do so. This was achieved with technology that today seems dated but with it we achieved large savings in travel costs to both the Court and the parties.¹²⁵ Videoconferencing is, of course, used routinely by Australian courts today with greatly improved technology.

In electronic case management, the Court has for a long time stood amongst the leaders and self-administration has facilitated that. Recently, an enhanced system of electronic lodgement — eLodgement, eSearch and eAccess (and much else besides) — called 'MyFiles' has been developed cooperatively with the Family Court of Australia and the Federal Magistrates Court of Australia. This is a highly innovative system which will be accessible through one 'Commonwealth Law Courts Portal'.¹²⁶

Other innovations — shared with other Australian courts — such as the development of medium neutral citation, online access to judgments, online searching, close attention to court websites, the publication of judgment summaries and allowing television access to courts in certain circumstances,¹²⁷ are beyond the scope of this essay but are mentioned here as important developments in which the Federal Court, with its own resources and need for their efficient management, was a pioneer.

The spirit of innovation has extended to the Court's robes. Having decided collegiately in 1994 that wigs should no longer be worn by judges in the Federal Court,¹²⁸ there was considerable pressure either to abandon the wearing of robes as well or to adopt distinctive Federal Court robes. In the event, the two new robes were designed and adopted by acclamation at a meeting of the whole Court in 1999, one for first instance matters and another for appeals. The designs are simple but visually interesting and symbolically appropriate. The robes are made of Australian wool, woven in Australia. They are black because of that colour's intrinsic suitability for a court robe and for reasons of symbolic continuity. The trial robes have seven vertical elements which are symbolic of federal jurisdiction; the six states and the territories are symbolised by the seven elements, as they are in the seven points of the Federation Star. The seven elements combine, as they do in the Federation, to create a unity. The uneven spacings illustrate the

¹²⁵ See, eg, Chief Justice M E J Black, 'A Court-Based National Video-Conferencing Network for Taking Evidence and Aiding in Administration' (Paper presented at the First Worldwide Common Law Judiciary Conference, Washington DC, June 1995).

¹²⁶ Chief Justice M E J Black, 'New Technology Developments in the Courts: Usages, Trends and Recent Developments in Australia' (Paper presented at the Seventh Worldwide Common Law Judiciary Conference, London, May 2007).

¹²⁷ This has occurred in the Federal Court since 1986. Television access was initially restricted to ceremonial sittings, and subsequently for the opening or delivery of judgment in important cases. However, more recently, in some circumstances permission has been given by the trial judge to televise entire proceedings, for example, *Victorian Council for Civil Liberties Inc v Minister for Immigration and Multicultural Affairs* (2001) 110 FCR 452 ('*Tampa Case*') at first instance before North J: see Justice R S French, 'Television and Radio Broadcasting in the Federal Court of Australia — A Personal Perspective' (Presentation delivered by video link to Broadcasting Courts Seminar, London, 10 January 2005) 2–4.

¹²⁸ Barristers ceased wearing wigs in the Federal Court in 1999: see Federal Court of Australia, 'No Wigs for Barristers in the Federal Court of Australia' (Press Release, 8 December 1998).

diversity and geographical breadth of the Court's work. The appellate robe carries a deep red silk band with seven equal segments, again symbolic of the Federation but symbolic also of equality before the law.

XIV THE FEDERAL COURT AND ITS INTERNATIONAL RELATIONSHIPS

From its beginnings the Federal Court began to engage with other courts in our region. In doing so, it followed the example of earlier federal judges, such as Sir John Nimmo who served for a time as Chief Justice of Fiji before becoming one of the Federal Court's foundation judges.¹²⁹ The first Chief Justice, who as noted had been a Minister for Foreign Affairs, encouraged engagement with the courts of the South Pacific and the Federal Court's participation in the biennial South Pacific Judicial Conference. Justice Trevor Morling, who was a member of the Federal Court from 1981 to 1993, was one of the pioneers in this work, serving as a judge of the Supreme Courts of Tonga, Western Samoa and Vanuatu. Today Federal Court judges continue to provide judicial assistance to courts in the South Pacific.

