BURYING THE AUTOCHTHONOUS EXPEDIENT?

By The Honourable Rae Else-Mitchell*

Although the framers of the Commonwealth Constitution, steeped in the study of American federalism, found the United States Constitution a valuable model which they could copy or adapt to the requirements of the six federating Australian colonies,[1] they deliberately departed from the judicial provisions of that model in two major respects: first by creating the High Court of Australia as a general court of appeal from the Supreme Courts of the States;[2] and, secondly, by empowering the Parliament to invest State courts with jurisdiction in all matters which might be brought before the High Court in its original jurisdiction.[3]

The experience of more than half a century has shown the wisdom of the first departure from the American precedent: differences resulting from conflicting decisions of State courts have been resolved not only in the common law fields and those where there is a Commonwealth statute but also where differences have arisen as to the construction or application of State statutes of similar substance.[4] This unified law of the Australian States has been given no less weight than the rules laid down in comparable situations by the House of Lords[5] and it has received ultimate recognition by the abolition of appeals from the High Court to the Privy Council.[6]

There was no less wisdom in the decision of the Founding Fathers to provide for the vesting of federal jurisdiction in State courts—the "autochthonous expedient" as the High Court has characterized it[7]—but in this instance the advantages are not so apparent. They have indeed been substantially overlooked in the proposal to establish a Commonwealth Superior Court[8] which is certain to produce many of the problems of the divided judicial system existing in the United States of America[9] and to result in the eventual burial of the autochthonous expedient.

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[1] Dixon, "The Law and the Constitution" (1935) 51 *Law Quarterly Review* 590, 597.

[2] S. 73 (ii) of the Constitution.

[3] S. 77 (iii) of the Constitution.

[4] *Coates v. National Trustees Executors & Agency Co. Ltd* (1956) 95 C.L.R. 494; *Crooks National Stores Pty Ltd v. Collie* (1957) 97 C.L.R. 581.

[5] *Smyth v. The Queen* (1957) 98 C.L.R. 163; *Director of Public Prosecutions v. Smith* [1961] A.C. 290; *Parker v. The Queen* (1963) 111 C.L.R. 610.

[6] Privy Council (Limitation of Appeals) Act 1968 (Cth).

[7] *The Queen v. Kirby; ex parte Boilermakers Society of Australia* (1956) 94 C.L.R. 254, 268.

[8] See references in note 20 *infra*.

[9] Hart & Wechsler, *The Federal Courts and the Federal System* (1953) Chs 4, 5, 8; Bunn, *Jurisdiction and Practice of the Courts of the United States* (5th ed. 1949) Chs I, II, VI, X.

This proposal, which has advanced to the stage that a Bill "to create a Court to be known as the Commonwealth Superior Court" was introduced into the House of Representatives on 21 November, 1968,[10] has had several advocates and more than one putative parent. Its genesis appears to have been the Law Council of Australia's Uniform Divorce Bill drafted in 1951-1952 at the instance of that Council in which provision was made, *inter alia*, for a Federal Divorce Court.[11] Subsequently, a case for a new Federal Court with jurisdiction in divorce was sought to be made out by Messrs Byers and Toose of the New South Wales Bar in a paper presented in January 1963 to the Thirteenth Legal Convention of the Law Council of Australia.[12] In the following year, the Commonwealth Attorney-General, Sir Garfield Barwick, in an article published in this Review[13] developed his conception of the Federal Superior Court which he thought should be established. On Sir Garfield's relinquishing the office of Attorney-General, his successor Mr B. M. Snedden, Q.C., formulated concrete proposals for the Court and these were inherited by the present Attorney-General Mr N. H. Bowen, Q.C.,[14] who introduced the Bill in the House of Representatives and elaborated its scope and purpose on that and other occasions.[15] It must be said at once, however, that the Bill now before Parliament does not conform with all the conceptions and principles which have been outlined and developed in the several papers and statements by these several learned gentlemen. Indeed, there is no clear agreement amongst them as to the reason why a new federal court is considered necessary or advisable.[16]

There is little doubt that in large measure the need for a new federal court was seen, initially, as stemming from the enactment by the Commonwealth of the Matrimonial Causes Act 1959: a uniform Commonwealth divorce law required a Commonwealth divorce court which would give uniform decisions throughout the Commonwealth and avoid the delays in hearing and differences in opinion which had been experienced in the courts of the States.[17] A more pressing need

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[10] (1968) *C.P.D.* 3144 (21 November 1968).

[11] (1951-1952) 25 *Australian Law Journal* 381; (1952-1953) 26 *Australian Law Journal* 307.

[12] "The Necessity for a New Federal Court", (1962-1963) 36 *Australian Law Journal* 308.

[13] "The Australian Judicial System: The Proposed New Federal Superior Court", (1964-1965) 1 F.L.Rev. 1.

