Chapter Six

"Just tidying up": Two Decades of the Federal Court

Dr John Forbes

> "The judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia, and in such other federal courts as the Parliament creates, and in such [State] courts as it invests with federal jurisdiction....."
>
> So states s.71 of the Constitution.

The Commonwealth existed for nearly three years without a single federal judge. It survived for another seventy years without the guidance of the Federal Court or the Family Court. Today we have forty-nine Federal Court judges[1] (about four-fifths of them, excellent as they may be, anointed during the regnal years of Messrs Hawke and Keating) and more than fifty Family Court judges, chauffeur-driven at public expense.

1903: The first federal judiciary

The High Court was not created by the Constitution but by the *Judiciary Act* of 1903. In a fulsome speech on 10 June, 1903 Attorney-General Deakin promised that the new court would protect the interests of the "less populous States".[2] Deakin had many prescient things to say about Federation but that was decidedly not one of them.

Deakin planned to begin with five judges so that "nearly every State" could be represented.[3] In the event the High Court began with three judges from just two States; ninety-five years later two States (Tasmania and South Australia) have never supplied a High Court judge.

Opposition came from Adelaide's Patrick McMahon Glynn. There was, he said, "nothing that justified" Deakin's belief that "the mental equipment of the High Court of Australia, which he idealises, ... [would] be superior to that of the State tribunals".[4] Henry Bournes Higgins of Melbourne agreed with Glynn, but three years later Higgins happily took a place on the Court.

Higgins predicted that arid jurisdictional problems would arise so soon as the Commonwealth, in pursuit of "some mystical notion", created another level of appeal above the long-established Supreme Courts.[5] Sir John Quick, a co-author of the first authoritative text on the Constitution, noted that since January, 1901 only twenty cases involving federal law had arisen, and the State courts had handled them very well.[6] But an intensely ambitious Isaac Isaacs, destined to join the Court in 1906, strongly supported the Bill. He assured honourable members that the High Court would be "an easily accessible tribunal". That was never quite true, but Isaacs could not be expected to foresee the High Court's monastic retreat to Canberra in the Barwick era, or its reduction of liberal rights of appeal to a system of "special leave", with the judges picking and choosing, with little explanation, cases in which they were inclined to develop or change the law.

Nor could Isaacs anticipate the wonders of long and sudden leaps of judicial legislation *à la Mabo*, but there was more than a touch of Edwardian hyperbole in his prediction that the new court would be "so high above political interference as to be free from the faintest breath of suspicion, and yet so close to the common life of the people as to feel the pulse-beat of their daily life".[7] Just ten years later William Morris Hughes, as Attorney-General and Prime Minister, would be able to influence appointments of no fewer than five High Court judges. One was the unhappy Albert Piddington, who resigned when it became public knowledge that he had assured Hughes of a predilection for centralism.[8]

But in 1903 Hughes evinced no enthusiasm for the creation of the High Court, arguing that it would soon begin tinkering with the Constitution:

> "This federal judiciary ... is to be created with an express purpose of ... continuing to develop the Constitution by methods of which the people had no knowledge when they accepted the instrument".[9]

Hughes was not the only parliamentarian who feared that the High Court would become a more prolific source of amendments than s.128 of the Constitution, according to which High Court judges have just one vote like the rest of us.

Edmund Barton, destined to be one of the first three members of the Court, spoke at great length in support of the Bill:

> "The federal judges should do this work not because they will be biased in favour of the [Commonwealth] but because, being responsible to the national Parliament [sic], they will take the national view. This does not mean the obliteration of States' rights ...".[10]

Barton could hardly have foreseen the modern explosion of the external affairs power.

No one seems to have envisaged a system of appointments to ensure that Commonwealth ministers or bureaucrats did not choose *all* the constitutional umpires. With the hindsight of ninety-eight years it may be seen that from their point of view the Founding Fathers' failure to do so was a grievous error.

On 24 September, 1903 the Parliament was told that the Chief Justice of Queensland, Sir Samuel Griffith, would lead the Court and that Prime Minister Barton and Senator O'Connor were leaving politics to join him. At long last Griffith transcended the little world of Brisbane's Edwardian bench and bar. He had it in mind for many years. In the 1870s and 1880s he bitterly opposed attempts to "amalgamate" Queensland's little legal profession, asserting that if the strict English division (or class system) of barristers and solicitors were not rigidly observed, Queensland barristers would lose status *vis a vis* their Melbourne and Sydney brethren and thus be handicapped in the race for a pan-Australian court to come.[11] In the 1880s Griffith was no doubt aware that in 1879 Victoria had tried to organise an "Intercolonial Court of Appeal".[12]

"Divided" professions such as those of Queensland, NSW and Victoria still harbour attitudes of superiority towards "amalgams" from other States, albeit more diplomatically than in days gone by. The "amalgamated" profession of Western Australia did not secure a High Court appointment until 1979 (when the Attorney-General happened to come from Perth) and the "fused" professions of Tasmania and South Australia still await their turn.

There are strong hints in the Parliamentary debate of 1903 that Griffith was in close touch with Barton and Deakin, and it is said that he "hovered around at gatherings of influential men for the two or three years before the court was established".[13] If so, he was neither the first nor the last judicial aspirant to court strategic patrons, judicial independence notwithstanding.[14]

Even better placed to keep their names before the selectors were Prime Minister Barton and his old friend Richard O'Connor. For each of those men an appointment to the new court offered welcome relief. Barton had collapsed in his office in August, 1903 and O'Connor, though only fifty-two, was in declining health. The court was effectively Griffith's; legal wits soon dubbed Barton the "concurrent jurisdiction" and the less talented O'Connor the "auxiliary jurisdiction".[15]

It should not be assumed that the status of the early High Court was that of the Dixon court, or even the High Court of today. In 1903 the Commonwealth was still distinctly a creature of the States, and the position of a State Supreme Court judge was one of prestige, security and remuneration beyond most people's dreams. Few appeals went beyond the State Full Courts, and the High Court could be bypassed in favour of the Privy Council. It is difficult to believe that Melbourne could not have supplied a judge in 1903 if its legal magnates had been anxious to do so. The nomadic life of the new court did not appeal to many lawyers of appropriate seniority. To Samuel Way, Chief Justice of South Australia, it would have been "... a step downstairs ... I should have been obliged to give up the Lieutenant-Governorship, the Chancellorship of the University

and ... tramp about the continent as a subordinate member of an itinerant tribunal".[16] It is not unlikely that the Chief Justices of Victoria and New South Wales felt the same.

In 1906 the number of High Court judges was increased from three to five, and in 1913 from five to seven, which remains the number today. Until 1920 a member of the High Court acted as President of the federal Arbitration Court, and for more than fifty years thereafter the rest of the federal judiciary was confined to the Territories, to Commonwealth industrial tribunals, and to a tiny Court of Bankruptcy.