As well as judicial service in the South Pacific, generally undertaken in periods of judicial leave from the Federal Court, there has been a strong judicial cooperation and support element in the Court's engagement with other courts in our region. Judges of the Federal Court have been involved in judicial education and support programmes in the region, including in Vietnam and Indonesia. There have been exchanges with the People's Republic of China and also with senior courts in Thailand. Notably, the Court has a memorandum of understanding with the Supreme Court of Indonesia under which assistance has been given with that court's programme of fundamental reform.

The Federal Court's involvement with reforms in the judicial system of Indonesia predates its formal memorandum of understanding. Since 1999 the Court has delivered over 70 workshops to more than 750 judges in Jakarta and in regional courts and nearly 100 Indonesian judges and court administrators have attended training programmes in Australia, mostly with the Federal Court. The subjects covered have included backlog reduction, financial management and administrative and judicial leadership.

For a long time, the Court has given library assistance to courts in the South Pacific by providing needed books and law reports and through occasional visits by Federal Court library staff. More recently, information technology assistance has been provided, particularly to the Supreme Court of Tonga.

Close relations have also been developed with the Canadian judiciary and there is a continuing and successful programme of exchange visits between judges of the Federal Court of Australia and the Canadian Federal Court.

¹²⁹ Commonwealth, *Parliamentary Debates*, House of Representatives, 2 December 1971, 4009 (Nigel Bowen, Minister for Foreign Affairs).

XV CONCLUSION

The growth of the Federal Court of Australia from its beginnings in 1977 to the large national trial and appellate court of today reflects the continued expansion of Commonwealth legislative activity into new areas such as human rights and the environment as well as further activities in areas of longstanding special federal concern such as administrative law, taxation, competition law, intellectual property and workplace relations law.

In light of this expanding jurisdiction and the increasing complexity of the world in which it exercises its constitutional functions as a Chapter III court, the Federal Court needs to maintain not only the ideal of its founders that it be a court of excellence, but also the ideal of innovation since the application of existing practices and procedures will not, without innovation and reform, satisfy the continuing requirement for the Court to be efficient in the management of its own administrative affairs and the disposition of its caseload. The Court will also need to be innovative if access to the Court is to be a practical reality and is not denied in consideration of cost and complexity.

Finally, some very brief comments about the future. It would seem likely that there will be pressures to enlarge the Court. I would hope that these pressures can be resisted and that the successful establishment of the Federal Magistrates Court in 1999 — a very important step in the century-long history of Australia's federal judiciary — and its continued growth in numbers, jurisdiction and stature will allow the Federal Court to remain at about its present size and retain its present character. As for the Federal Magistrates Court, there are strong arguments for its continued growth and for it to have a new name to reflect its changing nature and increasing stature.

It seems likely that jurisdiction to try indictable federal offences will be conferred in the near future with the creation of a federal offence of serious cartel behaviour. It may well be that the Court's criminal jurisdiction will expand later into other areas closely related to its existing civil jurisdiction, such as tax and corporations. In preparation for these changes the Court has, for some time now, had a committee to plan for the introduction of a jurisdiction over federal indictable offences and to implement reformed procedures for such cases.

It remains to be seen whether the Federal Court will be given a wider federal criminal jurisdiction, perhaps even a general federal criminal jurisdiction. It also remains to be seen whether the Federal Court will acquire an appellate jurisdiction for all federal offences — that may well depend upon the extent to which, under the present arrangements, consistency is achievable between the state and territory courts in the sentencing of federal offenders.

We may expect debate from time to time about the possible establishment of a federal court of appeals or of an appellate division of the Federal Court, but for the reasons I have outlined earlier in this essay I would not favour that. Apart from anything else, given the Federal Court's several important areas of specialist jurisdiction, the ability under the present arrangements to constitute experienced appellate benches in any of its areas of specialty is simply too valuable to give up.

I conclude this survey, prompted as it is by the correspondence between two anniversaries, by noting one other trend that has developed over the past 30 years. That trend is the increasing value placed by the Federal Court and by other superior courts in Australia upon scholarly academic writing in journals such as the *Melbourne University Law Review*. It is a trend that I am sure will continue.

It remains only to congratulate the *Melbourne University Law Review* upon its 50 years of excellence and to wish it well for the next 50 years.