Judicial Tidy-Up or Takeover? Centralism's Next Stage

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Judicial centralism in Australia is a phenomenon of the last twenty years. The courts are the last branch of government to be affected. Centralisation of other branches may be traced through the *Engineers' Case* of 1920 (the end of federalist presumptions), the Financial Agreement of the 1920s, the Uniform Tax Case of 1942, the explosion of the defence power during World War II, and the apotheosis of the external affairs power in the *Franklin Dam Case* of 1983. Since then, as Sir Harry Gibbs has remarked, the federalism we still enjoy exists not by legal guarantee, but by political expediency or inertia.

While legislative and executive centralism advanced, the Australian judiciary, for almost eighty years, was remarkably decentralised, as befits the branch of government that is properly concerned with the individual rather than Leviathan. The State courts, the oldest founded 175 years ago, administered Commonwealth and State law. The vast majority of actions ended in State appeal courts (if they went so far) and in criminal matters the High Court, in deference to local expertise, refrained from the incessant and often impractical tinkering which now makes trial judges' work more onerous, and their instructions to juries more bewildering.

Change began in the mid-1970s with the creation of the Family Court and the Federal Court of Australia. The former is an accident of history – a "permanent temporary" government structure thrown up when the Senate delayed the creation of the Federal Court. But not for long; Canberra's legal mandarins, keen to have their concerns before the Commonwealth's "own" judges, persuaded a new government to engage in "a little tidying-up operation". There are now one hundred federal judges, and their Stalin Baroque court houses occupy prime sites in several capital cities, accommodating not only "justices", but also a miscellany of federal tribunals and instruments of social engineering.

Let us consider how this concentration of judicial power came about in just two decades.

The Federal Court, unlike the Supreme Courts, is not inherently a court of general jurisdiction. But it is now directly fed by more than 100 items of federal legislation, and it has progressively picked the eyes out of the State courts' civil lists by means of a self-serving doctrine of "accrued jurisdiction". (The idea is that, so long as there is a plausible appeal to Commonwealth law, then all "related" claims can also be handled by the Federal Court.) This device enables that court to use one of its broad-brush powers to take over contract, tort and commercial law cases from the States – but not criminal cases, even when they are based on federal law. That exacting and unfashionable work is left to the States.

The Federal Court, if it so desired, could probably take over personal injury cases (a large slice of surviving State jurisdiction) by tacking them on to a claim that advertisements for the mangled motor cars breached the *Trade Practices Act*. Mile-wide clauses in that Act have absorbed even more State business since it was amended to cover "unconscionable conduct". Our laws are rapidly becoming vaguer and more dependent on the autocracy of judicial discretion. But discretion is a great work-maker, raising new hopes for a profession overcrowded by the output of ubiquitous law schools staffed by young non-tenured teachers, who dare not upset their salesmen-administrators by omitting to confer honours on half the graduating class and to pass any and every student "consumer". ("All shall run and all shall have prizes".)[1]

The Federal Court is no longer a triangle on a "trade practices" apex. When the Australian

Law Reform Commission sampled its cases last year, 22 per cent of them were immigration matters. (The plethora of immigration reports suggests that this is an under-estimate.) Other categories were trade practices (16.3 per cent – many with "accrued" common law matters attached), company law (12.2 per cent), administrative review apart from immigration (9.1 per cent) and intellectual property (8.4 per cent). No doubt the burgeoning native title department accounts for much of the remainder.

Immigration

The use and abuse of judicial review in relation to the *Migration Act* provides a feast of judicial politics in the Federal Court. It is difficult to escape the conclusion that some Federal Court judges fervently believe that they are the only true arbiters of illegal immigration and refugee status. A high standard of judicial arrogance was set by Justice Donald Graham Hill, a former death and stamp duties specialist, in *Moges Eshetu v. Minister for Immigration* (1997):

"So zealously does the Australian Parliament desire to implement its UN Treaty obligations to assist refugees, that it has enacted legislation specifically to ensure that it is acceptable for a decision on refugee status to be made by the Tribunal which not merely denies natural justice to an applicant but also is so unreasonable that no reasonable decision maker could ever make it".

At about the same time the Honourable Anthony Max North, a TV judge during the *Maritime Union v. Patricks* dispute, found actual bias in a refugee appeals tribunal. Most judges would have been content to find "apprehended bias", which meets an agenda of judicial intervention in a much less offensive way. With a slender sense of relevance, North proceeded to advertise his attendance at the political correctness sessions which began to be held for consenting judges in the Keating era:

"Some judges, including myself, who have in recent years attended gender and race awareness programmes, have been struck by the unrecognised nature of the baggage which we carry on such issues".

In another case his Honour, with a fine sense of theatre, was about to order an international flight bearing deportees to make an immediate U-turn to Australia. He managed to resist the prospect of a headline when the Commonwealth promised to return them on the next flight.

Federal Court activism soared in the notorious *Teoh Case*, in which, unfortunately, the High Court was complicit. A convicted drug dealer faced deportation. The primary judge dismissed his application for review, but by the time of his appeal to a full Federal Court his lawyers had come across a United Nations manifesto on the Rights of the Child. Australia had no corresponding domestic law. Nevertheless it was held that Mr Teoh, who had never heard of the UN declaration until his lawyers belatedly discovered it, had a "legitimate expectation" that immigration officers would take it into account before deciding to deport him. The perceived basis of his "legitimate expectation" was just this: in some brief moments of leisure from his busy round of drug dealing Mr Teoh had fathered children in this country by the *de facto* wife of his deceased brother. Both sides of Parliament agreed that this judicial confection was "over the top".

It is amazing how a small group of judges can gaze into the Constitution, or a UN document – as witch doctors of old gazed into the entrails of a chicken – and find things there that are invisible to the rest of our tribe. We have the discovery of native title, implied rights and other divinations. Now the oracle has proclaimed – albeit not in unison – that England is a foreign power.

In immigration and other cases an expansion of Federal Court powers has been secured by ignoring the well-known limits of judicial review and effectively conducting appeals on the merits. Judicial review should be limited to the correction of legal errors, such as acting without authority or denying natural justice. It is not a licence to substitute a judge's opinion of the "right" result for the decision of the official authorised by law to make that decision. In this regard the High Court (even the Mason court) has taken Federal Court judges to task on several occasions, and it is safe to assume that quite a few similar cases have slipped through because of the cost and trouble of High Court appeals.

The Federal Court was overruled in the case of *Wu Shan* (1996), with a sharp reminder that judicial review is not a licence to second-guess the Minister. The High Court's strictures were not limited to the particular case. The Federal Court was bluntly told that it had developed a "false line of authority" by conducting *de facto* re-hearings thinly disguised as judicial review despite repeated directions not to do so. The Federal Court in *Wu Shan* included two gentlemen from Perth, Malcolm William Lee and Christopher John Seymour Metford Carr; each man has been creative in the native title area.

