

40TH ANNIVERSARY OF THE FEDERAL COURT OF AUSTRALIA CONFERENCE
THE ROLE AND FUTURE OF THE FEDERAL COURT WITHIN THE AUSTRALIAN JUDICIAL
SYSTEM
CHIEF JUSTICE ALLSOP

I acknowledge the traditional custodians of the land on which we meet, the Gadigal people of the Eora Nation and pay my respects to their elders, past and present.

INTRODUCTION

Before I begin, I would like to extend my warmest congratulations to the ANU Centre for Commercial Law and the ANU Centre for International and Public Law for their efforts in organising this conference to mark the Court's 40th anniversary. There is an excellent program set down for the next two days which will provide a wide-ranging survey into the Court's contribution to the development of Australian law.

My task today is to address in broad terms the role and future of the Federal Court. It is important to look back to the origins and development of the Court for a number of reasons. First, it is important to understand why some fine lawyers and great Australians thought the creation of a national superior Court to be important. Secondly, an examination of the past helps to identify the trajectory of the Court into the future. Thirdly, from reflection upon the experiences of the Court, one may see the place of the Court in the life of the nation.

THE EARLY HISTORY OF THE FEDERAL COURT

In the 1960s, there was momentum within the profession for the establishment of a new federal court. While some have put this down to purely pragmatic considerations, others, including Justice Susan Kenny of this Court, have drawn parallels between the impetus for a federal court and what historian Geoffrey Serle has described as a 'surge of national consciousness' from the period of the 1960s to 1980s.¹ This focus upon nationhood can be detected in comments from Mr M.H. Byers QC and Mr P.B. Toose QC, who described the creation of federal courts as a *national* endeavour befitting a 'fully independent nation' where identification with nation rather than State had been cemented through the experience of the World Wars and the Great Depression, and the less violent experience of the uniform tax

¹ Susan Kenny, 'Federal Courts and Australian National Identity' (2015) 38 *Melbourne University Law Review* 996, 999 quoting Geoffrey Serle, *From Deserts the Prophets Come: The Creative Spirit in Australia 1788-1972* (Heinemann, 1973), 176; and 998 citing James Curran and Stuart Ward, *The Unknown Nation: Australia after Empire* (Melbourne University Press, 2010).

legislation.² Initial imaginings on the role of the Federal Court, at least by Byers and Toose and like minds, entertained the idea that any superior federal court would be a court of the *nation* in the fullest sense of that term, including width of jurisdiction.

The paper of Justice John Griffiths and Professor James Stellios to be delivered at this conference charts the political progress of the formation of the Court and the views, sometimes changing, of senior judges and politicians that saw the Court created as it was. I do not propose to trespass in detail over that subject matter. Important to many at the time was the proper living institutional framework for the Australian court system and the Australian judiciary. Put in terms that are more likely to evoke the debate – the standing and central importance of the State Supreme Courts and the importance of not undermining their status were factors that were openly articulated as reasons to limit the conferral of jurisdiction on the new court to particular and special subjects.

The status and importance of State Supreme Courts remain fundamental considerations in the relationships between judicial institutions and in policy formulation in the future. That this is likely to be so, and is unlikely ever to change, is dictated by the nature of the federal compact and the place of the Supreme Courts within it. This is reflected in the important role they play in the doctrines and conceptions concerning our constitutional and institutional freedoms. The cases of *Kable*³ (and related doctrines) and *Kirk*⁴, together with other cases, including the *Communist Party Case*⁵, the *Boilermakers' Case*⁶, *Coco v The Queen*⁷, *Mabo (No 2)*⁸, *Lange*⁹, and *S157*¹⁰ form the foundations, and shape the architecture, of our freedoms in this country. For illustration of this, see this week's decisions in *Graham* and *Te Puia*.¹¹

The proposal for the new court got underway in December 1962, when the then Attorney General, Sir Garfield Barwick, was authorised to draft legislation for Cabinet approval providing for an Australian superior federal court.¹² The government's intention was aired publically by the Commonwealth Solicitor-General, Sir Kenneth Bailey, on behalf of the

² Maurice Byers and Paul Toose 'The Necessity for a New Federal Court (A Survey of the Federal Court System in Australia)' (1963) 36 *Australian Law Journal* 308, 313.

³ *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.

⁴ *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531.

⁵ *Australian Communist Party v Commonwealth* (1951) 83 CLR 1.

