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COMMENT
THE FEDERAL COURT OF AUSTRALIA

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The passing of the Federal Court of Australia Act 1976, brought to fruition the attempts of many to establish a Commonwealth superior court exercising a diverse jurisdiction in respect of Commonwealth legislation. The matter first became prominent at the Thirteenth Legal Convention of the Law Council of Australia held in 1963, at which there was presented by Mr. Toose, Q.C. (as he then was), and Mr. Byers, Q.C., a paper entitled "The Necessity for a New Federal Court".[1] The learned authors argued that the investing of Federal judisdiction in State courts was intended by the framers of the Constitution to be an interim measure pending the establishment of a Federal system of courts concerned with interpreting and enforcing Commonwealth legislation. Further, it was envisaged that a Federal court system would be established when there was a sufficient volume of Commonwealth legislation for it to interpret and enforce.

That rationale for the establishment of a new Federal court has not, however, been the one that has prevailed. Rather the establishment of the new Court was urged for the more prosaic but no less important reason that by it, the High Court would be relieved of part of its workload and would be left free to devote its time to what is seen to be its essential functions; *viz,* the interpretation of the Constitution and the hearing of appeals on questions of general law.

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[1] See (1963) 36 *A.L.J.* 308.

It is not here necessary to trace the history of the jurisdiction which was proposed from time to time to be given to the Court. It is sufficient to discuss the jurisdiction in fact conferred on the Court by the Federal Court of Australia Act 1976 and associated legislation.

The Court is presently constituted in two Divisons. The General Division and the Industrial Division. The Act provides that the Governor-General may in the commission of appointment of a Judge to the Court, assign a Judge, other than the Chief Judge, to one of the Divisions.[2] In fact twelve Judges have been appointed with commissions assigning them to the General Division; three Judges have been appointed with commissions assigning them to the Industrial Division. The Chief Judge and five other Judges have general commissions, which empower them to sit in either Division. Where the Chief Judge considers the circumstances make it desirable to do so, he may, with the consent of the Judge concerned, arrange for a Judge who is attached to one Division of the Court to take part in the exercise of the jurisdiction of the Court in the other Division.[3] Since the Court sits in all State capital cities and in Canberra and Darwin, the disposition of its judicial manpower, which is at present concentrated in Sydney, Melbourne, Canberra and Darwin, not infrequently renders it convenient to exercise this power of transfer between Divisions. Indeed, pressure of business as it grows, may well lead eventually to the abolition of the distinction between the two Divisions.

In its General Division the Court exercises original and appellate jurisdiction. In its original jurisdiction it deals with a great variety of matters. For the most part, these may be found in the Federal Court of Australia (Consequential Provisions) Act 1976 and need not be detailed here. There are, however, three areas which generate and are expected increasingly to generate the main volume of work in the original jurisdiction in the General Division. The first is the civil and original jurisdiction in the General Division. The first is the civil and second is the jurisdiction in bankruptcy inherited from the Federal Court of Bankruptcy. The third is the jurisdiction in relation to the administrative decisions.

A substantial body of work has already arisen under the Trade Practices Act. The civil cases include proceedings for injunctions or for damages in respect of alleged breaches of the provisions of Part IV — Restrictive Trade Practices, and Part V — Consumer Protection. One, perhaps unforeseen, development is the bringing of proceedings analogous to passing-off by the reliance upon ss. 52(1), 53(c) and (d) and 55 of the Trade Practices Act. There have been several such cases. An example is furnished by the case of *Colgate-Palmolive & Co. Pty. Limited* v. *Washington H. Soul Pattinson & Co. Limited*[4] in which an injunction was

[2] Federal Court of Australia Act 1976, s. 6(3).
[3] *Id.* s. 13(4).
[4] 6th May 1977, unreported.