The multicultural interests of Justice Marcus Einfeld protruded when he and two other members of the court smiled on *Guo Wei Rong* (1997). While his colleague, Foster J, did not emerge unscathed, the High Court was especially critical of Einfeld's effort, which it described as "untenable", and improperly concerned with "purely factual" matters that were no business of the court. Even Justice Kirby could not forbear to say that "no course would be more likely to undermine the legitimacy ... of judicial review than a usurpation" of the functions of the other branches of government. Einfeld and Foster blotted their copybook again by granting Mr Guo a visa off their own bat, contrary to every principle of judicial review.

That is not the end of it. In December last year the High Court marked the Federal Court's homework in a case of *Thiyagarajah*, and the results were not impressive. The Federal Court had told the Refugee Tribunal to think again, simply because the alien's circumstances might have changed since its original decision to deport him. To the High Court this was a preposterous misuse of judicial review. Michael Kirby pointed out that, if the Federal Court had its way, the result would be "a circular process of endless litigation", while the appellants stayed in Australia, living and litigating at taxpayers' expense.

It is against this background that we should view the protests of the mild-mannered Minister for Immigration, Philip Ruddock. In November last year he said that some Federal Court judges were imposing their personal immigration policies on the country. "It's not too hard", he said, "to find one or two judges with a view of the world that is different from everyone else's". In December Mr Ruddock complained that some federal judges were on a "frolic" of their own to undermine immigration control, and were helping people wealthy enough to get here to frustrate the authorities in interminable court proceedings. Naturally, the Minister did not name the judges he had in mind, but *The Sydney Morning Herald* awarded guernseys to Justices Tony North and Raymond Finkelstein, who found that a large group of East Timorese asylum seekers were not Portuguese nationals. A ministerial award may have been intended for Hill, Einfeld, Carr and Lee as well.

On 15 July, 1999 the extremes of *Teoh* were matched by a 2-1 decision of the Federal Court in *Le Geng Jia v. Minister for Immigration*. Mr Jia, who gained entry to Australia on a student visa, was subsequently convicted of rape. The Minister ordered him to be deported as a person of bad character. Several stages of litigation followed at public expense.

Eventually two judges set the deportation order aside, on the ground that the Minister was guilty of bias in concluding that a person recently convicted of rape is not of good character. This is the merest pretence of using a technical ground of judicial review – "apprehended bias" – to second-guess the Minister. When the limited grounds of true judicial review are so distorted, there are few limits to judicial-political activities.

The Federal Court's own style of class action is nicely attuned to immigration by litigious exhaustion. Mr Ruddock instanced a case in which no fewer than 2,900 people were joined in an immigration action at $500 per head. He estimated that by 2001 taxpayers will be outlaying $20 million per annum for the privilege of supporting immigration lawyers and the pawns in their game.

The Federal Court as fount of Native Title

Aboriginal affairs have been a preoccupation of the Brennans since Brennan senior helped Woodward, QC to draft the *Aboriginal Land Rights (Northern Territory) Act*. Woodward was given that job after losing a speculative native title case in 1971. It was really a publicity stunt; as the law then stood the action had no chance of success, and significantly there was no appeal. Twenty-one years later *Mabo* arrived. Four years after that, in *Wik*, Brennan senior looked into the cupboard he had designed, shivered, and tried to close the door. But as he should have known, revolutions can be easy to start and very, very difficult to stop. The hope was that a place in history had been won by a relatively harmless transfer of vacant Crown lands, but now all Crown leaseholds were at risk. A new and wonderful legal industry was already established, heavily dependent on European ideas and resources, with highly-assimilated "leaders" as keen on a first-class flight to Canada, New York or Geneva as any other politician.

The *Native Title Act*, like the rest of us, has only the foggiest idea of what "native title" means, but it provides claimants (or their puppet-masters) with a superb tool for extracting "go away money". It gives a monopoly of *Native Title Act* actions to the Federal Court, despite the facts that: (a) virtually all the targeted land is State land; (b) land management is a State responsibility; and (c) land law is essentially a matter of State jurisdiction. A rich legal harvest is already evident, although many cases will end in "voluntary" settlements for reasons of financial or political expediency.

Subject to appeal (by which time findings of fact and credit are very hard to disturb), all it takes to establish rights over vast tracts of land, and perhaps natural resources of great value, is the opinion of one Federal Court judge that he accepts "oral history", orchestrated by anthropologists or a Land Council, as proof of native title.

We now have three substantive judgments relating to the mainland, as distinct from that Melanesian islet near New Guinea. (There have also been a number of expensive preliminary battles, including *Wik* itself, which established no native title but decided, by 4 votes to 3, that many Crown leases are not "real" leases after all.) The three substantive decisions are *Croker Island (Yarmirr v. Northern Territory)* (6 July, 1998), *Ward v. Western Australia* (24 November, 1998) and *Yorta Yorta v. Victoria and NSW* (18 December, 1998). The Aborigines won *Ward* and lost *Yorta*, while *Croker Island* is reminiscent of the Battle of Jutland in World War One; it took a long time and untold resources, and historians are still trying to decide the winner.

Croker Island

This case was heard by Howard William Olney J, sometime Perth magistrate, State parliamentarian, Supreme Court judge and (from 1988) a Federal Court judge and Northern

Territory land rights commissioner. He is a Deputy President of the National Native Title Tribunal.

The claimants, inhabitants of an island situated about 250 km north-east of Darwin, and sponsored by the Northern Land Council, claimed exclusive rights over some 2,000 sq kms of Australian waters and the seabed. "Sub-surface sacred dreaming tracks" were alleged. In a more secular vein an executive of the NLC confided to the press that the claimants wanted "a piece of the action" in the commercial fishing industry. The judge and his entourage camped on Croker Island to hear the Aboriginal witnesses; special arrangements for claimants abound in this type of litigation. After a long and costly inquiry, which produced no evidence of trading in the marine resources, let alone usage of minerals, the declaration of native title was limited to the protection of objects and places of "cultural significance" and a non-exclusive right to hunt and fish for non-commercial purposes. In cases of inconsistency the offshore rights are subject to State and federal laws.

There may be better times just around the corner. In March, 1997 there were 85 offshore claims pending in the Kimberley region, in South Australia, and in Queensland. By mid-1998 the number had risen to 120, including the simmering *Wik* claim.