The federal judiciary takes off

In the late 1960s Attorney-General Barwick canvassed the idea of a federal trial court. In 1968 his successor Nigel Bowen, later the first chief Judge of the Federal Court, introduced a Bill for that purpose.[17] However, nothing eventuated at that stage. While there was a constitutional command to create the High Court, the case for another federal tribunal was much less compelling. The State courts had administered federal laws for sixty years. They had applied the Commonwealth bankruptcy law since 1924, uniform divorce laws since 1960 and the Commonwealth *Crimes Act* since 1914.

In early 1974 the Whitlam government mooted a "Federal Superior Court" but the plan stalled in the Senate. A by-product of that defeat was creation of the Family Court to implement judicially — and in no small measure legislatively — Lionel Murphy's promise of a new heaven and a new earth in matrimonial disputes. The original idea was to make the divorce judges a division of the "Superior Court". Today's Federal Court incumbents may rejoice that this vision was not realised; it would have resulted in a long tail wagging an unhappy Federal Court quadruped. Later efforts to combine the two bodies were firmly resisted by the more status-conscious members of that institution.

The movement towards a much larger federal judiciary did not end with the birth of the Family Court. In 1976, barely one year after the Coalition vetoed the "Superior Court", it reappeared as a proposal for a "Federal Court of Australia". In the lower House the Bill was in the hands of Robert Ellicott, Attorney-General in the new Fraser government, who had recently rejected the "Superior Court" idea as an unwise and unwanted addition to an Australian court system that was already over-complicated.[18] However, Ellicott stressed that his Bill was less ambitious than the Whitlam-Murphy plan. There was no intention of weakening the status of the Supreme Courts. On the contrary, they would retain "the bulk" of the federal jurisdiction they had exercised for many years. And it went without saying that there would be no poaching on their fields of equity and common law.[19]

As often happens when politicians are faced with "lawyers' law", the debate on the *Federal Court Bill* was not lengthy, nor particularly lively or informative. Labour's only regret was that there would not be a more aggressive takeover from the State courts.[20] Anthony Whitlam, scion of the recently-departed Prime Minister, ridiculed the government's "timidity" and "the rooster-like boasting of an Attorney-General who is looking forward to a new nest for his well-feathered friends".[21] In January, 1993 Whitlam Junior accepted the Keating government's offer of a nest of his own in the Federal Court.

Just a little "tidying up"

In the upper House the *Federal Court Bill* was in the hands of Senator Durack. He was adamant that the new tribunal would be confined to "well-defined fields of federal law. It would not enter into any ... jurisdiction now exercised by State courts".[22] It was vital not to develop "two parallel legal systems ... [and to] preserve the status and jurisdiction of the Supreme Courts". The Bill was merely a little "tidying up operation" to collect in one tribunal of limited statutory jurisdiction the Commonwealth Industrial Court and a few "disparate jurisdictions" which had grown up over

the years, such as the Bankruptcy Court, which occupied one judge in Sydney and Melbourne while the States did the rest of the work.[23] There was no suggestion that the State courts did not efficiently deal with the federal matters they had been handling for seventy years. (Indeed, in 1998 the States are still conducting federal criminal trials that the commercially-oriented Federal Court does not deign to hear.)

Initially the Federal Court was staffed by ex-members of the Industrial Court (including Gerard Brennan J), one or two bankruptcy judges and a few judges of the Territory Supreme Courts. But the child born in modest circumstances would rise and rise anon. Soon after Ellicott and Durack delivered their *placebos,* Canberra began to expand its judicial patronage well beyond the High Court. By 1978 the Family Court alone boasted thirty-six judges. That institution was busily engaged in the creation of a self-contained world of jurisprudence, replete with various rules which the politicians debating the *Family Law Bill* did not envisage or preferred not to publicise. In the words of W M Hughes in 1903,[24] a lot of judicial "filling in" was going on, although we had to wait until 1998 for judicial activity quite so egregious as an order that a mother cease breast-feeding her child.

Within a year of Mr Hawke's ascension there were twenty-nine members of the Federal Court, including Michael Kirby, then chiefly a Law Reform Commissioner. By 1986 the Family Court numbered forty-six, and by 1988 the Federal Court contingent had expanded to thirty-two, an increase of 32 per cent in less than six years. The expansion of the Federal Court then abated for a while; it comprised thirty-four judges in 1993. But jurisdictional empire-building went on, and there was a leap to forty-five in 1995, Mr Keating's last full year in power — an increase of 33 per cent since 1994 and 250 per cent since 1976. When the Howard government took office the Family Court had over 50 judges and 8 less costly (non-chauffeured) quasi-judges, described as judicial registrars. All these ladies and gentlemen were offering, more or less efficiently and courteously, services which the State courts had previously provided as part of their general jurisdiction.

An empire is assembled

Law, of all vapours, is most apt to fill the space available. The Federal Court's initial empire-building depended on a few brief and vague sections of the *Trade Practices Act* 1974. As a means of annexing power, those provisions have served the Federal Court almost as well as the external affairs power, in High Court hands, has served the Commonwealth since 1983.

Section 52 of the *Trade Practices Act* states:

> "A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive".

A distinguished judge of appeal, in private conversation, described this provision as being "more like the terms of reference for a roving Royal Commission than a rule for legal adjudication". Just so. Readers may wonder whether search for the "misleading and deceptive" requires the panoply of wigs, gowns and copious documentation. They would of course be wrong; it is a tribute to professional ingenuity that a few ordinary words have accreted the pseudo-technical verbiage that fills many volumes of law reports. The *Australian Law Reports* series**,** which largely records the doings of the Federal Court, began in 1976. Already there are more than 150 volumes! A typical set of State Reports would take fifty to seventy years to grow so great. Lawyers often say, sadly or gladly depending on their brief: "There's authority for anything and everything in the Federal Court".

To the extent that we still have a rule of law, we are living mainly on legal capital accumulated in our traditional courts of law. Meanwhile new tribunals grow great on vague legislation and self-serving interpretations of their own powers. The result is an ever-expanding court system with the characteristics of uncertainty, politicisation and breadth of judicial

discretion. This may have one advantage: less risk of technical embarrassment for the more dubious graduates of pullulating law schools and their misleading and deceptive "assessments".

The new court and its clientele soon discovered that the "misleading and deceptive" mantra could cover many of the more lucrative (and hence higher-status) commercial cases which had been the central and exclusive business of the Supreme Courts since the Australian legal system began. But there was more to come.

Soon the Federal Court, abetted by the High Court, discovered a vague and highly convenient means of poaching civil cases based on State law. This was the doctrine of "accrued jurisdiction". According to this figment of federal jurisprudence, a State common law claim can be handled by the Federal Court if it is sufficiently "connected" to a federal matter (usually a trade practices claim), even if the federal claim fails.[25]

"Lifting oneself by one's own bootlaces" is a well-known metaphor. The "accrued jurisdiction" notion goes one better; even if the bootlaces break, the Federal Court still self-levitates. And who is the arbiter of "sufficient connection" and the genuineness of the federal claim? The Federal Court, of course, subject only to its elder brother the High Court.