sought to restrain the use of a get-up for a tube of tooth paste which was alleged to be misleading. The Commonwealth Superior Court Bill 1968, which was presented to the House of Representatives but eventually lapsed, provided that the Court then envisaged should have original jurisdiction in trade-mark matters. One criticism levelled at the proposals of that time was that, although the Commonwealth had legislative power in relation to trade-marks under s. 51(xviii) of the Constitution, it had no power in respect of passing-off. It could happen, therefore, that proceeding for infringement of trade-mark might be brought in the Federal Court but proceedings for passing-off would have to be brought in the Supreme Court of a State, and this could well lead to undesirable conflicts of jurisdiction. Although the Bill provided that the Federal Court should have jurisdiction to hear "associated" matters, it was considered uncertain whether this would cover a passing-off claim connected with a claim for infringement of trade-mark.[5]

This may yet prove to be a live question. No difficulty should arise at the stage where a claim for infringement of trade-mark is combined with a claim in respect of passing-off in proceedings before a State Supreme Court. That Court will have jurisdiction to entertain both claims. Under present arrangements, original jurisdiction in cases relating to trade-marks is left with State Supreme Courts as invested Federal jurisdiction. Difficulty, however, could arise in the event of an appeal being brought against the decision of the State Supreme Court. The appeal in respect of the claim for infringement of trade-mark would lie to the Federal Court.[6] Would the Federal Court have jurisdiction to entertain an appeal from the decision of the Supreme Court in the same proceedings on the related issue of passing-off?

I have mentioned that jurisdiction in trade-mark cases has been left with State Supreme Courts as invested Federal jurisdiction, with a right of appeal to the Federal Court. The same course has been followed in relation to patent cases and, it seems likely, will be followed in relation to copyright and design cases. None of these form part of the original jurisdiction of the Federal Court.

The criminal proceedings in the original jurisdiction brought under the Trade Practices Act, have been commenced generally by an individual from the Commission acting as an informant. One of the practical problems facing the Court in this area, where it hears cases in the various States and the two Territories, is to maintain a reasonable consistency in the imposition of penalties.

It may be observed that in one case where the constitutional validity of s. 45(2) of the Trade Practices Act was challenged, the matter was

[5] See now Federal Court of Australia Act 1976, s. 32. See remarks to the Fourteenth Australian Legal Convention in Adelaide in 1967 reported in (1967-68) 41 *A.L.J.* 336 at 338.

[6] Trade Marks Act 1955, s. 114(1) inserted by Act No. 163 of 1976.

referred by a single Judge to a Full Court of three Judges.[7] That the Court should be found hearing a constitutional question is a reflection of recent changes in the Judiciary Act 1903.[8]

As to the bankruptcy jurisdiction, the fact that bankruptcy matters are now heard by a Judge of the General Division of the Federal Court, has not resulted in any change in the way in which these matters are dealt with. However, an appeal lies as of right from a single Judge of this Court to the Full Court.[9] This means there is a simple and speedy appeal, which previously did not exist. Litigants have already availed themselves of the right of appeal in bankruptcy.[10]

Turning to the original jurisdiction in administrative law, the Court performs two functions. First, it has power to hear appeals on questions of law or questions of law referred from the Administrative Appeals Tribunal.[11] When such a so-called appeal comes to this Court it is not strictly an appeal but is heard in the original jurisdiction of the Court.

The Court in its original jurisdiction will also have conferred upon it by the Administrative Decisions (Judicial Review) Act 1977 exclusive jurisdiction to review administrative decisions made under Commonwealth legislation. The Court will not be empowered to review the decisions on their merits; that function belongs to the Administrative Appeals Tribunal, where it has jurisdiction. Rather an order to review may be sought from the Court on grounds which correspond broadly with the grounds on which prerogative writs or orders would formerly have lain.

Parties seeking relief in respect of administrative decisions will not be liable to be defeated by having adopted the wrong procedure. There will be one simple procedure, which will be provided for in Rules of Court. The Act is to come into operation upon a date to be proclaimed. It contains provision for regulations to be made exempting certain classes of decisions from review. The formulation of these regulations is at present under consideration. This should prove to be an interesting jurisdiction. Although there have been some notable cases in Australia, it is fair to say that administrative law has been less developed in Australia than in, say, the United States or New Zealand. The Court should be able to make a significant contribution to the development of administrative law in Australia.