⁶ *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.

⁷ *Coco v The Queen* (1994) 179 CLR 427.

⁸ *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

⁹ *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

¹⁰ *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476.

¹¹ *Graham v Minister for Immigration and Border Protection; Te Puia v Minister for Immigration and Border Protection* [2017] HCA 33.

¹² Gerald Brennan, 'Creation of the Federal Court: A Reflection' 91 *Australian Law Journal* 461, 461.

Attorney General, at the Thirteenth Australian Legal Convention of the Law Council of Australia in early 1963. At the Convention, the vision of Byers and Toose of the new national superior court taking over significant work of the State Supreme courts was exposed to discussion and a degree of criticism. For Byers and Toose, the investiture of State courts with federal jurisdiction so that they may hear federal matters was only half of the bargain. The other half was that the legislature should establish federal courts other than the High Court to deal with increased federal litigation.¹³ For Byers and Toose, the constitutional drafters had envisaged the eventual creation of a federal court system and it would be the role of any new federal court to materialise that vision.

Barwick and others took a different view. This was evidenced from an article that Barwick prepared whilst Attorney General and published in the *Federal Law Review* in 1964, by which time he had been appointed as Chief Justice of the High Court.¹⁴ His focus was squarely on the fact that an increased workload at the High Court level had meant that the ultimate appellate Court of Australia was being distracted from its *raison d'être*, namely constitutional interpretation and the determination of appeals from other superior courts on matters of legal principle.¹⁵

Barwick's proposal was for the jurisdiction of a superior federal court to encompass so-called 'special' classes of case that, on account of the 'distinctive and separate character' of specific areas of the law, would be better adjudicated by a federal as opposed to a State court.¹⁶ Among this special class of case Barwick included bankruptcy and industrial law cases, obviously with an eye to the fact that any federal superior court would assume the Australian Industrial Court and the Federal Court of Bankruptcy. However, he also noted that cases may be 'special' on account of the party concerned (e.g. the Commonwealth as a party) as well as by virtue of subject-matter.¹⁷ This notion of the distinctive and separate character of specific areas remains an important consideration.

The proposal for a Commonwealth superior court attracted strong opposition from other quarters. And its passage through the political system was not a smooth one. The debate was still going on in the early 1970s with Prime Minister Gough Whitlam being a strong advocate

¹³ Byers and Toose, above n 2, 309.

¹⁴ Garfield Barwick, 'The Australian Judicial System: The Proposed New Federal Superior Court' (1964) 1 *Federal Law Review* 1.

¹⁵ *Ibid.*, 3

¹⁶ *Ibid.*, 3

¹⁷ *Ibid.*, 3.

for the Court on the basis that it would contribute to the development and certainty of federal law. The Bill under Whitlam's prime ministership was defeated in the Senate both before and after the double dissolution election of May 1974.¹⁸

After the change of government in 1975, the Bill introduced by Attorney-General Robert Ellicott was attuned to concerns about the way in which a federal court might diminish the standing of the State and Territory Supreme Courts.¹⁹ When the Federal Court was created by the *Federal Court of Australia Act 1976* and began to exercise its jurisdiction on 1 February 1977 as a superior court of record and a court of law and equity, it had a limited jurisdiction conferred by around ten statutes.

It took time for emotion around the creation of the Federal Court to subside. It is not necessary or appropriate to dwell on the manifestations of that emotion. What is necessary, and appropriate, to say is how well now the courts work harmoniously and co-operatively together. I say that having been a member of both a State judiciary and the Commonwealth judiciary and having participated in the Council of Australasian Chief Justices. I will say a little more of this co-operation later.

THE JURISDICTIONAL AND JURISPRUDENTIAL ROLES OF THE COURT

In its early days, the Court exercised the jurisdiction that previously had been vested in the Australian Industrial Court and the Court of Bankruptcy as well the new jurisdiction under the *Trade Practices Act* and some 'statutory jurisdictions formerly exercised by the High Court'.²⁰ As former Chief Justice Black pointed out, however, it was the content of the jurisdiction conferred on the Court (as opposed to the number of statutes) that shaped its early role.²¹ He and former Chief Justice French have drawn attention in particular to the jurisdiction vested in the Court by the *Trade Practices Act*, which opened up for the Court work in the areas of competition law by virtue of the anti-trust provisions in Part IV as well as work arising from the provisions in Part V and, in particular, s 52, a section that proved so fundamentally important for commercial litigation.²²

¹⁸ Brennan, above n 12, 462.