***Ward v. Western Australia* (the Miriuwung-Gajerrong claim)**

Ward and other nominal plaintiffs asserted title to land and sea in the Kimberley region. The trial judge was Malcolm William Lee J. Four and a half years after the claim was filed he made sweeping orders in favour of the claimants over 7,900 sq kms, including Lake Argyle and the Ord River, parts of the Northern Territory's Keep River National Park, and Crown land near Kununurra. Parts of the land were listed by the State government as "exclusive possession" leases, immune from native title under last year's amendments to the *Native Title Act*.

Lee's orders gave the claimants exclusive rights to "make decisions about the use and enjoyment" of the area, to "use and enjoy [its] resources", to trade in them, and "to receive a proportion of resources taken by others", irrespective (it seems) of any efforts of their own. The orders coyly avoided any explicit reference to mining rights, but if the judgment survives appeal the word "resources" must surely include minerals. It will be interesting to read an articulate account of traditional prospecting and mining by Aborigines, onshore and offshore. Lee did not provide one.

Estimates of trial costs in *Ward*, directly or indirectly payable by the general public, range from three to ten million dollars. Obviously costs, delays and manpower diversions of this order must turn the minds of governments and even the largest companies to thoughts of "go away money" or "voluntary" settlements. How many native titles will be founded on proper judicial proof, and how many on fear of interminable proceedings with astronomical costs – win, lose or draw?

Apart from the question of title to minerals, the *Ward* judgment raises the crucial question whether a Canadian fashion – special treatment of "indigenous" evidence – will become part of the Federal Court's native title lore. In *Delgamuukw v. British Columbia* (1997) the Canadian Supreme Court summarily and superficially dismissed the painstaking work of two other courts, and with a little shudder of "concern", directed trial judges to treat evidence of native title "with a consciousness of the special nature of aboriginal claims", and to adopt a "unique approach to the treatment of evidence which accords due weight to the perspective of aboriginal peoples". This is easily decoded as a direction to suspend disbelief and to lower normal standards of proof for a special class of litigants, however

enormous their claims may be. Forget the academic metaphysics of native title law; the really vital issues are the manner and standard of proof.

In *Ward*, in an explicit reference to the Canadian wisdom, Lee stressed the "evidentiary difficulties" of native title claimants, and a need to give special treatment to their "oral histories". He proceeded to claim a right to supplement the evidence given in court with his own "historical knowledge and research". He did not consider what this meant for natural justice. Unfortunately, there is a precedent for such extraordinary behaviour in *Mabo*, although it defies fundamental principles of our judicial system. *Mabo* does not explicitly overrule the jurisprudence of due process, but it is hard to escape the conclusion that it does so implicitly.

In response to the Canadian fashion it should be said that the "evidentiary difficulties" of claimants are likely to be less severe than the difficulties of *defendants* trying to test the hearsay-upon-hearsay-upon-hearsay of claimants and their anthropological supporters. As it is, various special arrangements for taking claimants' evidence already have the Federal Court's blessing. They include special trips to remote areas (sometimes rewarded with ceremonial welcomes, as on Croker Island), "restricted" (secret) evidence, and bizarre procedures for "group evidence" and for excluding people of the "wrong" sex from hearings, in sedulous response to claims of "secret mens'/women's business". Surely these concessions are sufficiently "unique" and "sensitive" without a special low standard of proof?

On the contrary, some long-standing guidelines for assessing evidence should be emphasised: how easy is it to assert the claim, and how difficult is it to rebut? How significant is the self-interest of claimants and their witnesses, particularly if they are exposed to communal pressures (moral or physical) in isolated situations? What are the political or financial interests of professed experts who associate closely with the claimants, and whose essential subject-matter is Aboriginal affairs? How rigorous is their proclaimed science? And then there is the "Briginshaw test" – the larger and more unusual a claim, the higher the standard of proof should be.

Judges do not comment publicly on one another's judgments – unless they are Federal Court judges and the judgment involves native title. So soon as the *Ward* judgment appeared Robert French, first President of the Native Title Tribunal and a founder of the Aboriginal Legal Aid Service (WA), hailed Lee's decision as "further defining native title and clarifying where it could exist". A month later French declared that "rural groups" (but not their opponents, apparently) were "ferally intransigent" about native title, and that some State governments were more interested in acrimonious debate than in teaching the public about *Mabo*.

Ward is under appeal.

The *Yorta Yorta Case*

This was a claim for exclusive possession of about 2,000 sq kms of land straddling the Victoria-NSW border. The trial judge was Olney J, who heard the *Croker Island Case.*

It may not be widely known that, two weeks before the *Yorta* hearing began, Olney attended an anthropologists' symposium on native title at Sydney University. Another participant was Deborah Rose, who soon afterwards gave evidence in that case. Olney told the assembled anthropologists:

"The common law adversarial system of justice ... really throws back on those who are going to give the evidence, which really means the anthropologists, the experts, a very

heavy responsibility of convincing the particular court ... as to ... traditional customs. Some thought should be given to as to whether (sic) the Act needs some form of amendment *to facilitate the proof of traditional evidence*. ... My fear is that, left to the ordinary legal system, it will be very difficult indeed, except in the most obvious case such as *Mabo,* to get up a claim ... It may be that the anthropologists have got a job ahead of them in the political lobbying field". (Emphasis added)

The job of establishing the *Delgamuukw* doctrine in Australia, perchance? Anthropologist Gaynor MacDonald took the point: "The message here is (that) they need us white experts anyway, even before they put in their application". And then (in all innocence?): "Where do they get the money?". Ms Maher agreed that "the *creation* phase of the application is an absolutely vital one". But Dr Sutton, an experienced witness, warned: "[In contested cases] you are going to be asked, when was the first time you went out there with the Land Council?". (Anthropologists supporting native title claims, often full time employees of Aboriginal corporations, commonly live and work with claimants for long periods before a trial.)

Jim Fingleton tossed the ball back to the judge:

"Given the sensitivity of touching the Act at all for obvious reasons, do you think [that lowering the standard of proof] might be done by practice directions or something like that?"

Olney merely replied that the Chief Judge had asked him to draft practice rules for native title hearings.

Sutton suspected that judges would receive more scrutiny in native title cases than in Darwin's cosy Land Rights Commission. This cryptic statement of his seems to have been well understood by colleagues:

"We all saw how even the flexible Mr Justice Toohey was made to be inflexible in the case of the Alligator Rivers II, where the politics of it and the pressures were so great that this looseness of interpretation really went into the background".

But to Gillian Cowlishaw it was all perfectly simple:

"Of course it is Aborigines who know what native title is, and they alone".

The experts were then treated to insights into Northern Territory land rights hearings generally and Olney's contributions in particular. The following *obiter dicta* confirm earlier, well-informed advice to the writer that those hearings, which have resulted in transfers of about half the Territory to Aboriginal interests, were ponderous formalities:

"I think the tendency in the Northern Territory was for the Commissioner to be reasonably easily persuaded."