The General Division also exercises the appellate jurisdiction of the Court. As has already been noted, an appeal lies as of right to the Full Court from any decision of a single Judge of the Court. Appeals from final orders have presented no problems. However, there have already been several appeals from interlocutory orders of single Judges. Some

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[7] *Trade Practices Commission* v. *Milreis Pty. Limited and Others*, 22nd June 1977, unreported.

[8] See new s. 40 of Judiciary Act 1903 inserted by Act No. 164 of 1976.

[9] Federal Court of Australia Act 1976, s. 24(1)(a).

[10] See for example *Krailach* v. *Gray*, 13th May 1977, unreported.

[11] Administrative Appeals Tribunal Act 1975, ss. 44 and 45, and Federal Court of Australia (Consequential Provisions) Act 1976.

thought may have to be given in the future, to providing that appeals from interlocutory orders will lie only if leave of the Full Court is granted. The appeal procedures have, in practice, been streamlined and the preparation of appeal books has been dispensed with. But it may be doubted whether time of the Full Court should be able to be taken up, as a matter of right, with appeals on procedural matters.

The Full Court has jurisdiction to hear appeals from State Supreme Courts in income tax matters and in matters concerning trade-marks and patents.[12] Several appeals have been instituted in income tax matters, from the Supreme Courts of New South Wales, Victoria and Western Australia.[13] It is expected that these appeals, which otherwise would have lain to the High Court, will furnish a substantial part of the Court's appellate work. No appeals have so far been brought concerning trade-marks or patents.

Jurisdiction is conferred on the Full Court to hear appeals from judgments of any State Court other than the Full Court of a Supreme Court, where Federal jurisdiction is being exercised and specific provision is made in a Commonwealth Act.[14]

The Full Court also has jurisdiction to hear appeals from the Supreme Court of a Territory. This appeal relates to law in all its branches, civil and criminal. Except where the Chief Judge considers it impracticable, a Full Court on an appeal from the Supreme Court of a Territory, must include at least one Judge who holds office as a primary Judge of the Territory. Where the appeal is from the Supreme Court of a Territory constituted by two or more Judges (as it would be, for example, in a disciplinary matter), the Full Court of this Court must be constituted by not less than five Judges.[15]

Pending the phasing out of the jurisdiction of the Federal Court of Bankruptcy, appeals may also be brought from that Court to the Federal Court.[16]

In its Industrial Division, the Court hears matters arising under the Conciliation and Arbitration Act 1904, and the Stevedoring Industry Act 1956, which formerly were heard by the Australian Industrial Court. Most matters in this Division are heard by a Full Court, but whether the jurisdiction is exercised by a Full Court or a single Judge sitting alone, the only appeal is to the High Court by special leave of that Court.[17] There are some specific matters arising under the Conciliation and Arbitration Act in respect of which no appeal lies at all.

The disciplinary powers of the Federal Court over practitioners are

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[12] See Acts Nos. 162, 163 and 165 of 1976.

[13] See for example *The Federal Coke Co. Pty. Limited* v. *Federal Commissioner of Taxation*, 20th June 1977, unreported.

[14] Federal Court of Australia Act 1976, s. 24(1)(c).

[15] *Id.* s. 25.

[16] Act No. 161 of 1976.