¹⁹ See Michael Black, 'The Federal Court of Australia: The first 30 Years' (2008) 31 *Melbourne University Law Review* 1017, 1021.

²⁰ See Brian Beaumont, 'Federal Court of Australia' in Tony Blackshield, Michael Coper & George Williams (eds), *Oxford Companion to the High Court of Australia* (Oxford University Press, 2001), 272.

²¹ Black, above n 19, 1029.

²² *Ibid.* See also Robert French, 'Federal Courts Created by Parliament' in Brian Opeskin and Fiona Wheeler (eds), *The Australian Federal Judicial System* (Melbourne University Press, 2000) 123; See also Black, above n 19, 1030.

The 1980s and 1990s saw tectonic shifts in the jurisdictional architecture of the Court. Judicial review through the *Administrative Decisions (Judicial Review) Act 1977* (Cth), the *Administrative Appeals Tribunal Act 1975* (Cth) and s 39B of the *Judiciary Act 1903* (Cth) saw the establishment of the Court as a significant place of public law jurisdiction, heightened in texture and volume by the increasing waves of migration cases from the 1990s. Taxation and intellectual property cases began in the 1980s increasingly to come to the Court drawn by its efficiency, modern procedure and the intellectual calibre of the judges. But the world changed with the cross-vesting legislation of the Commonwealth and all States and Territories. That legislation, in its working for little over a decade until *Re Wakim*²³, saw the growth in vitality and confidence of the Court as jurisdictional debates that had marked the early 1980s evaporated. The Court came to assume a place in company law, commercial law, taxation, admiralty and maritime and intellectual property that in significant part, was driven by its capacity for innovation, efficiency and skill.

In 1997, in a timely (given the impending demolition of one half of the cross-vesting legislation to come in 1999) group of amendments to the Court's jurisdiction by the addition of subs (1A) to s 39B of the *Judiciary Act* (tucked away in the *Law and Justice Legislation Amendment Act 1997* (Cth)), the Court was given important responsibilities. The enactment of s 39B(1A)(c) of the *Judiciary Act* transformed the Court from one of limited jurisdiction to one of general federal civil jurisdiction with the authority to hear cases in all non-criminal matters arising under any Commonwealth law. One other limb of the 1997 amendments, the conferral of jurisdiction in matters arising under the *Constitution* or involving its interpretation was equally important is laying the groundwork of the Federal Court as a Constitutional court acting in a 'supporting role' to the High Court.²⁴

After *Re Wakim* in 1999, corporations law returned to the Court in 2001 with the referral of the corporations power by the States to the Commonwealth.

Meanwhile, in 1993, one of the most historically momentous additions to the Court's jurisdiction was conferred by the *Native Title Act 1993* (Cth). That very important jurisdiction arose from the recognition in the common law of the rights and interests of Aboriginal peoples and Torres Strait Islanders under the traditional laws and customs to their lands and waters. The Federal Court is the Commonwealth forum for indigenous groups to gain

²³ *Re Wakim; Ex parte McNally* (1999) 198 CLR 511.

²⁴ Black, above n 19, 1032.

recognition of their long-existing land rights. This jurisdiction is of paramount importance for the nation as a whole.

The years following *Re Wakim* with the foundational provision of s 39B(1A)(c) have seen the Court grow in depth of jurisprudence and entrenchment of broad areas of jurisdiction. The Court has recently sought to organise its work in a more subject specific and nationally focused way. It has done so by organising itself by reference to its major jurisdictional areas: administrative, and constitutional law and human rights; admiralty and maritime; commercial and corporations (including corporate and personal insolvency); federal crime and related proceedings; employment & industrial relations; intellectual property; native title; taxation; and other federal jurisdiction. Each of these national practice areas has one or more judges in charge of running the practice areas in consultation with me and with the new national operations registry. The aim is to see the operation of the Court focus on development of the deep skill of its judges and registrars in what are in some, but not all, respects very specialised areas of practice.

In one sense, the movement away from the State-based registry organisation of the Court to a national focus is the natural outcome of a number of forces at work: first, the growth of deep expertise in the Court in areas of its exclusive jurisdiction and in the areas of its special skill and the need to deploy that expertise and skill across a continent; secondly, the growth in volume of difficult, complex litigation; thirdly, the modern, digital environment allowing for the creation of national organisational structures; and fourthly, the working through of the consequences of *Re Wakim* in a national setting.