Then a touch of naiveté that leaves one wondering whether the speaker should be a sole arbiter of law and fact in ambitious native title cases:

" In my term as a Land Commissioner I never once required a witness to be sworn. My view was that they were there to tell the truth, and ... talking about such an important subject, you wouldn't expect them not to speak the truth. The moment you say to a witness ... if you don't speak the truth you might go to gaol – you are not going to get much co-operation from many Aboriginal witnesses I would think, because they'd rather not go to gaol and let you have the land back".

The Northern Territory Commission is the school in which several Federal Court judges, including John Toohey of the *Mabo* majority, were introduced to the mysteries of native title. Is there no possibility of distortion due to self-interest, group pressure or the influence

of non-Aboriginal oath-helpers or myth-makers? If not, why would the witnesses fear to take an oath? In *Yorta*, indeed, Olney found that two Aboriginal witnesses had lied, but far more important, the defendants in that case had the rare good fortune to come across strong documentary proof of extinguishment.

In a petition presented to the colonial Governor as long ago as 1881, ancestors of the Yortas admitted that their "old mode of life" had gone, and went on to demand a greater degree of assimilation to the European way of life. That was enough to dispose of the case, and surely the judge knew that in October, 1997 when, after 101 days and 195 witnesses, he tried to set aside the chalice of an unfashionable judgment by urging compromise. (Although, as it turned out, the merits were 100 per cent to nil. In "mediation" there is always something for everyone.)

When a decision could not be avoided, Olney grumbled about the great expense of the proceedings. It was indeed appalling, but Olney could have reduced it considerably by better case management – by taking the extinguishment issue first. The long-winded "traditional" and anthropological evidence would then have been unnecessary. Once extinguishment was proved, any prior native title would be of academic interest only. However, Arnold, Bloch, Liebler, the solicitors who employ Noel Pearson, should be content with the litigious saraband; it is reported that they have derived more than $3.5 million from the Yorta affair so far, and there is at least one appeal to look forward to.

Quite apart from the evidence of extinguishment, the claimants' case was not impressive:

"Notwithstanding the genuine efforts of members of the claimant group to revive [create?] the lost culture, native title rights and interests, once lost, are not capable of revival. ... Oven mounds, shell middens and scarred trees were described by a number of witnesses as sacred ... middens are nothing more than accumulations of the remains of shell fish frequently found on the banks of rivers ... many are protected by heritage legislation, but there is no evidence to suggest that they were of any significance to the original inhabitants ... nor that traditional law or custom required them to be preserved".

The *Delgamuukw* court would find this most "concerning", and local anthropologists were shocked. As for the claimants, after getting in some practice at a violent political demonstration while Olney was still deliberating, they branded his judgment "genocide". Friendly journalists opined that "native title claims in southern Australia have been dealt a massive blow".

The volume of the cries of genocide was probably amplified by this surprisingly robust comment of the judge:

" It is appropriate to observe that the special procedures that were previously ordained by s.82 [of the NTA] do not authorise the court to depart from two basic principles ... namely that the standard of proof is on the balance of probabilities and that the Court will have regard only to evidence which is relevant, probative and cogent. In particular, pure speculation, of which there has been much, must be disregarded. *Nor is there any warrant ... for the court to play the role of social engineer*, righting the wrongs of past centuries and dispensing justice according to contemporary notions of political correctness rather than according to law". (Emphasis added)

However, all was not lost, because the Yorta Yorta were now prime contenders for "a slice of the federal government's $1.2 billion land acquisition fund".[2] They also had the consolation of knowing that taxpayers would meet the costs of a case that ran for four years, at a cost of several million dollars.

The native title business has some profitable subsidiaries. One of them provides developers with "cultural clearances". In January an ATSIC official admitted that anthropologists working in the bush with power or pipeline crews can earn up to $4,000 per week for their "culturally sensitive" absolutions. There is also money to be made by Aborigines for "sitting fees" at mediation sessions, or for identifying "areas of cultural significance". Last year it was reported that 70 Aborigines demanded $350-800 each to discuss "heritage issues" relating to a power line from Mt Isa to the Century zinc mine (for which enormous compensation had already been agreed). According to Century, some individuals received up to $100,000 for "consultancy services", and last year North Queensland Electricity Corporation spent nearly $1 million on "cultural clearances". Queensland's Labor government is planning changes to "heritage" legislation to curb what some of its officials describe as "a *de facto* compensation racket".[3]

Inevitably a less guilt-stricken and pliant Australia will one day decide that it must recover some of the native title domains decreed by the central judiciary, or ceded in "voluntary" settlements. What will then become of *Mabo* and all its elaborate superstructure?

Nicholson and the Magistrates

The Family Court was meant to be part of the Federal Court, but when Parliament did not deliver that benison in time another court was hastily assembled to celebrate Lionel Murphy's new rites of divorce. It has some very good judges who deserve better appointments, and case loads are certainly heavy, yet a separate Family Court provides high salaries, non-contributory pensions and chauffeured cars for more than a few mediocrities who would probably never have reached a State District Court, let alone a Supreme Court.

The Family Court gained an immediate monopoly of divorce, custody, property and maintenance litigation between married people. Later, by cession of State powers, it acquired custody jurisdiction over unmarried couples, and then the cross-vesting legislation gave it power to deal with property disputes between such people. The fact that most State judges were happy to be rid of these matters does not necessarily mean that the centralisation of the work (much of it formerly done by local magistrates) is on balance beneficial to the community.

The Commonwealth's judicial centralism began at the top. In the last 25 years it has created two bureaux described as superior courts[4] but no intermediate court or magistrates' court. Now, however, the federal Attorney-General plans a central magistracy and a *Federal Magistrates Bill* is before the Parliament. The new court, like its big sisters, will no doubt grow like Topsy. (In "Yes Minister" fashion there will have to be extra public servants to implement the economy measures.) Like State magistrates' courts, the new federal institution will be a convenient receptacle for any work that courts above find boring or beneath their dignity. The Federal Court will probably dump the bulk of its bankruptcy caseload on the magistrates. The beginnings will be modest, as with the Federal Court. Initially there will be sixteen federal magistrates, but the variety of their work, as outlined in the Bill, suggests there will soon be many more. It is proposed to give them subordinate jurisdiction in administrative law, bankruptcy, "human rights", trade practices and family law (including property matters up to $300,000).

This is not just an economy measure. Recent skirmishes between Attorney-General Williams and Justice Alistair Nicholson, head of the Family Court, suggest that in the short term the Commonwealth is less concerned to increase judicial centralism than to deconstruct Nicholson's empire. At last it has dawned on Canberra that a lot of Family

Court business used to be magistrates' work, and that it should be magistrates' work again – but now under Commonwealth control. This would not worry Nicholson if the new magistrates joined the army of judges, registrars, judicial registrars, counsellors and social workers under his control, but that is not what the Attorney intends. The magistrates will not be part of the Family Court.