[14] (1967-1968) 41 *Australian Law Journal* 336.

[15] (1967) *C.P.D.* 2336 (18 November 1967); (1968), *C.P.D.* 2298 (24 October 1968) 3144 (21 November 1968); (1967-1968) 41 *Australian Law Journal* 336.

[16] See the diverse views expressed at the Thirteenth Legal Convention by Messrs Byers and Toose, (1962-1963) 36 *Australian Law Journal* 308, 328, Mr B. Hall *loc. cit.* 324, Sir Kenneth Bailey *loc. cit.* 325, Mr R. S. Watson, *loc. cit.* 326-327, Mr E. G. Whitlam, *loc. cit.* 327, as well as by Sir Garfield Barwick, (1964-1965) 1 *F.L. Rev.* 1, and Mr N. H. Bowen, *supra* n. 15.

[17] See discussion at Thirteenth Legal Convention, (1962-1963) 36 *Australian Law Journal* 320 *et seq.*; and Fourteenth Legal Convention (1967-1968) 41 *Australian Law Journal* 342 *et seq.*

was seen in the increased workload of the High Court which, if not lightened, could prejudice the prompt disposal of appeals and cases of constitutional importance. This was the major point made by the Commonwealth Solicitor-General when he announced his Government's decision to create a new federal court[18] and subsequently by Sir Garfield Barwick.[19] Other reasons advanced for the creation of the court revolved around the convenience which would ensue from the combination of the Commonwealth Industrial Court, the Federal Bankruptcy Court, and the Courts of the Territories, and the desirability of an intermediate court of appeal being established to hear appeals from the Courts of Territories instead of those appeals being taken to the High Court. Finally, a need was seen in some quarters for courts constituted by judges with specialized experience to hear cases arising under Commonwealth law such as the Income Tax and Sales Tax Assessment Acts, the Patents, Trade Marks, Copyright and Designs Acts, the Life Insurance Act, the Lands Acquisition Act, and other matters of federal jurisdiction enumerated in section 75 of the Constitution.

It cannot be gainsaid that any one or more of these reasons can be invoked to justify the creation of a new federal court if one is anxious to find justification for such a political decision, but it is submitted that on an objective analysis the only compelling reason which carries real conviction is the need to lighten the workload of the High Court so that it should be free to determine, without the pressure of an overfull list, appeals from the Supreme Courts of the State *en banc* on matters of general law and cases of constitutional significance. The question which should be considered in more detail than it apparently has, is whether on balance the creation of the proposed Commonwealth Superior Court is the most rational means of producing this result.[20]

The scheme of the Bill to create that Court has been expounded elsewhere[21] and it is not necessary to say more than that the Court is to consist of two divisions one of which will be the Industrial Division and the other a General Division.[22] The Industrial Division will pick

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[18] Sir Kenneth Bailey (1962-1963) 36 *Australian Law Journal* 325-326.

[19] (1964-1965) 1 *F.L. Rev.* 2.

[20] The only critical and constructive comment, apart from the discussion at the Thirteenth and Fourteenth Legal Conventions, has come from Professor Sawer who, in an article in the (1964-1965) Vol VIII *Journal of the Society of Public Teachers of Law* 301, has drawn attention to some of the general considerations against the proposed Court. At the political level, there has apparently been no criticism and the leader of the Australian Labor Party—no doubt because of his party's centralist policies—has commended the proposal: see E. G. Whitlam, 1967 *C.P.D.* 2339 (18 May 1967); (1959-1960) 33 *Australian Law Journal* 124. The absence of any critical comments reinforces Professor Sawer's disappointment that "neither the practising nor teaching professions seem to have thought it worthwhile to give these proposals the critical attention . . . they deserve"; it also demonstrates an ignorance of the problems which have been encountered in the United States of America.

[21] Lane, "The Commonwealth Superior Court" (1969) 43 *Australian Law Journal* 148.

[22] Cl. 14.

up the present jurisdiction of the Commonwealth Industrial Court whilst the jurisdiction of the General Division, exercisable by a single judge, or a full court in appellate cases, will extend to all matters of federal jurisdiction set out in sections 75 and 76 of the Constitution[23] excluding specified matters in which a writ or order is sought against a court of a Territory or a Judge of certain courts, suits between States or to which the Commonwealth is a party, and trials of offences against laws of the Commonwealth unless expressly made triable before the Court.[24] The Court, which is to administer law and equity concurrently,[25] may grant injunctions and other relief[26] and is obliged to "give effect to all legal claims and demands and to all estates, titles, rights, duties, obligations and liabilities, existing by the common law, or by any custom, or created by legislation".[27] The Bill hopefully declares that the Court in its discretion shall grant "all remedies to which any of the parties appears to be entitled in respect of a legal or equitable claim properly brought forward . . . so that, as far as possible, all matters in controversy between the parties may be completely and finally determined and all multiplicity of legal proceedings concerning any of those matters avoided".[28]