One example must suffice. In 1983, when a Gold Coast real estate bubble burst, a seller sued a buyer for breach of an agreement to purchase a home unit. The action was classically one for the Queensland Supreme Court, and that was where the plaintiff filed his writ. But lawyers for the defaulting buyer filed a competing claim in the Federal Court, alleging that the seller had breached the *Trade Practices Act.* The Federal Court then held that the seller's common law claim was caught by its "accrued jurisdiction", and gave the buyer an injunction to halt the original Supreme Court proceedings.[26] The Federal Court's 1996-97 Report assures us that "cases arising under ... the *Trade Practices Act* 1974 still constitute a significant part of [our] workload".

By the early 1980s Senator Durack's little "tidying up" exercise had acquired a runaway life of its own; the house was being turned upside down. In September, 1987 the Federal Court gained control of tax cases, which the State courts had handled for more than ten years after the High Court shed most of its "original" (or trial) jurisdiction. Bankruptcy matters went the same way, although outside Sydney and Melbourne the State courts had done that work for sixty-odd years. In 1991 the Federal Court gained a large slice of company litigation, and in 1993 it was awarded exclusive jurisdiction under the *Native Title Act.*

The Federal Court's thirst for jurisdiction recalls the chaotic competition and jurisdictional claim-jumping among the unreconstructed English courts of the seventeenth and eighteenth Centuries. A national judges' meeting was told that Victoria's decision to follow NSW and Queensland in establishing a separate Court of Appeal was an effort to save some of its up-market commercial litigation. Some State courts damaged their cause by clinging too long to archaic rules of procedure.

A facile and predictable plea of specialisation would be beside the point. Three State courts have separate Courts of Appeal, while "full courts" of the Federal Court are *ad hoc* gatherings of any three of the forty-nine members thereof.

It is interesting that there has been no similar scramble to assume the unfashionable criminal work that increasingly arises under Commonwealth laws. The rigorous judicial duties in those cases are still left to the State courts. The States may well ask why the Federal Court does not condescend to "sit in crime", or to share its powers with juries, while it picks the eyes out of the commercial causes lists and monopolises the fashionable and unpredictable novelties of native title litigation.

Promoters of the Federal Court promised that it would never damage our Supreme Courts. The reality is now very different. The inexorable annexation of State judicial business and long-held federal jurisdiction has deprived the Supreme Courts of the cases in which the cleverest word-spinning is reputed to occur. According to the 1996-97 report of the Queensland Court of Appeal, its civil business is now a mere 30 per cent of its entire workload. When James Spigelman, former

assistant to Prime Minister Whitlam, consented to replace Murray Gleeson as Chief Justice of New South Wales, the lawyer-journalist David Marr exclaimed:

> "Why did Spigs want it? Once the Chief Justice of NSW was a great figure in the land ... [but] many of the really interesting cases now end up in the Federal Court ... The race [i.e. native title] battles will not be fought in his court".[27]

Does this change in the pecking order explain earlier retirements from State courts, lateral arabesques to the Federal Court by State judges who attract the federal eye, or the willingness of brave or bored State judges to serve on high-profile commissions to examine organised crime?

It has been said that social engineering feeds upon itself by demanding "solutions" which rapidly become problems, for which further "solutions" are then prescribed. If Mr Ellicott had maintained his mid-1970s opposition to the Federal Court idea there would probably have been no need for Byzantine "cross-vesting" laws in 1987. At the time J M Spender, QC told Parliament that the demand for that legislation arose "just after the Federal court system had been set up".[28] The constitutional validity of cross-vesting is now in the balance after an equal division of opinion in the High Court this year.[29] In any event, federal-State cross-vesting does not work fully and freely in each direction. Why not give the State courts an "accrued jurisdiction" with respect to federal matters which relate to actions within *their* normal jurisdiction?

Judicial review or second guessing?

The *Administrative Decisions (Judicial Review) Act* empowers the Federal Court to examine allegations of legal irregularities in decisions of Commonwealth officers and agencies with respect to Aboriginal councils and associations, child support, defence force discipline, export licensing, extradition, immigration, the Northern Territory land rights legislation, race and sex discrimination, the securities industry and various other topics, some of them highly politicised.

In May this year *The Australian Lawyer* noted with fashionable disapproval a complaint of the Minister for Immigration about Federal Court judges who, in his view, were "employing judicial activism in immigration and deportation matters ... re-interpreting and rewriting Australian law". No doubt the Minister had in mind the extraordinary *Teoh Case.* There, after the primary judge rejected a challenge by a convicted drug dealer to a deportation order, three of his brethren (Black CJ, Lee and Carr JJ) allowed Teoh to change his legal tune and to rely on two new points: (1) a United Nations' decree about "The Rights of the Child" which had never been carried into Australian law; and (2) the fact that in this country he had fathered ex-nuptial children by the *de facto* wife of his deceased brother. It was then held that Teoh had a "legitimate expectation", based on the UN document, that he would be allowed to stay in this country, although he (and the immigration officials) had never heard of "The Rights of the Child" until his lawyers belatedly discovered that pious document. The decision dismayed both sides of federal politics, but it was endorsed by a High Court majority comprising Mason CJ, Gaudron, Deane and Toohey JJ.[30]

For reasons including the highly discretionary character of much of its jurisdiction, and the *doppelganger* role of a number of its judges in the Administrative Appeals Tribunal (which is actually authorised to second-guess government decisions), the Federal Court's notions of judicial review tend to be less disciplined than legally they ought to be. There is a widening gap between its approach and that of our long-standing courts of common law. Accordingly, serious students of judicial review are more likely to be enlightened by Supreme Court decisions than by the lucubrations of the Federal Court.

The point is that judicial review (by a single judge) is supposed to be a narrower inquiry than an appeal, in the true sense, to a court of three or more judges. On judicial review, issues of fact are not to be revisited and the focus should be strictly confined to suggested errors of law. It is true that there is some room for manipulation by treating matters of fact as questions of "law", but generally State courts show due restraint and observe the vital difference between judicial review and second-guessing the original (non-judicial) decision-maker.

After all, this distinction is an aspect of the much admired separation of powers, designed to prevent the judiciary from becoming involved in politics and the work of the public service. Judges zealously invoke the "separation" when they believe that the legislature or the Executive is trespassing on *their* terrain. But in the High Court in 1990 Sir Anthony Mason felt bound to give the Federal Court a sharp reminder of the proper limits of judicial review.[31] When such a judicial imperialist rebukes judicial imperialism, the rest of us can but listen in a posture of deep respect.