The object is to have operating within one national court a number of what might be said to be virtual courts of skill and international reputation: a commercial court, a tax court, an intellectual property court, a labour court, a maritime court etc.

The work of the Court is a balance between broad areas of concurrent jurisdiction and important areas of exclusive or quasi-exclusive jurisdiction. In significant areas of the work the Court shares the litigation load of the country with the State courts, in particular corporations and many areas of commercial law. In other areas such as intellectual property and admiralty and maritime, while jurisdiction is concurrent, the Court has, over time, come to undertake most of the work. In other important areas: bankruptcy, Commonwealth

taxation, economic regulation, anti-trust and Commonwealth administrative law the jurisdiction is exclusive or effectively exclusive. This has led to a stable and coherent body of jurisprudence in the Court in those areas. Each of the exclusive areas is centrally important to the work and responsibility of the Court in a way which is emblematic of its role – the control of power, public and private, in our society.

This balance of jurisdiction has been notable in recent years for the absence of tension between the exercise of State and Federal courts that marked the early 1980s. This is a mark of the sophistication of the profession and the judiciary of Australia. Problems of jurisdiction will always exist in a federation; but we should be keen to put arrangements in place to minimise those problems, especially if we are to see a vision for ourselves in the wider world. It should always be recalled that litigants, especially foreign litigants, resent deeply paying good money to be advised about or to litigate issues of jurisdiction.

Before looking briefly to the future, it is important to say something of procedure. Together with other Courts in Australia since the 1980s, in particular the Commercial List of the Supreme Court of NSW, the Court has played its part in developing modern procedures for the management and conduct of litigation. Case management and the docket system have quietly revolutionised litigation in Australia. There remain problems, but we have at least recognised in Australia that bureaucratized, cookie-cutting procedure manuals do not work. Rather, human experience, and practical efficiency are the hallmarks of handling cases well. This Court has been deeply influential since the 1980s in that realisation and in its practical application of the docket system.

THE FUTURE ROLE OF THE FEDERAL COURT

I begin this section by recalling a Greek expression: If you wish to make the gods laugh, tell them your plans.

Looking to the future of the Court is not intended as a presumption on the roles of Parliament and the Executive. As a creature of statute, the Court's shape and place is ultimately a matter for Parliament. There remain policy issues that echo those discussed in the 1960s and 1970s where a choice may be made, ultimately by Parliament, in relation to the shape and role of

the Court. The place of the Court in criminal law beyond cartel crime is one example. These issues may raise the same considerations as were abroad in the 1960s and 1970s.

The attempt in the 1980s by every Parliament in the Commonwealth to create a simple unified judicature through the cross-vesting legislation was rejected by the High Court in 1999 as unconstitutional. To a degree, the recognition of the status and place of the State Supreme Courts in the constitutional structure may perhaps be seen to be an unspoken premise of the majority judgments. Since then, with no apparent political appetite for resuscitation of the policy that gave rise to that legislation, the Court's character has been moulded as a national superior Court grounded in Commonwealth legislation.

The potential place of the Court in the future can be seen, or hinted at, from its essential contemporary elements. The importance of the Court to the contemporary life of the nation in dealing with national legislation is significant. The Court's jurisdiction (being a mixture of exclusive and concurrent jurisdiction) is central to the economic well-being of the nation. Corporations, finance, banking, insurance, insolvency (corporate and personal bankruptcy), trade practices, anti-trust, consumer protection, economic regulation, national labour law, maritime law, taxation, intellectual property, public and constitutional and native title law all underpin the success and health of the Australian economy and of broader society.

The future of the Court's role in part depends upon the choices to be made in the structure of the federal judicature. The transformation of the Federal Magistrates' Court into the Federal Circuit Court and its important jurisdictional responsibilities under both the Family Court and the Federal Court throw up the need for the consideration of structural reform of the federal courts. Since arrangements made at the beginning of 2016, the Federal Court (in its emanation as an entity under the *Courts Administration Legislation Amendment Act 2016* (Cth) and the *Public Governance, Performance and Accountability Act 2013* (Cth)) has been responsible for delivering all corporate services for the three federal courts. Though the three courts remain operationally separate in their exercise of judicial power, there has been a merger of the courts for financial administration purposes. Thus, to a degree there is an asymmetry of financial and judicial organisational structures which requires consideration.