At the threshold of the question whether the creation of the Commonwealth Superior Court is the most rational means of lightening the workload of the High Court lies, I think, one matter which appears to have been overlooked in most of the discussion of the proposal, namely, the special function of the administration of justice in a country which adheres to the Rule of Law, whether it has a federal constitution or not. It is not necessary to go back to Dicey to recognize that the Queen's Courts, generally speaking, stand between the Executive and the citizen and between all citizens themselves as a means of ensuring that the law is observed and that each citizen is protected from the unlawful invasion or infringement of his personal and property rights by the acts of the Executive or another citizen. The function, nay the duty, of every one of the Queen's Courts of Justice manifested by the judicial oath which every incumbent of judicial office takes is to apply the law and to do so "without fear or favour, affection or ill-will". This duty can be performed so as to do complete justice between the parties only if the court is able to apply all relevant law, whether it arise from a Commonwealth, State, or local enactment, regulation, or ordinance, or has its origin in the common law or the rules of equity: anything less than a comprehensive power to determine and apply the law regardless of its origin

[23] Cl. 19 (1).
[24] Cl. 19 (2).
[25] Cl. 29-33, 37.
[26] Cl. 38.
[27] Cl. 35.
[28] Cl. 36.

or constitutional or statutory force will necessarily result in the imperfect and incomplete resolution of claims and matters, not to mention the institution of abortive proceedings for which a proper jurisdictional basis cannot be found. A judicial system which limits the jurisdiction of a court by criteria other than the traditional and simple ones of *quantum* such as are found in the legislation constituting the County and District Courts of the States cannot fail to produce frustrations for the litigants who are encouraged to resort to it. Sir Victor Windeyer expressed some apprehensions about this matter in commenting on the proposal to establish the Court[29] and a little reflection will reinforce his comments. By way of illustration, a citizen who complains that he has been defamed by a governmental official or who suffers a trespass to his person or property should be entitled to protection from the courts and consequent redress without having to make fine distinctions as to whether the slander, libel, or trespass arose from some action, unauthorized or not, by Commonwealth, State, or local law, and his complaint must not be open to the risk that one tribunal to which he is invited to resort has not, but another has, the appropriate jurisdiction to entertain that complaint and grant him full redress. It is hardly necessary to recall that the assimilation of all causes of action at common law and the creation of courts of comprehensive jurisdiction were the great victories of the reforming legislation of 1833 and 1852 in England and of the Judicature Acts of 1873 and 1875. The Commonwealth Superior Court Bill, however, adopts the artificial criteria of sections 75 and 76 of the Constitution as the basis of the Court's jurisdiction and, in spite of the aspirations of clause 36, its jurisdiction will be limited to those matters so that it will be liable to prohibition or certiorari if it exceeds those limits. It can hardly be said, to adapt Maitland's language, that the law will be "freed from the complexity of conflicting and overlapping systems of precedents" so that attention "can be directed to the real problem of what are the rights between man and man, what is the substantive law".[30]

The advocates for the proposed Court and of the method of defining its jurisdiction which has been adopted in the Bill have overlooked or chosen to disregard the weighty criticism which over many years has been directed to the categories of federal jurisdiction set out in sections 75 and 76 of the Constitution.[31] These categories were characterized in 1935 by Dixon J., as manifesting "the greatest departure from English principle" of the supremacy of the law.[32] The natural desire of the Commonwealth to create courts of its own was, he thought, a superficial

[29] (1967-1968) 41 *Australian Law Journal* 344.

[30] Maitland, *Equity and the Forms of Action at Common Law* (1910) 375.

[31] *Report of Royal Commission on the Constitution* (1927) 99-111; Cowen, *Federal Jurisdiction in Australia* (1959).

[32] "The Law and the Constitution" (1935) 51 *Law Quarterly Review* 590, 606.

view which had led in America to the separation of courts into federal and State tribunals with a wealth of consequent problems and inconsistencies. The learned Judge added:

> But neither from the point of view of juristic principle nor from that of the practical and efficient administration of justice can the division of the Courts into state and federal be regarded as sound. The theory of the federal system is that power, particularly legislative power, may be divided, that it may be defined by reference to subject-matters upon which it is capable of exercise, and that it may be distributed between a central and local organs of government. Such a system requires that the allocation of powers shall be accomplished by law and it is for this reason that it depends upon the supremacy of the law. Further, it was considered an essential part of the federal system, as the writings in the *Federalist* insist, that the powers of central and local governments alike should operate directly upon the people. The various legislatures were, in other words, co-ordinate authorities from which law emanated but on different subject-matters. The relation of the governments was not to be one of legal obligation one to another ; but of agencies operating over the same people but in different fields of action. An attempt of one agency to intrude upon the field of another was simply an excess of legal power and the attempt would, therefore, be nugatory and void. In such a polity, the part played by the Courts is, or should be, to decide, in the ordinary course of ascertaining and enforcing the law, whether government action in reference to the citizen was lawful or unlawful, valid or void; that is in the case of legislation to decide whether it was effectual to make a change in the law, or left it unaltered. This function must be performed whenever the necessity arises for enforcing rights which depend upon a doubtful exercise of power. Every Court in the land must exercise it. The only alternative when such a question arises is for it to refuse jurisdiction. Now in such a state of affairs, it would appear natural to endeavour to establish the Courts of justice as independent organs which were neither Commonwealth nor State. The basis of the system is the supremacy of the law.[33]