To Nicholson this is anathema. He rejects out of hand any suggestion that his bureau is a "troubled institution", affected by "complaints of inefficiency and doubts about public confidence [and] overtaken by judicial formality and lacklustre administration", for which "the Nicholson recipe of more judges and more money is not viable".[5] He has publicly described his disagreements with Williams as "personal", and the latter's plan for a separate magistracy as a "recipe for trouble".[6] Williams, for his part, makes no secret of the fact that he does not want Nicholson to have "his own magistrates to boss about".

But to a degree Nicholson has pre-empted the Government. Several years ago, when the novelty of windfall judgeships began to wear off, and too much of the work became boring, it was progressively sloughed off to deputy registrars, registrars and more recently to semi-judges entitled "judicial registrars". Then a couple of months ago, after the Williams plan was announced, yet another grade of up-market registrars was invented, Nicholson explaining disingenuously that he "could not afford to wait" for the magistrates' court he hopes he will not see.

It is remarkable that the Family Court was able to create all these quasi-judicial positions by internal rules and delegations, without a need to amend the Act. The constitutional validity of such delegation was challenged in *Harris v. Caladine* (1991). On the authorities then available it seemed likely that the practice would be banned; the High Court usually draws a precious distinction between Commonwealth judicial power and "mere" executives. But not on this occasion; an unwillingness to touch the politically sensitive Family Court, or a reluctance to provoke further proliferation of its judges, may explain the difference.

State politicians have raised more objections to a federal magistracy than they ever made to the takeovers organised by and for the Federal Court. In January the NSW Attorney-General described the federal plan as an expensive waste of time, and the Law Society of NSW saw no good reason for adding an "extra layer" to the existing court system. However, these people said nothing while the Federal Court empire grew exponentially in the 1980s. The States, of course, have long-established networks of magistrates, and they were given some family law powers in 1975. In practice those powers have been whittled away by the Family Court and by lawyers who prefer a more prestigious venue, but the Commonwealth could easily reverse that trend without further centralisation.

Williams has also tried to shake one of the pillars of the Family Court edifice. Unlike other courts, the Family Court includes not only judges and administrative staff but also psychologists and social workers ("counsellors") who profess an ability to divine people's marital and parental qualities, in unfamiliar surroundings, and in a matter of hours. These functionaries also appear as witnesses in the court, and in custody cases their disfavour is usually the kiss of death. Daryl Williams believes – as do most lawyers who are not hostages to Family Court culture – that a court house is not the place to deliver marriage guidance, and that "in house" witnesses threaten the appearance if not the reality of justice.

There is a danger that weak, lazy or overworked judges will use experts to make their decisions for them, whereupon the witness effectively becomes the court. The risk is greater in the extraordinary situation where the experts as well as the judges are on the court staff.

Family Court litigants may call outside experts, but will they be seen as equals of the "house pets"? At least one Family Court judge, appointed with a minimum of court experience, and oblivious to the rules of natural justice, had a private chat with a "counsellor" during a trial, to the horror of the High Court. (A competent third year law student would have detected the error.) Another judge heard a case in which her current gentleman friend was professionally involved. According to Justice Peter Young, editor of the *Australian Law Journal*, there is a professional perception that if a Family Court judge does not accept the evidence of an in-house social worker, "there is a lowering of morale". Alas, that could result in a less pleasant work environment for the judge in question, if not a rebuke from three more correct colleagues sitting as a Full Court. The more clubbable and careerist followers of the Family Court have not given this question the attention that it deserves.

It was airily brushed aside until a senior judge of the court, Alwynne Richard Rowlands, entered the pages of the *NSW Law Society Journal.* "Given its umpiring role," he asked, "should the court employ and control these social science experts?" He doubted that "in house witnesses" are really consistent with the separation of powers. Worse still, Rowlands supported the idea of magistrates free from Family Court control and from the "formal, lengthy and costly ways of judges on superior courts".

Then a barrister of 25 years' experience, in a letter to *The Australian*, braved the penalties for political incorrectness:

"It is heartening to read the recommendation of one of the senior judges of the Family Court, that the primary function of the court be separated from its counselling services. He echoes my concern and that of many of my colleagues ... The non-confidential reporting function of the in-house counsellors has been a matter of concern to me in more than 20 years' legal practice. There is a very strong perception that the relationship between judge and counsellor is too close. Some in-house reporters are thought to be favourites of certain judges. One judge, now retired, committed the judicial indiscretion of consulting the in-house witness in the lunch hour and provoked a successful appeal".

Nicholson returned to the fray with the patronising statement that his brother Rowland's views were "neither new nor representative of even a significant minority of Family Court judges". But apparently there was *something* to worry about; in an elaborate public relations exercise, "consumer opinion" was sought. It was less flattering than the Chief Judge would have wished, but the tireless publicist was photographed in a suitably informal setting promising that in future his court would treat people "as individuals, not units to be processed in what some described as a sausage-machine like manner". Richard Ackland, Sydney's iconoclastic journalist-lawyer, remarked that:

"A softer, more caring Family Court is the idea that Nicholson is trying to get across ... [But there are] shocking relations between Nicholson and the federal government ... It would love a Family Court not headed by Alistair Nicholson".[7]

If one door closes perhaps another will open. Last month Linda Dessau, a recent Family Court appointment, claimed that it should have criminal jurisdiction over all juvenile offenders in Australia. And while her Chief Judge guarded his border marches against the Williams clan, Robert French, first President of the Native Title Tribunal, deplored the prospect of sharing its influence with the State organisations that may be set up under last year's amendments to the *Native Title Act*.

Judicial Tidy-Up or Takeover? Centralism's Next Stage (Continued)

Dr John Forbes

Class actions in the Federal Court

Centralisation has been assisted by procedural innovations. These have had the good effect of dragging the rules of some State courts into the modern era. But so far the States have prudently stopped short of adopting the open-ended class actions available in the Federal Court.

Until a few years ago class actions were seldom seen in Australian courts, because they could not be used in the area most attractive to the speculative lawyers who are now coalescing in "Plaintiff Lawyers Associations", namely actions for personal injuries and "consumer protection". But as disciples of America's Ralph Nader ascended into the firmament of legal fashion, the federal Law Reform Commission joined in. Eventually the Commission got its way, and the Federal Court's charter now offers Plaintiffs' Lawyers Associations a mouth-watering form of class action – the "opt out" system. You could call it the Slater and Gordon Amendment.