Oddly enough, the grand libertarian sweep of cases like *Teoh* is not always to be seen when citizens' common law liberties are in question. There is a legal presumption that safeguards such as the privilege against self-incrimination can only be removed by the clear and unambiguous words of Parliament. But at least two Federal Court decisions have arrived, by tortuous and far from compelling reasons, at the conclusion that in certain federal statutes privilege has been "impliedly" abrogated.[32] When politicians and civil servants are not prepared to be candid about such things, it ill behoves the judiciary to complete their insanitary work for them. A young court in which the central government is a constant litigant (and its officers a fertile source of judicial preferment) should be especially careful of appearing executive-minded.

The Native Title monopoly

By 1993 the empire-building potentialities of the *Trade Practices Act* were on the wane. The new jewel in the imperial-judicial crown is a monopoly of property claims under the *Native Title Act.* Aborigines may make claims based on common law alone in State courts, but they will be few and far between.

It is remarkable that the States have so tamely accepted this situation. Recent amendments to the *Native Title Act* have restored State control of development applications with land subject to claims. Why not do the same with actions brought to *prove* such claims? After all, native title is not statute law of the Commonwealth; it is common law. The High Court said as much when it made its momentous discovery in 1992. Most of the land involved is State land. Native title is an aspect of land law, and that is quintessential State law. There simply is no reason why the twenty-two year old Federal Court should have the power over State lands that the *Native Title Act* has awarded to it.

The vague and discretionary character of much Federal Court jurisprudence engenders legal uncertainty and judicial activism. In its present state, the law of native title is made for trend-setting or self-important judicial legislators. Federal Court judges are appointed in a place, and by unknown people, remote from the main professional centres, and most of the present incumbents were selected by or for governments of one political complexion. Its membership intersects with that of socio-political agencies such as the Northern Territory land rights commission, which seldom if ever rejects a claim. Such institutions tend to be selected and "socialised" by the cause which created them. There are people who would relish the limelight of hearing native title cases, who attach little importance to the tradition that judges should eschew publicity-seeking and public political stances.

Native title cases should be widely distributed among judges appointed by various governments to our long-established courts of general jurisdiction. Just as it is easier for electors far from the practicalities of native title claims to be highly enthusiastic about them, it may be easier for peripatetic judges chosen in Canberra to endorse them. Students of native title should spend less time on speculative theory and more time observing those who are appointed to hear the crucial early cases, what they treat as credible evidence, and the orders that they make.

Let there be no illusions about where the main power resides. It will be exercised less by courts of appeal than by judges sitting alone. There is no more autocratic function than fact-finding by a trial judge. It must go badly and very plainly wrong before there is much chance of changing it on appeal. The vaguer and more opinionated the evidence — and evidence in native title cases will often be of that kind — the easier it is for judges of appeal to play Pontius Pilate

and intone: "We can see no basis for interfering with his Honour's findings of fact. He had the advantage of seeing and hearing the witnesses". Single-judge decisions about vast tracts of land will usually be the *alpha* and the *omega*.

A former Northern Territory land rights commissioner has already decided the Croker Island "sea rights" case, and the same gentleman dealt with the claim of the Yorta Yorta group to valuable land on the NSW-Victoria border; judgment in that case was reserved on 15 May, 1998. Press reports suggested that the Croker Island judgment was expedited to coincide with the climax of the Senate debate on the *Native Title Amendment Bill* 1998. According to a statement by counsel in a case of *Fejo* (now awaiting judgment in the High Court), the same judge is dealing with a novel claim to government-owned freehold land. Apart from French J (President of the Native Title Tribunal), a short list of judges involved in early native title cases of substance includes Olney, Carr and Lee JJ. In the end, native titles and related compensation will depend on the fact-finding of trial judges, and on settlements influenced by just how "special" their treatment of claimants' evidence is seen to be.

In its 1996-97 Report the Federal Court is keenly aware of the power it can wield under the *Native Title Act.* Thirteen *NTA* actions were lodged in 1994-95, another twelve in 1995-96, and a further eleven in 1996-97. In the latter period the Court also dealt with five native title matters by way of judicial review, and four appeals from the Native Title Tribunal. In the Kimberley region, evidence in a matter of *Ward* occupied twelve weeks, and the Court expects twenty such cases per annum from now on.

Will the Court find its true destiny as the hierophant of *Mabo* and *Wik,* which offer far greater scope for fertile imaginations than the "misleading and deceptive" formula? How often and how deeply will it draw upon intuitions of "contemporary values", or the views of a notional "international community"? As cases wend their leisurely way through the Federal Court, the empty vessel of native title will gradually be filled — but with what libation?

> "All of us know that the legal and political issues to be addressed are daunting. As it stands, native title confers vaguely defined rights on vaguely defined groups of people to undertake vaguely defined activities on vaguely defined pieces of land. And if you think it is any more concrete than that, you haven't tried to work through the issues involved".[33]

Lateral and vertical arabesques

There are two crucial omissions from modern homilies on judicial independence by Sir Gerard Brennan and others. One is the reflection that, if judges want politicians and public servants to respect judicial territory, judges should do their best to avoid legislating or acting as administrators in the name of judicial review. There is also a strange silence about the decline of the tradition that "justice without fear or favour" is best served by minimising promotions from one court to another and making it clear that one's first judicial appointment will in all probability be the last. Perish the thought that upwardly mobile lawyers will be encouraged to see their first "elevation" as just a step on an elite public service ladder.

Nevertheless, the Federal Court era has seen a remarkable proliferation of judicial promotions, lateral arabesques and intermingling of judicial posts with membership of sub-judicial tribunals. To their credit, Ellicott and David Jackson JJ simply left the Federal Court and returned to the Bar. One early appointee to the Family Court did the same, freely if not always fairly regaling friends with epigrams and anecdotes about "a ******* court and a ******* Act".

Mr G E (Tony) Fitzgerald stepped down from the Federal Court and soon afterwards received a Royal Commission, followed by two senior judicial appointments. Other performers of lateral or vertical arabesques are Sir William Deane (NSW Supreme Court, Federal Court, High Court), Michael McHugh (NSW Supreme Court, High Court), Michael Kirby (Industrial Court, Federal Court, NSW Supreme Court, High Court), Alistair Nicholson (Victorian Supreme Court, Family Court, Federal Court), Richard Cooper and Susan Kiefel (Queensland Supreme Court,

Federal Court), Jane Mathews (NSW District Court, NSW Supreme Court, Federal Court), C W Pincus (Federal Court, Queensland Supreme Court), John von Doussa (South Australian Supreme Court, Federal Court) and Margaret Beasley (Federal Court, NSW Supreme Court). Publicly funded and chauffeured cars (not generally available to State judges) are said to be one virtue of a sidestep to the Federal Court, and freedom from criminal work another. The status of annexed commercial work may be counted as a third.