His Honour, not only on that occasion, but many years before as a witness before the Royal Commission on the Constitution[34] advocated a constitutional structure under which the entire system of superior courts would derive its existence and authority from the Constitution. There are practical difficulties in giving effect to such a conception but it must be conceded that the creation of a court of comprehensive jurisdiction to exercise the so-called federal jurisdiction along with all other powers of the Queen's Courts at Westminster would approach very closely the ideal he had in mind. Such a court would have complete power to determine every question arising in any litigation and to pronounce on every legal question whether it involved the common law, the rules of equity, or the provisions of Commonwealth, State, or local

[33] *Ibid*, 606-607.

[34] *Minutes of Evidence*, 776 *et seq.*

legislation; and it would have power to grant all and every remedy or redress known to the adjectival law. Except for the fact that the Supreme Courts of the State have been denied the rights to a full exercise of federal jurisdiction under sections 75 and 76 of the Constitution they also approximate the ideal conception for they all are courts with comprehensive jurisdiction similar to that of the Supreme Court of Judicature in England constituted by judges whose independence is ensured by the requirement that they cannot be removed except upon a resolution of both Houses of the relevant State Parliament, and their salaries are guaranteed by permanent provision and are not subject to annual appropriation.[35] It is therefore unfortunate that the Commonwealth Parliament has not seen fit to invest the Supreme Courts of the States with full federal jurisdiction in all the matters set out in sections 75 and 76 of the Constitution and in particular that it has denied State Supreme Courts the right to entertain at first instance any matter in which an inter se question arises and any appeal from any inferior court in the exercise of federal jurisdiction.[36] The reasons for these decisions can only be understood from historical sources and warrant some closer examination.

The exclusion of State courts from the exercise of some items of federal jurisdiction was part of the fabric built upon the foundation of section 74 of the Constitution to ensure that the Privy Council should not be able to determine any *inter se* question and that the High Court would be the ultimate authority on the interpretation of the Constitution. The need for this was felt very strongly and the framers of the Judiciary Act were highly suspicious of the likelihood of appeals being taken direct to the Privy Council and decisions being given by that body which would misconstrue the Constitution and bring to naught the victory which had been fought over section 74 to create the High Court as the ultimate tribunal to construe the Constitution.[37] Nor were they wrong or precipitate in their suspicions, for within a short span of years the Privy Council had entertained an appeal from the Victorian Supreme Court[38] and held that an earlier decision of the High Court on the immunity of Commonwealth officers[39] was erroneous. In spite of this, the High Court declined to follow Privy Council decisions on *inter se* matters[40] and the Judiciary Act 1903 was amended in 1907 to obviate the possibility of the High Court being circumvented in such matters. These amendments made in 1907 included, first, the enlargement of

[35] Davis, *The Government of the Australian States* (1960) 28.

[36] Judiciary Act 1903-1965 (Cth), ss. 38A, 39, 40A.

[37] Deakin, *The Federal Story* (1944) Chs. 21, 22; Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) 748 *et seq.*

[38] *Webb v. Outrim* [1907] A.C. 81.

[39] *Deakin v. Webb* (1904) 1 C.L.R. 585.

[40] *Baxter v. Commissioner of Taxation (N.S.W.)* (1907) 4 C.L.R. 1087.

section 40 so as to allow the removal to the High Court of any cause involving the interpretation of the Constitution which might be pending in a State court and not merely of appeals; secondly, the addition of section 38A to deprive the State courts of jurisdiction, at first instance or on appeal, to entertain or determine any *inter se* question; and, thirdly, the introduction of a provision to transfer to the High Court, automatically and without application to that end, any cause pending in a State court in which any inter se question had arisen (section 40A).