One other aspect of the organisation of the Court warrants mention. The Court's appellate work is conducted under a Full Court system, without a dedicated Court of Appeal. This gives judges of all registries the opportunity to undertake work at appellate level and regularly interstate. This fosters the collegiality and national character of the Court. Further, it

better meets the demands of the Court's diverse but specialised jurisdictional base, whose only common feature is that it was the view of the framers of the *Constitution* that certain subjects, as are set out in s 51 of the *Constitution*, were appropriate for national legislation. A Full Court system allows the Court to list on the same day appeals in a range of specialised areas, all over the country in a way that would not be possible if there were a standing court of appeal, unless the appeal court regularly borrowed first instance judges.

The Court has for many years had an international focus to its work. It has been an active participant in judicial assistance and exchange in the region with memoranda of understanding with Courts in Indonesia, Papua New Guinea, Vanuatu, Vietnam and Myanmar, and it has been and is (in consultation with New Zealand judges) responsible for the administration of Pacific Judicial training in important programs funded by the New Zealand government. The work of the Court itself is highly international. Many corporations and taxation, most intellectual property and virtually all shipping and international commercial arbitration matters involve international parties.

These matters suggest a place for a national court in this region's justice system. I use that expression "justice system" of this region because that is precisely what is developing – through the growth of skilled courts and arbitral institutions in the region. International and transnational courts are being established. A number have been begun in the Gulf Region, and Singapore has established its own international commercial court. I venture to suggest that had *Re Wakim* not struck down one half of the cross-vesting system, we would have an Australian international commercial court operating today. I leave it to others to exercise energy and ingenuity in devising constitutionally valid frameworks to achieve this. A cooperative arrangement may be possible among Australian courts. This is a venture worthy of national consideration.

The sophistication of the Court's digital file base and the specialised skill of its judges and registrars in areas of international jurisprudence and litigation such as shipping and maritime, intellectual property, commercial law and commercial arbitration may make possible the utilisation of infrastructure to provide platforms for Australian participation in regional dispute resolution. This may take a number of forms such as participation in joint arbitral or judicial tribunals, or the provision of digital court or tribunal platforms.

To a degree, the future must remain unknown. Artificial intelligence and its effect on Courts, the profession and the law will change the landscape of life in ways we cannot predict. The

Court and the Supreme Court of New South Wales are conducting an important symposium later this year on this topic. The digital future awaits.

I wish to conclude on the work of the Court in native title and to reflect upon the significance of that body of law and on the place of the Court in its history.

The judgments of the majority in *Mabo (No 2)* were an event in the history of this country that marked the recognition of an historical truth that laid a foundation for the commencement of the process of reconciliation and for the formation of a sense of nationhood with its beginnings tens of thousands of years ago, and not merely 200 years ago in its modern manifestation. The emergence of that truth to the wider Australian society and its place in the experience of all Australians is not to be feared, nor is it to be seen as a diminishment of anyone's history. It is, or should be, part of our lived experience.

The Court's exercise of its jurisdiction in native title has been transformative. The procedural innovations introduced to deal with large, complex and often subtle cases, usually on country, have been remarkable. The history of these cases and of this work should be written, because these cases contain the history of indigenous peoples all over the country. But there is much yet to be done. The Court has devoted and continues to devote, significant energy and resources to the resolution of claims. Sometimes, however, the approach of State parties has left something to be desired. Native title cases cannot be run as if State governments are gatekeepers to a public interest to which the interests of native title claimants are inimical.²⁵ This is generally now understood, but perhaps not universally. One fears that underlying that attitude may be a view that any declaration of native title, whether exclusive or non-exclusive, somehow removes lands from the people of the State. It is unfortunate that recently a judge of the Court felt it necessary to point out the illegitimacy of such an approach.²⁶

Every judge who has ever involved her or himself in this work has seen the prose of words such as spiritual connection with country, given deep experiential meaning.

Sydney
8 September 2017

²⁵ *Western Bundjalung People v Attorney General of New South Wales* [2017] FCA 992 at [47] (*per Jagot J*).

²⁶ *Western Bundjalung People v Attorney General of New South Wales* [2017] FCA 992, see esp. at [7], [47], [63] and [67] (*per Jagot J*); *Yaegl People #2 v Attorney General of New South Wales* [2017] FCA 993 at [16] (*per Jagot J*).