How are these translations and elevations arranged? In this age of frantic self-promotion it is seldom that some guardian angel taps a quiet achiever on the shoulder to say: "Well done. Come ye to a higher place". Touting by judges or judicial aspirants is of course unthinkable, but an academic lawyer-cum-barrister with an eye for the main chance may have the answer:

> "It's at least as important to know the bureaucrats as the politicians. It's usually the bureaucrats who put up the names".

A culture of judicial promotion facilitates appointments of mediocrities and political friends to the higher courts. First confer some minor appointment which lawyers and other observers either do not notice or do not much care about. Then later, when people are used to hearing the favoured one called "judge", move him up a grade or two. How could a judge not be worthy to be made a judge again? It is a self-proving theorem.

By the mid-1990s the Federal Court was firmly if unofficially established as the waiting room for High Court hopefuls, although its jurisdiction is a patchwork of civil matters narrower than Supreme Court experience, "accrued jurisdiction" notwithstanding. Justices Brennan, Deane, Toohey, Gummow and Kirby moved directly or indirectly from the Federal Court to the High Court. Gaudron J held a minor federal industrial post before her appointment as Solicitor-General to a NSW Labor administration. The recent appointments of Chief Justice Gleeson from the NSW Supreme Court and Ian Callinan from the Queensland Bar are a temporary setback to Federal Court rights of succession, although it is an open secret that the vacancy filled by Callinan almost went to John von Doussa of the Federal Court.

A fair amount of "cross-dressing" also occurs. Federal Court judges often hold other appointments, not all of them quite compatible with judicial office. The most common "second hat" is presidential membership of the Administrative Appeals Tribunal, a body which revisits government decisions free from the disciplines of regular courts of appeal. At least three members of the court have brought the title "Justice" to the investigative and advisory post of Commissioner under the Commonwealth's *Aboriginal Land Rights (Northern Territory) Act* 1976. A former judge-cum-Commissioner (John Toohey) wrote the most imaginative opinion in *Mabo*. His brethren have subsequently tiptoed away from some of its higher speculations.

Alistair Nicholson is a Federal Court judge and Chief Judge of the Family Court. Robert French is foundation President and keen promoter of the National Native Title Tribunal. Jane Mathews, who conducted the second costly inquiry into the Hindmarsh Island affair, is a Deputy President of the National Native Title Tribunal. Her Hindmarsh assignment ended when the High Court decided that it was so incompatible with judicial office as to be constitutionally invalid. According to the Federal Court's Internet page, Marcus Einfeld enjoys the most exotic "extras" — part-time appointments to courts in Dominica and the Eastern Carribean.

It is not suggested that all "outside" appointments are incompatible with judicial office. But they are uncommonly common in the Federal Court, and some of them relate to single-issue bureaux with socio-political agendas. Jack Waterford, editor of *The Canberra Times* and a man well placed to observe the Canberra-anointed elite, recently confided to a conclave of administrative lawyers:

> "The executive government can too often be criticised for putting into ... tribunals ... enthusiasts for the theory of particular legislation who are almost congenitally incapable of clothing their decisions with even a veneer of objectivity or impartiality. That some of the worst offenders are, for other purposes, members of the judiciary, and thereby invest their

decisions with the appearance of the authority of the courts, makes the problem even worse".[34]

What happened to judicial self-restraint?

The traditional self-restraint of judges in matters of politics and personal publicity is less pronounced in the Federal Court. While only a minority is involved, the events are frequent and florid enough to suggest that remote and discretionary adjudication is a heady cocktail.[35]

The extra-judicial utterances of Justice Michael Kirby (Industrial Court, Law Reform Commission, Federal Court, NSW Supreme Court, High Court) are so abundant that readers are left to gather blossoms as they please. One could begin by savouring a triumphant *conversazione* with impressionable law students on 23 May, 1997:

"I want to tell you how it came about that I was appointed [to the High Court]. ... As I was sitting there my Associate ... came in with a little yellow sticker. It had a note on it, 'Please phone Mr Lavarch' [a junior Brisbane solicitor, then federal Attorney-General] ... I knew my life had changed. From the President of the NSW Court of Appeal I was to become a Justice of the High Court ... I had previously thought that the time for my appointment to [it] had passed".

Was further promotion possible? "I ask you to note that two predecessors went on to become the Governor-General of Australia". Meanwhile, unspectacular toil on the High Court is "the price for the honour and glory of being the fortieth of the forty Justices in the history of the court". It was left to P P McGuinness to inquire: "When is he going to stand for political office"?

Justice Murray Wilcox joined the court in May, 1984. In October, 1993 his book *An Australian Charter of Rights* was launched by Michael Kirby. *The Australian* reported a concomitant "attack" on Australia's human rights laws as inadequate to prevent "discrimination" and a potential "international embarrassment". (The views of a notional "international community" are now standard weapons in domestic politics.) Wilcox was quoted as saying that "Parliaments and the common law [are] not doing their jobs". In particular, they did not do enough to extirpate racial and sexual discrimination or to protect homosexuals. Kirby agreed that Parliament was "spineless" in such areas.

There was a more spectacular Wilcox appearance in February, 1996 at the height of a federal election campaign. In what the national daily termed an "extraordinary intervention", the learned gentleman gave "a series of interviews" in which he roundly criticised the Coalition's plans to amend "unfair dismissal" laws. His Honour's contribution to the political hurly-burly provoked Peter Reith, MP to express his "absolute amaze[ment] that a Federal Court judge ... should deem it appropriate to make a political entrance into the ... campaign on behalf of the Labor Party".

In April, 1998 Wilcox presided at an appeal to the full Federal Court in the Patrick Stevedores - MUA litigation. It was an opportunity to rebuke journalists for mentioning the career of the trial judge (North J) as an advocate for trade union parties.

We have seen that the Family Court was originally intended to be part of the Federal Court. Under its first leader the new and highly discretionary divorce tribunal set about "developing" its Act with a will, finding implications that its sponsors did not foresee, or were astute enough not to mention in public or parliamentary debate.

Initially the new "family" law was presented as *sui generis* and largely independent of any pre-existing legal culture. However, a number of chastening experiences with the rules of natural justice,[36] and certain other setbacks, nudged it closer to the mainstream. One concession to tradition was the adoptions of wigs and gowns — a vesture, indeed, more elaborate than the Federal Court's, not to mention the High Court, which now arrays itself like the US Supreme Court, *sans* wigs, *sans* neckbands, and in fine republican style. Alistair Nicholson, second leader of the Family Court, made two unsuccessful attempts to enter Parliament before serving briefly as a judge of the Victorian Supreme Court. From there he moved to the Family Court, and in February,

1988, in what may have been a gesture of reconciliation by a self-consciously superior institution, he was given an additional commission as a judge of the Federal Court.