Sir John Quick, co-author of *The Annotated Constitution of the Australian Commonwealth*, regarded it as "a matter for surprise and regret that in the early history of the interpretation of the Constitution the Parliament of the Commonwealth should have deemed it advisable to reject the services of the Supreme Courts of the States as primary courts in dealing with constitutional cases".[41] He emphasized that "nothing could be suggested against the honor, integrity and ability of the Justices of the Supreme Courts", but pointed to the manner in which this "drastic Federal legislation" depriving the State Supreme Courts of such jurisdiction had originated. It might be added, too, that the relevant provisions of the Judiciary Act as amended in 1907 did not entirely accomplish the desired ends because appeals under section 92 of the Constitution and some other matters which had originally been envisaged as involving *inter se* questions nevertheless reached the Privy Council.[42] Since the passage of the Privy Council (Limitation of Appeals) Act 1968 (Cth) and the wider recognition of the high authority of High Court decisions, there is relatively little prospect of any constitutional question reaching the Privy Council; the only possible way would seem to be by means of a civil action between private litigants in which a constitutional question is raised in the Privy Council (on appeal from a State Supreme Court) for the first time; even in such a case as this, the Privy Council would not only feel disposed to refuse to decide any question so raised for the first time but, if it entailed an *inter se* question, would be precluded from determining it by section 74 of the Constitution as it has been interpreted in the *Nelungaloo* cases[43] and later decisions.[44] To negative entirely any prospect of a constitutional question being determined by the Privy Council it would be necessary for the States to limit further the right of appeal to that body. Although this right of appeal has existed since before Federation and no State has taken such a course, it should not be regarded as politically unacceptable to the

[41] *The Judicial System of the Commonwealth* (1904) 699.

[42] *Dennis Hotels Pty Ltd v. Victoria* (1961) 104 C.L.R. 621; Sawer in Else-Mitchell (Ed.) *Essays on the Australian Constitution* (2nd ed. 1961) 86 *et seq*; Howard, *Australian Constitutional Law* (1968) 172 *et seq.*

[43] *Nelungaloo Pty Ltd v. The Commonwealth* (1950) 81 C.L.R. 144; (1952) 85 C.L.R. 545; (1953) 88 C.L.R. 529.

[44] *Dennis Hotels Pty Ltd v. Victoria* (1961) 104 C.L.R. 621.

States if the Supreme Courts of the States were to be conceded full jurisdiction in all federal matters, subject only to a right of removal to the High Court in the form originally provided by section 40 of the Judiciary Act, and a right in constitutional matters to refer or state a case, such as already exists under section 18 of that Act.[45]

The conception that the judicial power is divisible in some fashion into federal and State judicial power cannot fail to introduce confusion and multiplicity in litigation if further courts are to be erected with jurisdiction limited by categories as diffuse as those specified in sections 75 and 76 of the Constitution. Of these provisions, the Report of the Royal Commission on the Constitution quoted the observations of Mr Owen Dixon which were presented on behalf of the Committee of Counsel of Victoria to the effect that:

> If sections 75 and 76 were considered merely as provisions conferring jurisdiction, they would seem to us to be open to the most serious practical objection, because a jurisdiction given to a court for the enforcement of the law is made to depend upon the most controversial matters, which must be determined before even the merits of the case are reached. These provisions in truth sacrifice the interests of the litigant to the desire of the framers of the Constitution to preserve to the High Court the power of giving constitutional rulings and making constitutional precedents. When these provisions are considered in relation to section 77 and the use which has been made of that section, it will be seen that the greatest difficulty and confusion have arisen, and an incredible burden has been placed upon the litigant who has the misfortune to be affected in his litigation by any Federal law or any other matter with which sections 75 and 76 of the Constitution are concerned.
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> We think that, generally speaking, it might have been wiser if, when it was decided to bestow upon the High Court the functions of a final court of appeal, it had been thought this was enough to enable that court to maintain full control of the interpretation of the Constitution and the administration of the Federal law in common with that of all other law. We realise that, on occasions, a prompt solution of constitutional controversies has been possible because of the power to bring them immediately before the High Court in its original jurisdiction; but we think that this might be preserved without adhering to the very complicated and difficult criteria of jurisdiction which at present prevail.[46]

Illustrations of the difficulty and confusion which had so arisen were given in the Report of the Royal Commission and they will of necessity be multiplied and exacerbated with the passage of time and with the creation of courts whose sole jurisdiction is defined in the terms of sections 75 and 76. In what circumstances, for example, may it be said that an action for trespass against a Commonwealth police officer

[45] Cf. *Commonwealth v. Anderson* (1960) 105 C.L.R. 303 where a case was stated by the N.S.W. Supreme Court for the opinion of the High Court.