[17] Conciliation and Arbitration Act 1904, s. 118B inserted by Act No. 160 of 1976.

somewhat limited. The Court has the same power as the High Court to commit for contempt.[18] No doubt this power could be used in an appropriate case. However, the Court maintains no roll of practitioners. The right to practise in the Court is conferred upon any practitioner who is entitled to practise in a State or Territory Supreme Court. This right is subject to the qualification that the practitioner's name must appear in the Register of Practitioners kept by the Principal Registrar of the High Court. The Register is kept at the Principal Registry with a copy at every District Registry. The High Court has power to suspend or strike off the Register, where it is proved to its satisfaction that a person has been guilty of conduct that justifies it in doing so. Just how misconduct in practice before the Federal Court should be brought before the High Court does not appear to have been prescribed as yet.[19]

In view of the stated objective of reducing the work of the High Court, it is worth noting the restrictions on appeals to the High Court from the Federal Court. Except as otherwise provided by another Act, an appeal may not be brought to the High Court from a judgment of the Court constituted by a single Judge.[20] This is understandable having regard to the provision for internal appeal within the Federal Court. Except as expressly provided, an appeal may not be brought from a judgment of a Full Court of the Federal Court unless the High Court gives special leave to appeal.[21] Express provision is then made (subject to an exception relating to appeals on a ground that relates to the quantum of any damages in respect of death or personal injury) that an appeal may be brought as of right from a final judgment of a Full Court of the Federal Court in a case which, to state the matter broadly, involves $20,000 or upwards.[22] Curiously, in the case of income tax, trade-mark and patent matters, which are heard by a State Supreme Court in the exercise of Federal jurisdiction, an appeal lies in the first instance either to the Federal Court or by special leave to the High Court.[23] If the appeal is taken to the Federal Court and $20,000 or upwards is involved, it would seem that an appeal then lies as of right to the High Court.

The transitional provisions which apply to different areas of the Court's jurisdiction are fairly complex. With the passage of time, no doubt they will work themselves out. Two areas which merit mention here are appeals from State and Territory Supreme Courts to the High Court and proceedings which were pending in the Australian Industrial Court

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[18] Federal Court of Australia Act 1976, s. 31.

[19] Judiciary Act 1903, ss. 55A, 55B and 55C. For a further qualification relating to Territory practitioners see s. 55B(2). Under s. 86(ga) the High Court has power to make rules of Court providing for admission, the conditions and qualifications for admission and continuance of the right to practise.

[20] Federal Court of Australia Act 1976, s. 33(2).

[21] *Id.* s. 33(3).

[22] *Id.* s. 33(4) and (5).

[23] Income Tax Assessment Act 1936, ss. 196(5) and 200(1); Trade Marks Act 1955, s. 114(1) and (3); and Patents Act 1952, s. 148(1) and (3); see Acts Nos. 165, 163 and 162 of 1976 respectively.

when the jurisdiction of the Federal Court first became exercisable on 1st February 1977.

In the case of appeals from State Supreme Courts in income tax matters and in proceedings concerning trade-marks or patents, where an appeal was instituted or leave or special leave to appeal was obtained before 1st February 1977, the proceedings remain in the High Court; otherwise, the right of appeal is converted to a right to appeal to the Federal Court.

In the case of appeals from the Supreme Court of a Territory, on or after 1st February 1977 an appeal may not be brought to the High Court from a judgment of the Territory Supreme Court except in a limited class of case. The excepted cases are where special leave is given by the High Court on or after 1st February 1977 or where leave or special leave has been given by the High Court or the Supreme Court before that day. So far as judgments given before 1st February 1977 are concerned, where before that day a person has a right to appeal (otherwise than in accordance with leave or special leave) or to seek leave or special leave to appeal to the High Court, that right is converted into a corresponding right to go to the Federal Court.[24]

Where proceedings had been instituted in the Australian Industrial Court and the hearing had commenced before 1st February 1977, jurisdiction remains with the Australian Industrial Court, which continues in existence to a date to be proclaimed. Where proceedings were pending in the Australian Industrial Court, but the hearing of the proceedings had not commenced by 1st February 1977, jurisdiction is transferred to the Federal Court. Where the Australian Industrial Court had formulated and determined preliminary questions of law in proceedings before it, the Federal Court held that the hearing of the proceedings had commenced and declined jurisdiction.[25]

Upon assuming jurisdiction, the Judges of the Federal Court on 18th February 1977 promulgated Rules of Court (Commonwealth Statutory Rules No. 20 of 1977). These, broadly speaking, apply the Rules of the High Court and the appropriate part of the Regulations made under the Conciliation and Arbitration Act. It is hoped ultimately to have an improved and self contained set of rules of the Court.