Some State courts have changed their rules to allow class actions for damages, but in the milder form of "opt-in" procedures, which make big class actions harder to organise. In South Australia the court's permission to begin is necessary, and it is not given until the class is precisely defined. In Victoria the written consent of every plaintiff must first be obtained.

"Opt out" rules are clearly better for entrepreneurial lawyers, and well calculated to siphon off State business to the Federal Court. One self-appointed (or lawyer-instigated) representative can sue on behalf of seven or more people who allegedly have claims arising out of similar or related circumstances. (Not necessarily the *same* circumstances – "similar" is wider, and "related" is wider still.) No permission or consent is needed to begin, and initially it is not necessary to specify the names or even the number of persons represented. Members of the class (if aware that they are in it) can sign papers to "opt out", but of course inertia is on the side of the promoters. It need not be shown that the action will resolve all the issues between the numerous plaintiffs and the defendant. If the lawyers are lucky there will be "second helpings" when the joint venture is completed. In the unlikely event of no win and no settlement, the plaintiffs could be liable for costs, but the court can reduce that disincentive by limiting in advance any costs that a successful defendant may recover. Ambulance-chasing lawyers are bad enough; litigation-seeking courts are worse.

The plea that class actions save court time and are a blessing for worthy little litigants is facile. Many of the claims would never be brought, or desired, without the class action device. Worthy little litigants who do wish to sue are quite well served by the less inflammatory "opt in" scheme, with less pressure from learned attorneys like Mr Nigel Pitt-Bull of Argy Bargy and Associates. As for alleged economies, many class actions become so complex and cumbersome that savings are problematic, to say the least. Still, whatever one thinks of the policy or ethics of class actions, they are certainly a great selling point for the Federal Court. It may need a little extra business while the cross-vesting confusion is sorted out.

"Melbourne Gas Disaster" was the first headline. "A Million Sue Esso for a Billion" was the next. Victoria's 1.2 million domestic consumers are part of the action unless they opt out. Messrs Slater & Gordon, Maurice Blackburn and Harry Nowicki & Co pegged out rich

deposits of legal ore for people who had never heard of those firms, and who may not all be grateful for their deep social concern. Esso complained that the solicitors were trying to corner the market in gaseous grievances; after all (it argued) the condign punishment of restrictive trade practices usually has high priority in the Federal Court. However, Merkel J is allowing Slaters and Blackburns to run in tandem. That is their reward for being off the mark within four days of the Longford explosion; poor Nowicki & Co left the blocks fully 24 hours later. So a huge unwieldy action has begun its stately progress, with excellent prospects of attracting much "go away money" (minus creative legal costs) in the coming by-and-by.

In February there was a volley of tummy rumbles after a school break-up dinner at a Brisbane hotel. Without the Federal Court's class action rules there would probably have been a slight rise in sales of Dexsal and possibly a few claims in the magistrates' court. But on receipt of papers from the Federal Court the hotel decided that "go away" money was the better part of valour. Even so, the organising lawyer complained to the waiting media that "a lot of judges still do not support the concept of class actions. There is no doubt they are beneficial to society".

The Federal Court's rules fertilise the already fecund field of applications for judicial review by immigrants with dubious legal tenure. Some of Mr Ruddock's complaints have already been noted. Last month he added that they "tout for cases in the ethnic press", particularly in "communities" with a high proportion of members hungry for valid visas.

In a recent issue of the *Australian Law Journal* Justice Peter Young observed that class actions enable lawyers to prosper by pursuing trivial grievances when most members of the class would never think of suing on their own. The position changed for the worse when the Federal Court's charter was "altered to accommodate [class actions], and to a degree to encourage them". The opt-out system has produced "a class of active solicitors and others who will promote class actions not just for the good of the consumers, but doubtless for the considerable fees involved".

Young sees an urgent need for supervision of class-action promoters and control of their fees. The popular line is that class actions are "with it" and provide the perfect answer to "rip-offs" by big business. But the very companies at which class action politics are aimed can turn the process to their own advantage:

"Under the 'opt out' system that applies in the Federal Court, they can cap their liability ... They settle, the plaintiffs' solicitors collect their fees and everyone is happy. However, great stress is placed on the person who has a claim because he or she needs to assess the position fairly quickly ... and decide whether to trust the promoters of the class action or mount their own proceedings".

In class actions, lubricated by a free-for-all in lawyers' advertising, the limits are being pushed by law firms with high financial incentives and low opportunity costs.

The cross-vesting imbroglio

In Brisbane last year I noted that cross-vesting legislation only became necessary when two new federal courts were created and rapidly expanded. I added that the constitutional validity of cross-vesting "is now in the balance after an equal division of opinion in the High Court this year". This was a reference to *Gould v. Brown*, in which the Brennan court divided 3-all.

Three weeks ago, in a collection of appeals that I shall simply call *Wakim*, the High Court, by a majority of 6 to 1, invalidated the cross-vesting arrangements – in so far as they confer

State jurisdiction on the Federal and Family Courts. While the Constitution has always allowed State courts to be given federal jurisdiction, it does not authorise traffic in the other direction. (The reason, I suspect, is that the authors of the Constitution neither expected nor intended federal tribunals to eclipse the Supreme Courts.)

Gaudron J went along with the *Wakim* majority after an elaborate complaint about submitting to "the will of men long since dead". The inexorable logic of her view does not seem to have occurred to her Honour. If the dead and their cultural legacy must be silenced forever, it follows that the only acceptable Constitution is one that is changeable at any time by a simple vote of Parliament (or a 4-3 division in the High Court). But if consistency still has any place in post-modern jurisprudence, what would Mary Gaudron and her fellow Bill of Rights enthusiasts say if *their* will could never be constitutionally "entrenched"?

Kirby J, alone in dissent, deplored the prospect of laws changing as High Court judges come and go. For what purpose, then, did the ailing Keating government, in the nick of Kirby's and its own time, place him on the High Court? The complaint ill befits the Kirby image. However, if it heralds a retreat from judicial activism, for that relief much thanks.

Will *Wakim* reverse the centralisation of Australian justice? Probably not; indeed, *Wakim* could even intensify it, if the politicians' first reactions to the decision are any guide. Media reports have raised spectres of arid demarcation disputes and actions between *de factos* split between State and federal courts. High-flying business lawyers who have developed a *rapport* with the Federal Court do not want to return to "old fashioned" State courts.

In such an atmosphere no politician is likely to say anything in favour of *Wakim*. Even around the parish pump, when it's a contest between votes and "State rights", the latter will come in second every time. No one mentions that, if the State courts still administered federal law generally, as they did for 80 years, no serious difficulties would arise. There would be an occasional question of whether to sue in one State or another, but there is nothing in *Wakim* to prevent cross-vesting *among the States*. It was the explosion of federal courts that created severe jurisdictional problems. Chief Justice after Chief Justice issued warnings,[8] but Canberra knew best. When it became just too obvious that this presumption was unsound, Canberra came up with cross-vesting as a perfect solution. Cross-vesting would solve everything and, incidentally, federal courts would be better off than ever. All that Canberra has to do now is to find a solution to the problem created by its solution to an earlier problem of its own making!