[46] 99 *et seq.*

appointed as such under the Commonwealth Police Act 1957 either arises under a law made by the Commonwealth Parliament or is an action in which the Commonwealth or a person sued on its behalf is a party? What categorization should be given to an action for damages against the driver of a Commonwealth vehicle who has, whilst "engaged on a frolic of his own" caused injury to a pedestrian, or to a claim for damages or compensation against an employer who is carrying out a contract authorized or ratified by Commonwealth legislation on Commonwealth property or in Commonwealth territory ? Would an action for noise nuisance against a commercial airline be a matter of federal jurisdiction either because of the source of the licensing power or the ownership of the airport from which it has taken off or on which it is landing ? How can one determine the relative fields of federal and state jurisdiction over collisions and injuries at sea and in bays and harbours if a federal court is given full jurisdiction in all matters of admiralty and maritime jurisdiction? And what of rights of industrial property which are claimed at common law analogous to the monopoly provisions of the patents, trade marks, design and copyright legislation or which arise from some original but expired registration under such legislation ?

The difficulty of categorization of the matters of federal jurisdiction of which these are but a few examples cannot fail to bedevil the litigant and his legal adviser to an even worse extent than in the times when procedure was governed by the forms of action. The last relics in Australia of the forms of action and of split jurisdictions are in the course of review and repeal in New South Wales[47] but the Commonwealth Superior Court Bill holds threats of the creation of new and even more esoteric distinctions than the old common law and equity ever knew. There can be little doubt, as Professor Lane has said of the proposed Court, that "one particular spectre will haunt its halls—split proceedings";[48] it might be added that a companion spectre will be that of abortive proceedings.[48A]

The consequences of adopting the categories of federal jurisdiction set out in the Constitution will necessarily mean that the Commonwealth Superior Court will be a court of limited statutory jurisdiction the decisions of which will be open to review by the prerogative writs under section 75 (v) of the Constitution. So far this remedy has not been widely invoked except in the field of matters which arise from section 51 (xxxv), but the profusion of these can be taken as an indication of the manner in which the High Court's jurisdiction may be exercised to review decisions of the Superior Court, not by appeal but by writs of

[47] Report of New South Wales Law Reform Commission on Supreme Court Procedure (1969) 9, 12-27.

[48] (1969) 43 *Australian Law Journal* 150.

[48A] Cf. *Bluett* v. *Fadden* (1956) 56 S.R. (N.S.W.) 254, 264.

mandamus and prohibition: it is indeed open to question whether, if the proposed Court is resorted to in any substantial measure there will be any consequent diminution in the number of matters which come before the High Court; they will simply be prohibition and *mandamus* applications instead of original suits and appeals, just as in the United States of America a large bulk of the Supreme Court's docket consists of motions for *certiorari*.[49] It is not unfair to say, therefore, that the adoption of the constitutional categories as a jurisdictional basis would show that we have not profited by the long experience of the United States of America, of which it has been said that "questions of federal jurisdiction for many people involved no more than the application of technical formulae created only to confuse the uninitiated";[50] we should also be overlooking the observation of leading jurists who have variously described "the Australian law of federal jurisdiction as technical, complicated, difficult and not infrequently absurd"[51] and as entailing "irrational rigidities".[52] And yet the very jurisdiction to entertain any matter will depend ultimately upon whether the facts disclosed in the course of the hearing have brought a case within one of the esoteric or diffuse categories of jurisdiction contained in sections 75 and 76 of the Constitution.

The objections to the proposed Court are, however, not only of a jurisdictional or constitutional character: there are also practical considerations which may have some cogency. As a first consideration, if there is warrant for a new federal court, why, it may be asked, should its jurisdiction not extend to divorce and matrimonial causes and the trial of criminal causes ?[53] No doubt some States would be happy to be rid of the former with their ever increasing preoccupation of judicial time and administration extending, in New South Wales at any rate, to the collection and payment of maintenance to many thousands of divorced wives and children of divorced couples; is it that the Commonwealth's advisers regard these matters as beneath the dignity or beyond the capacity in terms of time of the proposed Court ? Secondly, in spite of the arguments frequently advanced that a federal court will result in the more expeditious determination of matters, and the covert suggestion that it will do so more efficiently or more authoritatively,

[49] Harlan, "*Some Aspects of the Judicial Process in the Supreme Court of the United States*" 33 *Australian Law Journal* 108.

[50] Cowen, *op. cit.* ix.

[51] *Ibid.*

[52] Sawer (1964-1965) 8 *Journal of the Society of Public Teachers of Law* 312.

[53] Sir Garfield Barwick strongly opposed the vesting of divorce jurisdiction in a federal court: (1964-1965) 1 *F.L.Rev.* 3-4; but other advocates of the proposal regard this as desirable: see (1962-1963) 36 *Australian Law Journal* 320 *et seq.*; (1967-1968) 41 *Australian Law Journal* 342 *et seq.* The reasons for denying the court jurisdiction in divorce and criminal matters are stated briefly by Mr N. H. Bowen in (1968) *C.P.D.* 3145-3146 (21 November 1968).