In August, 1993 Nicholson publicly attacked critics of the *Mabo* decision, and simultaneously lectured politicians about child poverty, a subject peripheral to his official duties. Four months later he was the subject of a "feature interview" in the national press, presenting him a trifle equivocally as "one of the country's most outspoken and controversial judges", regarded by his colleagues "as being something of a publicity hound". In February, 1995 all his political skills were needed to subdue a serious potential embarrassment for his court. A lady who became a member of it after brief and unremarkable stints as a junior barrister was the subject of an appeal for bias. The particulars of the allegation were (shall we say) unusual. An aggrieved litigant claimed that the judge was currently and intimately associated with a lawyer acting for the other party. Attorney-General Lavarch declined to break the official silence, merely endorsing Nicholson's expression of "utmost confidence in her integrity and competence".

Of course, something had to be done about it on appeal, but the most informative report of the matter remains an unofficial one in *The Sydney Morning Herald* of 23 February, 1995. The *Herald* noted later that:

> "…..what astonished family lawyers [at the time] was Nicholson's reaction. Before the appeal he circulated a letter to other judges expressing his full support and took no action against her".

In July, 1995 Nicholson embarked on the perilous seas of immigration politics when he condemned the detention of illegal entrants in "virtual concentration camps". Labor's Immigration Minister Bolkus, not known as a severe critic of immigration irregularities, accused his Honour of talking "emotional and sensationalist nonsense". A few months later Nicholson advocated the insertion into Australian law of a Torres Strait Islander custom whereby "half the children born on the islands are given [away] to extended family members". After all, he added provocatively, Aboriginal laws had been "treated with disdain" for more than 200 years. In the Brisbane *Courier Mail* a citizen deplored the prominence given to "bizarre and grotesque social theories of so-called reformers like Justice Alistair Nicholson" and the "omniscience of the socialist aristocracy".

In May, 1997 Pauline Hanson, MHR was well and truly on the political scene. *The Australian* and *The Sydney Morning Herald* reported that Nicholson, not content to leave anti-Hanson politics to people unhindered by judicial office, declared that her only appeal was to "bigots" and "disgruntled, dysfunctional people"; for good measure there was a reference to Nazi Germany. The press noted that "Nicholson's strident criticisms are the first made by a judge of the nascent One Nation party".

"Dysfunctional" is a psychological buzz-word among family law *cognoscenti,* and two years earlier Nicholson used it against a "fathers' group" which dared to question the fairness of his court. The critics were summarily dismissed as "dysfunctional, strident, unrepresentative and often irrational". A *Sydney Morning Herald* reader made so bold as to ask:

> "Why does Justice Nicholson feel compelled to be a political and social commentator, and not exercise the reserve normally associated with judicial officers? He should make up his mind to be either a judge or a politician".

Undaunted, Nicholson returned to the headlines in June, 1997 as an international critic of the Howard government's response to the Wilson-Dodson report on Aboriginal "stolen children". He told a family law conference in California that, if the government did not immediately and officially apologise, "the issue would smear Australia's international reputation". He went on to offer gratuitous legal advice on the country's liability to pay compensation. On the same occasion Mick Dodson, an author of the report, accused Australians of genocide.

That was too much for a normally indulgent media. On 9 June, 1997 the judge's political forays provoked hostile editorials in the Brisbane *Courier Mail* and *The Australian.* The latter had this to say:

> "[These statements] raise fundamental questions in John Howard's mind over the commitment by some members of the bench to the proper relationship between the government and the judiciary. [This judge is] on notice that the Coalition's patience is running out ... Concerns over Nicholson's behaviour have been raised by several senior government figures ... [convinced] that some judges are wilfully flouting the doctrine of the separation of powers in the interests of advancing specific political causes ... At the most senior levels of government there is a belief that some [federal] judges are having an each-way bet. ... In San Francisco this week Nicholson flagrantly broke the conventions ... Despite the low artifice of Nicholson's disclaimer, his remarks are clearly highly politically charged. .... Privately, senior government figures don't mince words about [him]. They make the point that the Family Court is an administratively troubled institution subject to breakdowns in community confidence. 'Perhaps Nicholson should stay at home and look after the shop', says one of the Coalition, 'instead of travelling half way round the world to launch an attack on government policy' ".
>
> The Brisbane editorialist was equally trenchant:
>
> "Only last month the Chief Justices of the State courts issued a statement defending the independence of the judiciary. ... In this climate it is impossible to understand why two senior federal judges [Nicholson and Sackville] have taken it upon themselves in recent weeks to make out of court statements which were essentially political ... Nicholson ... has no role as protector of children generally or of Aboriginal children in particular. While he said he did not want to get into politics that is precisely what he did by volunteering to discuss a highly contentious political issue. ... Australian federal courts are constitutionally unable to give advisory opinions. Their judges should not do so either, particularly on issues which could possibly come before their courts .... claims over stolen children and over native title may both have to be determined in the Federal Court".
>
> A week later *The Australian* revisited the subject:
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> "The more often it is done the less newsworthy it becomes, but it may be the reputation of an impartial judiciary that suffers, not just a publicity-seeking judge".
>
> And elsewhere in the same issue:
>
> "Nicholson, whose newspaper file bulges with 'Chief Justice Hits Out' headlines, suddenly found himself out in the cold with many of his fellow judges and lawyers over his outburst ... [Even Justice] Kirby said it was 'better and wiser' for judges to leave such issues alone ... It is understood that Nicholson's staff were among the first people to ring Kirby's Canberra office on Thursday, seeking clarification [of that comment] ... Kirby maintained a discreet silence .... There are those in legal circles who now wonder whether his compulsion to speak out on issues other than those directly affecting the Family Court is beginning to devalue his utterances ... One side [is a] cherubic, snowy haired people's man ... The reverse side ... is steely, calculating and sometimes contemptuous".
>
> *The Sydney Morning Herald* returned to the fray:
>
> "It has been a rough year for Alistair Nicholson ... this time he may have gone too far. His recent attack on the Howard government for its failure to apologise to Aborigines has been condemned in newspaper editorials and has attracted widespread public criticism, perhaps most strikingly from Michael Kirby who warned: 'People elect politicians, not judges' ... An eminent Melbourne lawyer says: 'I got up the other morning and there he was again making headlines' ".

That was not the end of it. In May, 1998 Nicholson reappeared as "Victorian patron of Sorry Day", calling upon all courts that had been involved with "stolen children" to apologise copiously and forthwith. He did not say whether his own court was in the danger zone.

Ronald Sackville, a former university lecturer with excellent Canberra connections, was appointed to the Federal Court in September, 1994 soon after he produced another inconsequential report on defects in the legal profession. By June, 1997 he was at odds with the new federal government over public criticism of the Prime Minister's "Ten Point Plan" to amend the *Native Title Act.* It was, he said, "ambiguous and incomprehensible". This earned him a supporting role in editorials condemning Nicholson's San Francisco performance:

> "At the very least Sackville's comments are precipitate. At worst they are improper. ... Sackville's *Wik* commentary has prompted some in the government to remember that he was commissioned by ... [ex-Attorney-General] Lavarch to write the report that led to Lavarch's ministerial statement on access to justice. 'It's unlikely he's a staunch Coalition supporter', says one government official. ... [T]he behaviour of Sackville and Nicholson, in the government's eyes, invites such retaliation".