This then is a broad picture of the Court's work. From it, I wish to draw two conclusions.

The first concerns the rationale or philosophy underlying the establishment of the Court. It has been pointed out earlier that the prime motive that spurred on the attempts to create a Commonwealth Superior Court was to relieve the High Court of some of its workload. That reason continues to be of utmost importance. However, more can be said. It will be seen from the outline provided above, that the Court has juris-

[24] Federal Court of Australia Act 1976, s. 24.
[25] See *L. Grollo & Co. Pty. Limited* v. *Hammond*, 14th June 1977, unreported.

diction in respect of matters under the Trade Practices Act, in respect of appeals from the Administrative Appeals Tribunal and in respect of matters under the Conciliation and Arbitration Act. It will also have original jurisdiction to review administrative decisions on grounds not going to the merits. The Court is thus seen as the primary arbiter in respect of a wide range of matters arising from regulation by the Commonwealth Parliament on an Australia-wide basis of business conduct, the administration of government and the conduct of employer and employee organisations in industrial relations. It has been said that the jurisdiction of the Court is very restricted, much more so than was envisaged in the previous Bills before Parliament for the setting up of the Court. This may be so. But it certainly is not true that the Court has been given a ragtag of jurisdiction, designed only to assist the High Court to clear its lists. The Court is the judicial body which bears the immediate responsibility for the interpretation and enforcement of that Commonwealth legislation which directly regulates three major areas of regulation of the Australian community.

In addition, of course, the Court has appellate jurisdiction in income tax matters and certain industrial property matters, which come on appeal from the State Supreme Courts. The intention here no doubt is to establish in the Court a specialist expertise in these areas governed by Commonwealth legislation. It may well be that the Federal Court, being the first Court of appeal in these areas will, in the future, and subject to the ultimate appellate jurisdiction of the High Court, play the predominant role in the development of doctrine and principle in these areas. If this is to be the trend, it is likely to appear first in the area of income tax law, where the number of appeals can be expected greatly to outstrip the number of appeals relating to industrial property.

Consideration of this head of jurisdiction leads me to another matter of principle. One of the fears expressed concerning the establishment of a Commonwealth Superior Court was that its creation might diminish the stature of the Supreme Courts of the States. This fear was perhaps greatest in respect of the Superior Court of Australia Bill 1973. The scheme adopted by the 1976 legislation, however, should put these fears to rest. The burden of relieving the High Court of its workload has been borne not only by the Federal Court, but also by the Supreme Courts of the States.

Indeed in the short term, the burden borne by the States may be greater than that borne by the Federal Court. This has two consequences: if the status of a Court is directly affected by the magnitude of its jurisdiction, then the status of the State Supreme Courts is enhanced rather than diminished. Further, it lends emphasis to the point made above, that one cannot regard as the sole, perhaps not even as the primary, rationale for the establishment of the Federal Court, that it is to relieve the High Court of its workload.

The second of the conclusions, which I seek to draw, relates to

the nature and extent of the Court's jurisdiction. The most frequently expressed reservation about the establishment of a Federal Court exercising a jurisdiction other than a specialised one, concerns the apprehended conflict of jurisdiction between the Federal and State system of Courts. It is said that we in Australia ought to avoid the jurisdictional issues which arise in the United States as to which Court is appropriate to hear a matter containing elements of Federal and State law, and to avoid a situation where a plaintiff may be compelled to proceed in two courts to have the whole of his claim determined. The prospect of collateral proceedings in Federal and State Courts was daunting. This problem was discussed in some detail at the Fourteenth Legal Convention of the Law Council of Australia, in 1967.[26] It seems that, in comparison with previous proposals, the proposals to which effect has been given in setting up the present Federal Court, if they have not altogether eliminated this risk, have at least greatly reduced it.

[26] (1967-68) 41 *A.L.J.* 336.