is there really any basis for asserting that the incumbents of a Commonwealth court will achieve these objectives any better than a State court? The members of any court are chosen from the same Bars of the States and the status they are accorded, and their salaries, conditions and pensions do not differ to a point that any more competent lawyers grace the Federal Courts than those who are members of the Supreme Courts of the States. The latter Courts are, as Sir Garfield Barwick when Attorney-General said, "great courts"; they severally have a great tradition and the names of many masters of the law who have presided in those courts will be known to every lawyer and law student in Australia; it is not an accident that more than one third of the judges who have been members of the High Court of Australia since its creation were previously judges of a State Supreme Court.[54]

A third matter for consideration, if the chief object of creating the proposed Court is to lighten the workload of the High Court, is whether it is not more simple to remove from the jurisdiction of that Court as an appellate tribunal the various matters which have been cited as resulting in the increase of that load. One suggestion is that these matters should be assigned to additional Judges of the High Court to be appointed and who would presumably be associate or non-appellate judges.[55] But there are other means of achieving the same result: taxation matters could with as much expedition and no less satisfaction be heard at first instance by State Supreme Courts; all industrial property cases and applications could likewise be heard along with patent, trade mark, and copyright infringement suits by the State courts before which analogous common law rights are regularly litigated; the same may be said of appeals under the Commonwealth Employees' Compensation Act 1930 the basic scheme of which is little different from the Workers' Compensation Acts of the States, and of claims under the Lands Acquisition Act 1955, which present the same problems as come regularly before State Courts; similar observations could be made with respect to cases arising under the Life Insurance Act 1945, the Customs Act 1901 and other Commonwealth statutes. It is true that appeals from the Courts of the Territories cannot be disposed of in this fashion, but with the increase in the numbers of judges of Territorial courts it should be possible for each of those courts to sit *en banc* as a court of appeal in and for each Territory with a comparable status in the judicial hierarchy to that of the Full Court of a State Supreme Court, and to do so in all causes and matters

[54] Griffith C.J., Rich J., Dixon C.J., Fullagar, Williams, Webb, Taylor, Owen, Walsh JJ.

[55] Professor Sawer's examination of the volume of cases suggested that one additional judge could cope with the original jurisdiction work; he also expressed the view, with which I should agree, that any appellate court is improved if its judges maintain continuous experience of trial work. (1964-1965) 8 *Journal of the Society of Public Teachers of Law* 314; see also Mr C. H. Bright's comments in (1962-1963) 36 *Australian Law Journal* 324 and Sir Victor Windeyer's observations, (1967-1968) 41 *Australian Law Journal* 344.

not being limited by the provisions of sections 75 and 76 of the Constitution. There are indeed powerful arguments of convenience and policy in favour of a Court of Appeal for the major Territories being constituted by Judges of that Territory who would hear and determine appeals at some convenient place in the Territory where the cause of action arose or the trial was held.[56] The importance and value of justice being administered locally so that its exercise, incidents, and quality can be seen and appreciated by the public should always be borne in mind if the judicial arm of government is to maintain general respect and its touch with the people.

A fourth matter of practical concern stemming from the last observation is that a court which is to serve the people should be readily accessible to litigants. This means that it must sit continuously or regularly at set dates and times and at places which are convenient and with the benefit of practitioners skilled in the law. Obviously the proposed Court will not be able to sit in country centres[57] and presumably not in cities other than Canberra, Sydney, Melbourne, and Darwin unless and until court premises are built in other cities. It is plain, therefore, that the Court will not give the service which is provided throughout the States by District or County Courts and the Supreme Courts all of which entertain and dispose of all manner of cases, civil and criminal, in the course of circuit sessions held in provincial cities and country towns throughout the State.

A final matter which should not be overlooked, although it is not strictly an objection to the creation of the proposed Superior Court, is that such of the High Court's appellate work as consists of appeals from single judges of the Supreme Courts cannot under the present constitutional structure be diverted elsewhere. By virtue of the Charters of Justice and legislation creating the State Supreme Courts, all final decisions of single judges of those Courts, with some minor exceptions, have the effect of judgments, decrees, or orders of a "Supreme Court of a State from which at the establishment of the Commonwealth an appeal lay to the Queen in Council"[58] and an appeal as of right therefore lies to the High Court in its appellate jurisdiction, depending on the amount involved. Under this provision of the Constitution, as affected by the Judiciary Act 1903 (Cth), many appeals are taken each year to the High Court not only from decisions in equity suits and common law actions but also in a variety of cases involving the exercise of a statutory discretion such as Testators Family Maintenance applications, custody motions, and appeals in personal injury cases tried

[56] This was not the original proposal of Sir Garfield Barwick (see (1964-1965) 1 *F.L.Rev.* 5) but seems to have been adopted in part by Mr Bowen (1968) *C.P.D.* 3146 (21 November 1968).

[57] (1968) *C.P.D.* 3145 (21 November 1968).