The public persona of Justice Marcus Einfeld is effusive and occasionally lachrymose in the style of a former Prime Minister. He has admirable if not always judicially-compatible connections with internationalist and "human rights" causes. In July, 1993, not content to leave the defence of *Mabo* to Sir Anthony Mason and sundry non-judicial enthusiasts, Einfeld unburdened himself to delegates at a National Baha'i Studies Conference. Australia, he declared, was at risk of being engulfed in "hate, racism and division" by people pursuing personal interests at odds with the High Court's innovation. Justice Brennan's efforts in *Mabo* were a greater contribution to Australia's progress than "any mining executive could ever hope to emulate". The next homily came in August, 1993. Australia was still rife with exploitation and inequality, and its parsimony in the matter of Aboriginal land claims was the "most truly damnable example of our failures in human rights".

It is not known how often his Honour will be rostered to hear cases under the *Native Title Act.*

August, 1993 seems to have been a time of more than usually intense socio-judicial concern. There was a flying visit to Toomelah, an Aboriginal community in north-western New South Wales. Readers of *The Australian* were treated to a large picture of the judge striding over a bridge arm in arm with Aboriginal women. Untroubled by back-country dust, and in vivid contrast to the desolate surroundings, his Honour was resplendent in double-breasted navy jacket, tie, slacks, and breast-pocket handkerchief. An attentive press corps which happened to be in the outback that day reported that the "outspoken Federal Court judge ... launched a scathing attack on politicians and business leaders for making 'outrageous racist' statements about Aborigines".

So impressed was the Brisbane *Courier Mail,* a stable-mate of *The Australian,* that it published an even larger picture of the crossing of the bridge by the sartorially splendid judge. Three weeks later Einfeld told an admiring student throng at the University of Western Sydney that many police were racists who should be never be allowed to have any contact with Aborigines.

At the Gold Coast in October, 1993 *Mabo* sceptics were due for further castigation. Eddie Mabo's name was "being darkened 'blacker than his skin' " by critics of the decision, including "two State Premiers" who were stirring up "xenophobia" [sic] by making outrageous misrepresentations.

In February, 1994 Einfeld captured the attention of a senior journalist, P P McGuinness:

> "Another notable political-judicial figure is Justice Marcus Einfeld of the Federal Court, who gives frequent speeches on political themes. He was a foundation member of the Human Rights ... Commission at the same time as being on the bench; that organisation was and still is deep into political activism and propaganda ... The danger is that if the whistle is not

blown on the likes of Kirby, Evatt and Einfeld it will not be long before one of them, or someone of similar inclinations, finds his or her way on to the High Court and makes a joke of the division of judicial and executive powers".

In March, 1995 the Einfeld message (enhanced by another posed photograph) was that the Australian government lacked the will to punish Nazi war criminals lurking amongst us. In the following July *The Australian* published results of a lawyers' opinion poll on "The Best and Worst of the Bench"; judges sitting without juries and in the absence of the press have lawyers and litigants more or less at their mercy. Justice Margaret White of the Queensland Supreme Court received high praise. There were no prizes for Mason CJ and Gaudron J of the High Court, or for the Federal Court's Einfeld and Anthony Whitlam JJ.

In August, 1995 Einfeld had to deal with a delicate politico-legal dispute. The Aboriginal and Torres Strait Islanders Commission (ATSIC) had a *contretemps* with another entity of undoubted political correctness, the federal Ombudsman, who had prepared a report sharply critical of ATSIC's handling of a project for the New Burnt Bridge Community near Kempsey (NSW). ATSIC won a temporary order forbidding publication of the report. But there was much publicity, and permanent suppression was not a political possibility. In March, 1996 it eventually saw the light of day. The proceedings commenced in September, 1992.

In October, 1995, *apropos de bottes,* Einfeld declared that Australians were still paying for the mistakes of bankers and governments in the 1980s. After an obscure reference to America's O J Simpson trial, we were exhorted "not to lose sight of the values which sustain us". Perhaps judicial abstinence from politics is one of them.

In January, 1997 there was an extra-judicial order to embrace cultural diversity, and amid ritual denunciation of Pauline Hanson, his Honour's "old friend" John Howard was warned that he must do a much better job of discrediting her cause.

In June, 1997 a highly excitable member of the National Native Title Tribunal attacked the government's proposals to amend the *Native Title Act* and was obliged to fall upon his sword. (For other adventures of the quasi-judicial gentleman see Volume 7 of this Society's *Proceedings* at page 117.) Einfeld J declared that the political outburst was perfectly acceptable. Clearly his brother French, President of the Tribunal, did not agree.

Six months later the Australian government was still a grievous disappointment to his Honour:

"We expect strong moral and passionate leadership ... Instead, we have witnessed blind following of every public opinion poll".

However, on Queen's Birthday, 1998 the same government, on behalf of a grateful nation, granted him another decoration. *The Australian* hailed a man who had "devoted a large part of his life to trying to make the world a better and fairer place". *The Sydney Morning Herald* was no less sedulous and offered another photograph in noble pose.

All this may be excellent and admirable in its own way, but is it a set of precedents which our best Chief Justices would approve? Perhaps it is only the remoteness of the Federal Court from the public that has prevented some of these events from doing more harm to perceptions of the judiciary. In May, 1995 *The Australian* observed with a discreet absence of detail:

"A significant number of learned fools sit on benches throughout Australia, as do demagogues, ideologues, and self-promoters ... let judges [concentrate on] judging".

A peculiarly remote institution

There is now widespread concern about the remoteness of governments and political parties from the people they purport to serve. We do not suggest that judges must be as accessible as politicians in marginal seats at election time, but they should have a real connection with the community and the legal profession. The looser and more discretionary law becomes — the more that the rule of law becomes the rule of judges — the greater the need for closer connections between judges and a

specific community. The Federal Court, after all, is essentially a trial court; indeed, it is less specialised on the appellate side than the Supreme Courts of New South Wales, Queensland and Victoria.

When a State government makes a "political" appointment, the profession and the Press tell us about it, even if nothing can be done apart from hoping that the government will be more responsible next time. No such discussion of a Federal Court appointment is ever heard, although seventy or more such appointments have been made since 1976. Some will say that this is a mark of perfection, but it stretches faith to breaking point to suggest that every appointment to that court would survive close professional scrutiny.