As a stop-gap measure the States will pass laws "deeming" past federal decisions affected by *Wakim* to be decisions of their own courts. It is a moot point whether this will be legally effective, but future arrangements are matters of even greater complexity.

Ironically, the centralists may emerge as the popular heroes and beneficiaries of the cross-vesting disaster. They can blame it on the diversity of the States, with not a word about the effects of their little "tidying up" exercise in 1975-76. They might carry a referendum to redistribute judicial powers to the centre. Despite the modest record of constitutional referenda, this one might succeed; the "Yes" case would be the easier to simplify and popularise, and it is doubtful whether a major party would see any profit in standing in the way.

Another possibility is to persuade the States to refer power to the Commonwealth under s.51 (xxxvii) of the Constitution. This would be cheaper and perhaps quicker than a referendum, but popular sentiment might be more difficult to engage. A third possibility (so far as company law cases are concerned) is legislation under s.51(xx) of the Constitution –

the corporations power, still a sleeping giant.

What else? Several years ago there was a proposal for some form of combined Supreme Court, staffed by judges nominated by all the States, but it came to nothing. I suspect that in the short term, at least, the Federal Court will use its "accrued jurisdiction" device more self-indulgently than ever. There is support for that tactic in *Wakim* itself. However, one wonders how federal judges can validly do for themselves the very thing that the Commonwealth Parliament cannot openly do, namely give those judges State jurisdiction.

There is no return to the Arcadian simplicity of the High Court and eight State and Territory Supreme Courts with full federal and State jurisdiction. One hundred federal judges are now very much with us, and no government department, tribunal or anti-discrimination bureau, once imposed upon the nation, is likely to disappear. "Diversity" and "choice" are such fashionable buzz-words these days, but they do not include democratic devolution or a greater measure of local autonomy. The real question is whether the State courts will retain what *Wakim* has returned to them, or whether adjudication by remote control will intensify.

A desirable re-arrangement might look something like this:

1. Confine the Federal and Family Courts to Commonwealth law (minus native title) – no "accrued jurisdiction", and no other devices for poaching State jurisdiction. All matters not based on a Commonwealth statute would be matters for the State courts. Bits and pieces of family law not yet covered by the Family Law Act could be the subject of a modest reference of State powers. Re-invest State magistrates with significant "family" jurisdiction, and let all governments consider a gradual wind-down of the central Family Court in favour of the WA model – a State Court, with State-appointed judges administering the Commonwealth Act.

2. Re-invest State courts with federal jurisdiction unless there is a strong and special case for confining select parts to the federal courts – the Family Law Act and Commonwealth industrial law readily come to mind.

3. Where both State and federal courts have jurisdiction, let the litigant choose. If the Federal Court really offers a better service, then so be it. But if points (1) and (2) were adopted, the size and hence the appetite of the Federal Court should be smaller. Jurisdiction-splitting would not be necessary, because in this scheme disputes involving federal as well as State claims would be clearly within the competence of the State courts.

If the State courts do manage to keep what *Wakim* has returned to them they will need more resources – another reason, unfortunately, for State politicians to favour the centralist cause. Perhaps some judges could be recruited from a scaled-down Federal Court, using an advanced ballet step known as the Reverse Arabesque. (Quite a few State judges with good Canberra connections have executed lateral arabesques to the Federal Court, whether for lighter case loads, better perquisites, an escape from criminal trials or a better chance of ascension to the High Court.)

However, the decentralising effect of *Wakim* can easily be exaggerated. It relates mainly to company law, and according to the ALRCs 1998 survey, company law cases comprise only about 12 per cent of Federal Court business, and by no means all of them will be removed. *Wakim* removes cases from the federal arena only when the cross-vesting legislation is the sole reason for their presence there. *Wakim* does not touch the "accrued jurisdiction" which has absorbed so many State matters. If lawyers can plausibly tack a State claim to a "pure" federal claim (usually a section of the all-pervasive *Trade Practices Act*), then a federal court can still handle both of them. The recent Federal Court award of $28.5 million against

one of the Gutnick companies was based on accrued jurisdiction, not on cross-vesting. As things stand, the large remainder of Federal and Family Court jurisdiction can be augmented by more grants of "pure" federal power, or by the imaginative use of "accrued" jurisdiction. Law, like other gaseous substances, is capable of almost infinite expansion.

A wrinkle in the Mutual Recognition Scheme

In 1992, under s.51(xxxvii) of the Constitution, the States gave the Commonwealth power to legislate "for the recognition within each State ... of regulatory standards adopted elsewhere in Australia regarding goods and occupations". The term "occupation" includes the professions of medicine, law, dentistry, and so on. Thus someone who is registered as a medical practitioner in Victoria is *ipso facto* entitled to registration in Queensland. In the late twentieth Century this is reasonable; it put an end to some indefensible "closed shops", such as the rule that only barristers resident in Queensland could appear in Queensland courts.

But the mutual recognition Acts include a little-known and less commendable provision that removes disciplinary matters from well-qualified State authorities to a federal sub-court, the Administrative Appeals Tribunal. It matters not that the State authority combines local knowledge with obvious legal and professional expertise. In New South Wales, for example, appeals by doctors normally go to the Medical Tribunal. It is chaired by a District Court judge assisted by medical assessors. In Queensland the Medical Assessment Tribunal is similarly composed, save that a Supreme Court judge presides. Lawyers subject to discipline normally have an appeal on the merits to their Supreme Court.

However, if a "mutually recognised" person is disciplined in his home State, and another State then applies similar restrictions (as it is entitled to do), the appeal against that decision suddenly becomes a federal case for the AAT, remote from the profession and the community concerned. This covert piece of centralisation is ripe for review.

Conclusions

The greater the centralisation of the judiciary, the more Australia will be ruled by a branch of government chosen obscurely and remotely, while opportunities to monitor unsuitable appointments are much reduced. A centralised judiciary is even more prone to undue remoteness than a central legislature. At least our legislative masters represent localities (areas considerably smaller than most States), and they are elected by the people who live there (at any rate when their seats are not so safe that they are really elected by their party pre-selection committee).