[58] S.73 of the Constitution: *Minister of State for the Army v. Parbury Henty and Co. Pty Ltd.* (1946) 46 S.R. (N.S.W.) 7; *Simons v. Gale* (1958) 58 S.R. (N.S.W.) 273.

without a jury where the only issue is whether the damages awarded are excessive or inadequate.[59] In general, a jury's verdict is not appealable in this way[60] but as the scope for jury trial is being limited in New South Wales, and probably will be likewise restricted in Victoria in due time, the volume of appeals in personal injury cases to the High Court is likely to increase substantially and it is questionable whether that Court can do anything to quell that volume without at the same time denying to one party all right of appeal.[61] Clearly the full implications of the virtual abolition of jury trials at common law in New South Wales which is foreshadowed by pending legislation[62] have not been appreciated. Nothing is surer, however, than that many appellants, if they have an option, will take that course which gets their case to the final court of appeal most expeditiously and will avoid the Full Courts of the States as an intermediate appellate tribunal. A properly organized hierarchy of courts, on the other hand, would oblige such an appellant to go first to the State Supreme Court *en banc* and from that Court to the High Court as a final court of appeal.[63]

It is not pretended that these observations embrace every aspect or implication of the creation of the proposed Commonwealth Superior Court but they cover some matters which have not been adverted to in the relatively meagre literature already published about this proposal. Sufficient has been said to show that there is a need for a much closer examination of the proposal contained in the Bill at present before Parliament not only by Commonwealth officials whose experience of the work of the State Courts may be limited but also by the best legal administrators which the Commonwealth and the States can marshal. Along with the proposed Court, consideration should be given to the possibility of better co-ordination of the work of all State Courts and the High Court of Australia so as to relieve the latter Court of most of its work of original jurisdiction and such of its appellate work as does not entail constitutional questions or questions of major import in the rationalization of the law or the resolution of differences between State

[59] In illustration, of the appeals from State Supreme Courts reported or noted in Volumes 40, 41 and 42 of the *Australian Law Journal*, 77 were from a single judge of a State Supreme Court and 146 were from a State Supreme Court *en banc*. There is no reason why these figures covering three years should not be typical; they do not include appeals from courts of a Territory or from a single judge of the High Court; applications for leave or special leave (including those in criminal cases) have been included where the leave was refused and excluded where the leave was granted; most of these applications, however, were from decisions of a State Supreme Court *en banc*.

[60] *Musgrave v. McDonald* (1905) 3 C.L.R. 132.

[61] It is questionable whether the doctrine *forum non conveniens* has any application: see (1964-1965) 1 *F.L.Rev.* 10 and it is probable that an increased limit of amount involved would not effectively reduce the volume of these appeals.

[62] Report of New South Wales Law Reform Commission on Supreme Court Bill 1969, cl. 85.

[63] It has never been suggested, for example, that an appeal should lie from a single Judge of the High Court of Justice in England to the House of Lords.

Supreme Courts. The possibility of ensuring the prompt disposal of cases involving federal jurisdiction by State Courts should also be considered in detail.[64] These matters cannot fail to give rise to some challenging questions, for instance, the means, if any, by which decisions of a single judge of a State Supreme Court can be made appealable in the first instance only to the Supreme Court of that State *en banc*; the extent to which the States would be prepared to join in abolishing or restricting appeals to the Privy Council from decisions of their Supreme Courts so as to ensure that matters entailing a federal element would of necessity have to be taken to the High Court, and whether agreement could be reached for the more complete vesting of federal jurisdiction under sections 75 and 76 of the Constitution in State Courts so as to relieve the High Court of its exclusive original jurisdiction and of the bulk of the matters which are contributing, and likely in the future to add, to its heavy workload.

Many of these questions will require courageous and original thought and action which may embrace some standardization of existing procedures and limits of jurisdiction of the various Courts of the States but the Standing Committee of Attorneys-General has faced and solved more complex tasks in fields of substantive law.[65] It should be no less able to meet the chief problem of relieving the High Court of its major workload without being diverted by a consideration of loyalties of courts to government,[66] and other matters which might in the ultimate, be of prejudice to those litigants for whose benefit and protection the Queen's Courts dispense justice in their administration of the law, whether of Commonwealth, State, or local origin.

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[64] This accords with the suggestions of Mr F. T. P. Burt made at the Thirteenth Law Convention, (1962-1963) 36 *Australian Law Journal* 323-324, and those of Professor Sawer, (1964-1965) 8 *Journal of the Society of Public Teachers of Law* 311-312.

[65] For example, the Uniform Companies Acts, the Hire Purchase Acts, the Adoption of Children Acts.

[66] M. H. Byers and P. B. Toose, (1962-1963) 36 *Australian Law Journal* 308, 313, criticised the investing of State Courts with federal jurisdiction on the basis of possible hostility or friendship between the Governments. See G. L. Hart's comments, *loc. cit.* 323.