The first visible notice of a Federal Court appointment is often a belated and conventional eulogy in some professional journal. The glad tidings come as a *fait accompli* from Canberra, and too often the name of the anointed, when it filters through, leaves lawyers vaguely asking, "Who?" It is unlikely that a State government would imitate the appointment from Canberra backrooms to federal tribunals of a husband and wife with little experience of actual practice or the conduct of cases in court. For better or worse, our legal professions are concentrated in the State capitals; they can keep some sort of check on judge-making there, but not in the backrooms of Canberra.

The remoteness of central government is exponentially greater in the judicial branch than in the others. There is a reputable school of thought which seeks more transparent and consistent processes for judicial appointments, but Federal Court selections are made more remotely and more obscurely than most others in this country. Perhaps frequent disregard of the custom of political self-restraint is a symptom of a court too far removed from mainstream professional cultures.

None of this is to deny that in any court the *ad hoc* process of appointing judges advances some individuals who, whatever their academic ability, are so deficient in judgment, courtesy or common sense that one shudders at the thought of kith and kin at the mercy of their assessments of human nature and its affairs. But with State appointments, particularly in the smaller States, there is a better chance of regular *rapport* between the judiciary and the people in its power.

The Federal Court was imposed. There was no broad-based public or professional demand for it, and perhaps it is only the quiet gradualism of its empire-building that has averted serious questions about its place in the legal firmament. It symbolises rule from above, and a suspicion that people outside Canberra, and traditional courts, cannot be trusted to apply federal laws to the satisfaction of the federal elite.

The little tidying-up exercise of 1976 is out of hand. It is becoming harder and harder to find things around the legal house. On Brisbane's North Quay, the post-1976 judicial empire finds its physical expression in architecture which reminds one of the worst excesses of Mussolini Gothic or Stalin Baroque. If we really do need a Federal Court, it should be more like Peter Durack's naive painting of it twenty-two years ago — legally predictable, much smaller, and much less intrusive.

Endnotes:

1. Black (CJ), Northrop, Gallop, Davies, Lockhart, Beaumont, Wilcox, Spender, Gray, Burchett, Miles, Ryan, French, Einfeld, Foster, Nicholson, Lee, Olney, Von Doussa, Hill, O'Loughlin, O'Connor, Higgins, Heerey, Drummond, Cooper, Whitlam, Carr, Moore, Branson, Mathews, Lindgren, Tamberlin, Sackville, Kiefel, Nicholson, Finn, Sundberg, Marshall, Lehane, North, Madgwick, Merkel, Mansfield, Goldberg, Emmett, Finkelstein, Guidice and Weinberg JJ.

2. *Commonwealth Parliamentary Debates (HR)* (1903), Vol. 13, p.589.

3. *Ibid.,* p.611.

4. *Ibid.,* p.626.

5. *Ibid.,* p.635.

6. *Ibid.,* p.650. Quick, LL D (Melbourne) was co-author with Sir Robert Garran of the *Annotated Constitution of the Australian Commonwealth* (1901).

7. *Ibid.,* p.733.

8. Hughes' machinations in this matter are outlined in G Fricke, *Judges of the High Court,* Hutchinson of Australia, 1986 at 59-61.

9. *Commonwealth Parliamentary Debates (HR)* (1903),Vol. 13, p.703.

10. *Ibid.,* p.812.

11. *Queensland Parliamentary Debates* (1874), Vol. 16, p.85; on the history, politics and polemic of the old professional class system, see J R Forbes, *The Divided Legal Profession in Australia,* Law Book Company, 1979.

12. *Commonwealth Parliamentary Debates (HR)* (1903), Vol. 13, p. 592 (Alfred Deakin).

13. Fricke, *op. cit.,* p.11.

14. The writer has a vivid recollection of an aspirant for a federal judicial appointment in 1975-6, with little or no relevant practical experience, energetically lobbying at legal symposia at which he/she undertook a crash course on the legislation which he/she soon hoped to apply, augment and alter.

15. Fricke, *op. cit.,* pp.21, 25-27, 30, 34; R R Garran, *Prosper the Commonwealth*, Sydney, Angus & Robertson, 1958, p.170.

16. A J Hannan, *The Life of Chief Justice Way,* Sydney, Angus & Robertson, 1960, pp.216-217.

17. *Commonwealth Parliamentary Debates (HR),* Vol. 101, p.2110.

18. Quoted by A Whitlam, *ibid.,* p. 2539.

19. *Commonwealth Parliamentary Debates (HR),* Vol. 101, pp.2110-2111.

20. *Ibid.,* pp.2492, 2535 (Lionel Bowen).

21. *Ibid.,* p.2539.

22. *Commonwealth Parliamentary Debates (Senate),* Vol. 70, p.1953.

23. *Ibid.,* p.2473.

24. *Commonwealth Parliamentary Debates (HR)* (1903), Vol. 13, p.703.

25. *Philip Morris Inc v. Adam P Brown Male Fashions Pty Ltd* (1981) 148 CLR 457; *Fencott v. Muller* (1983) 152 CLR 570; *Burgundy Royale Investments v. Gold Coast Securities* (1987) 76 ALR 173.

26. *Stack v. Coast Securities (No 9) Pty Ltd* (1983) 154 CLR 261.

27. *The Freedom Rider's Supreme Court,* in *The Sydney Morning Herald*, 16 May, 1998.

28. *Commonwealth Parliamentary Debates (HR),* (1987), Vol. 153, p. 869. See also at 873 (Philip Ruddock and Family Court "overlaps".)

29. *Gould v. Brown* (1998) 151 CLR 395.

30. (1995) 183 CLR 273.

31. *Australian Broadcasting Tribunal v. Bond* (1990) 170 CLR 321 at 341.

32. See for example *Stergis v. FCT* (1989) 89 ATC 4442 and *Australian Securities Commission v. Kutzner* (1997) 16 ACLC 182.

33. Paul D'Arcy (Senior Adviser, Shell Australia), *Beyond Wik — Making Native Title Work,* Policy, Vol. 14, No 2, Winter, 1998, p.35.

34. Jack Waterford, *Administering Administrative Law* in L Pearson (ed.) *Administrative Law: Setting the Pace or Being Left Behind*, AIAL, Canberra, 1997, p.92.

35. In order to spare the editor an even more onerous task the full references which relate to this part of the paper are omitted or briefly indicated in the text. They can readily be supplied.

36. On the Family Court and elements of due process see, e.g*., R v. Watson; Ex parte Armstrong* (1976) 136 CLR 248; *Re Renaud; Ex parte CJL* (1986) 60 ALJR 528; *Patsalou v. Patsalou* [1995] FLC 92, 580. In *Patsalou* the Family Court persuaded itself that the judge mentioned in *The Sydney Morning Herald* of 23 February, 1995 (see later text) who, off her own bat, used several sociological articles on the "effect on children of interspousal violence" without giving the parties a chance to reply, did not draw any conclusions from them, so that natural justice was not offended. There is, after all, a precedent of sorts for such privately gathered "evidence" in *Mabo.*