Federal and Family Court appointments descend from the Canberra blue, and people with better local knowledge could often make wiser choices. There are at least two federal judges who were whisked from Canberra backrooms to the bench with little no experience of practice, even at minor levels. Others have served apprenticeships on tribunals that are long on politics and short on law, and where (as a High Court judge has wittily observed) the main qualification is the possession of the "right" bias. An obscure appointment to a tribunal is now a stock method of beginning to make a *protégé* a judge when an immediate appointment as such would simply not be credible. But membership of a social engineering tribunal should be a disqualification from, not a qualification for judicial appointment.

One interesting federal appointment (via a federal tribunal and a token period of practice) favoured a junior academic from a new law school distinguished by armchair radicalism and dubious professional training. Similar (but less extreme) things can happen in the States, but the remoteness of federal patronage makes them easier to perpetrate, and harder

to discourage in future. Political patronage in the early years of a new and rapidly expanding court is crucial because, as time passes, and the institution is stacked with long-term incumbents, opportunities to appoint become fewer and less frequent. One tightly-controlled political party had a monopoly of federal judicial posts for thirteen years; three quarters of the present Federal Court judges were chosen in that time.

A judicial charter featuring such mile-wide concepts as 'monopolisation", "deceptive or misleading" conduct, "fair access to infrastructure", "native title", and second-guessing the government under the guise of judicial review politicises courts that are relatively new. Judicial and extra-judicial statements by federal judges frequently ignore the standards of judicial restraint that are observed by members of our traditional (State) courts. Last year, in *Two Decades of the Federal Court*, I offered a *pot-pourri* of unjudicial and injudicious statements by an array of federal judges. The list continues. Justice Jane Mathews moved quietly through two grades of a State judiciary to the Federal Court, and conducted a very expensive Hindmarsh Inquiry Mark II until the High Court decided that it was an unsuitable diversion for a federal judge. Late last year she joined Alistair Nicholson in strident criticism of the Government.

Mathews' *bête noire* is a proposed merger of several special-purpose tribunals with the Administrative Appeals Tribunal, of which she is a member – one little "tidying up operation" that did *not* appeal to Canberra's judiciary. Wearing her AAT helmet, Mathews described the relevant committee as an "unlikely lot of bedfellows if ever there was one". She added that "the process had been commandeered by the head of the Prime Minister's [department], a gentleman not particularly sympathetic to ... judicial review". (But judicial review does not occur in the AAT.) The Veterans Affairs Tribunal was exempt, and "the explanation for [that was] obvious; the veterans' affairs organisations constitute such a powerful lobby that they succeeded in persuading the government to maintain the status quo for their own". A trifle unnecessarily, the irate judge and tribunalist added: "I have been vociferous about this matter since the proposal emerged".[9]

Mathews' colleague Goldberg J, in an action against a Brisbane legal firm, saw fit to cast aspersions on past professional conduct of Justice Ian Callinan, a recent and, so it seems, politically incorrect appointment to the High Court. Subsequently, these modern Goldberg Variations, distinctly less pleasing than those of J S Bach, had to be disowned by a court of appeal as unnecessary, irrelevant, and unfair to a man who was not even a party to the proceedings in question.

Happily there are excellent judges who still favour judicial restraint. Recently Justice Bruce McPherson, chairman of a national judicial conference and a member of the Queensland Court of Appeal, opined that governments are increasingly abusing their power over judicial appointments for short term political purposes:

"It's getting worse. It's becoming apparent that people are being appointed because they are friends, possibly even political allies. ... If it becomes widespread you will end up with a bench that is not worth much and it will shake public confidence".

McPherson is not given to overstatement, and he is no publicity hound. When he says "it's becoming apparent", he is probably referring to a process well advanced.

When government creates large and novel courts the perception of an executive-minded judiciary arises. The Federal Court recently decided that, when company law requires "reasonable assistance" to an investigator, it is unreasonable to claim privilege against self-incrimination.[10] In 1989[11] and again in 1995 it found by tortuous reasoning that tax

inspectors can override that privilege. The legislation did not obviously say so, but despite an old rule that laws abrogating basic common law rights must do so plainly, a circular sent to MPs before they rubber-stamped the Act served to give the Executive a win. (The circular, let it be said, was more honest than the Act.) If politicians and public servants are not prepared to abrogate privilege openly, should judges complete the agenda?

Observations of an Associate to a Federal Court judge are interesting. He was on the judge's staff before they moved across from a State Supreme Court:

"The judge got an unpleasant surprise. The Federal Court atmosphere is very 'public service'. There's a hierarchy of registrars answerable to the Attorney-General's Department in Canberra. There's none of the independence of judges from administrators that you still have in the Supreme Court".

Do not take at face value any and every assertion that a centralised court system is more efficient. Efficiency and community service do not always coincide. But if efficiency is all that matters, it may be mentioned that we have had ridiculous indecision in the Federal Court on the narrow technical question of whether professional privilege under the Commonwealth *Evidence Act* applies to the pre-trial process of "discovery", or only at the final hearing. And on a broader canvas, is it efficient to have a nominal Chief Judge in Melbourne or Sydney, with forty-odd others scattered from Brisbane to Perth? Is it efficient to have appeals to three Federal Court judges chosen *ad hoc*, while several State courts have specialist Courts of Appeal?

With bated breath we await a new Preamble to the Constitution. The idea, it seems, is to have the constitutional book judged in future by its cover. In February Sir Ronald Wilson declared that:

"Any preamble must, in terms agreed to by indigenous leaders beforehand, not only acknowledge prior occupation but also subsequent dispossession, to be followed by an appropriate expression of regret and an assurance of acceptance".

Heaven knows, trade practices, immigration and native title are brews that are heady enough. There will be no holding the central judiciary if we have a Preamble saturated with "feelgood" phrases to carve the 1970s *zeitgeist* in stone.

Endnotes:

. For a valuable insight into the current tertiary education industry, see Lewis Carroll's *Alice in Wonderland* on the Caucus Race.

2. *The Australian,* 19-20 December, 1998, *'Tide of History' Sinks Land Claim*.
3. *Courier Mail,* 4 January, 1999: *Tighter Rules for Sitting Fees*.
4. But subject to review by prerogative writ, unlike any State Supreme Court.
5. *The Australian,* 1 April, 1999: *Family Court Up for Discussion.*
6. *Courier Mail,* 26 October, 1998: *Bitter Spat Threatens Family Court.*
7. *The Sydney Morning Herald,* 9 April, 1999.
8. See L Street, *The Consequences of a Dual System of State and Federal Courts* (1978), 52 *Australian Law Journal* 434; W B Campbell, *The Relationship between the Federal Court and the Supreme Courts of the States* (1979), 11 *University of Queensland Law Journal* 3.
9. *The Australian Financial Review,* 30 October, 1998.
10. *Australian Securities Commission v. Kutzner* (1997) 16 ACLC 182.
11. *Stergis v. Federal Commissioner of Taxation* (1989) 89 ATC 4442.