Launch of the Fourth Edition of
Cowen and Zines's Federal Jurisdiction in Australia

Chief Justice Robert French AC

10 November 2016, Sydney

Chief Justice Allsop, Sir Anthony Mason, Geoffrey Lindell and his family, your Honours, ladies and gentlemen: I am grateful for the opportunity to launch this Fourth Edition of *Cowen and Zines's Federal Jurisdiction in Australia* which has been revised, extended and updated by Geoffrey Lindell.

Earlier this year I was invited to Cardiff by a Welsh Public Law Group of whom Lord Chief Justice Thomas is President to address it on the topic of federalism. There is a strong interest in that topic in Wales which is the beneficiary of a new tranche of devolution legislation which purports to protect, if not entrench, its parliamentary system and its legislative powers. While there I was asked by a Welsh legal officer attached to the local administration for my thoughts on proposals for a separate Welsh judicial system along the lines of those in Scotland and Northern Ireland. I began my response to her inquiry with two words 'federal jurisdiction'. I made the obvious point, which Geoffrey Lindell makes at p 451 of the book, about the shortcomings of a dual system of courts. The shortcomings to which he points, of course, provide much work for lawyers. Indeed a leading proponent of a separate Welsh judicial system, former High Court judge Sir Roderick Evans QC, said last year that '[a] Welsh jurisdiction would be a significant economic driver which would create new jobs and career structures in Wales.'

It is appropriate that I mention Wales because Cardiff is only about 32 kilometres from Merthyr Tydfil, the birth place of Sir Samuel Griffith, one of the architects of the Australian Constitution including its system of State and federal jurisdictions. That system is now into its second century. To change it fundamentally would require a significant constitutional amendment. That is unlikely to happen in the foreseeable future. In the meantime, many of us have learned to live with and even conceive a strange kind of love for federal jurisdiction, albeit it may be the kind of love of which only lawyers are capable.

All of us who know Geoffrey Lindell will know that his work on the Fourth Edition of *Cowen and Zines's Federal Jurisdiction in Australia* was not a labour of love. It was hard labour reflecting his life-long commitment to excellence and completeness in his academic writings. It updates, deepens and extends the scope of what has come to be regarded as the leading text on the topic of federal jurisdiction. Its previous authors, Zelman Cowen and Leslie Zines, were as Sir Anthony Mason says in his Preface 'two of Australia's eminent and venerated legal scholars'. In Geoffrey Lindell they have found a worthy successor.

I am particularly delighted to be able to launch this book because it was a question of federal jurisdiction that first led me to Geoffrey Lindell's door in 1982. My law firm was engaged by the purchaser of a wine bar in West Perth who complained of having been misled as to its historical performance by the vendors. We commenced proceedings in the Federal Court on the purchaser's behalf. The facts were complex. Even after all these years, reading the headnote is not a pleasant exercise. There were claims for damages for misleading or deceptive conduct under the *Trade Practices Act 1974* (Cth) against a corporation and individuals, and claims for damages for deceit, negligent misstatement, breach of contract and breach of fiduciary duty.

An objection to jurisdiction in the Federal Court was largely dismissed by Toohey J. The respondents appealed to the Full Court of the Federal Court but the Attorney-General of the Commonwealth applied, under s 40 of the *Judiciary Act 1903* (Cth), to remove the matter into the High Court so far as it concerned the statutory cause of action for damages under the *Trade Practices Act* in its application to natural persons.

This sudden elevation of the profile of the case led me to seek some assistance from an academic friend at the University of Western Australia, the late Peter Johnston. However, Peter had already been engaged by the respondents. He suggested that Geoffrey Lindell at the Australian National University might be interested in getting involved. I rang Geoffrey. I offered him $500 for his assistance on the basis that I would need the rest of the modest sum on account to get to and from Canberra and find some accommodation. He joined me in the endeavour with enthusiasm. In fact, his first appearance in the High Court was on the removal application in which he succeeded in obtaining an order that the entire cause be removed. The expanded removal picked up questions concerning the extent to which federal jurisdiction would allow the Federal Court to entertain our array of non-federal claims.

The case was *Fencott v Muller*,[1] 103 volumes of the Commonwealth Law Reports ago. Among other things the High Court adopted an expansive view of federal jurisdiction and specifically that aspect of it which came to be known as accrued jurisdiction. The outcome is described in the book at p 190 in the discussion of accrued jurisdiction:

> The principles were elaborated and, to a degree, clarified in *Fencott v Muller* where a majority ... in a joint judgment went beyond *Philip Morris* in broadening the jurisdiction of the Federal Court in respect of non-federal claims. They took the ratio of the earlier case to be that a matter arising under federal law may include another cause of action arising under another law 'provided it is attached to and not severable from the former claim'. They regarded the test of 'common transactions or facts' as a sound guide for determining whether a cause of action under common law or State law was an inseverable part of the 'matter' arising under federal law.[2]

Geoffrey and I have had a long association since that time including a period during which we were both office bearers of the Australian Association of Constitutional Law. I have the highest regard for his scholarship and his unremitting commitment to getting things just right in his writing, which was reflected in the very long weekend we spent drafting our three page outline of submissions to the High Court before the hearing in Canberra.

He still seems to harbour fond memories of *Fencott v Muller*. At p 385 of the book he refers to a possibility, advanced in my judgment in *Momcilovic v The Queen*[3] in 2011, that in the exercise by a State court of federal diversity jurisdiction, the relevant State law applies of its own force without the mediation of ss 79 or 80 of the *Judiciary Act*. That possibility, as he noted, may also encompass State law claims in the exercise of accrued jurisdiction. He describes it as a possibility 'which is at the very least consistent with, if not even supported by, the description of accrued claims quoted with approval in the influential case of *Fencott v Muller* as involving the enforcement of "rights which derive from a non-federal source".'

The general issue is highly topical. It arises directly in a case on appeal from the Court of Appeal in Western Australia to the High Court in which special leave was granted last month. A State criminal prosecution involved the exercise of federal diversity jurisdiction, as the accused was resident outside the State. The accused said that by operation

---

1 (1983) 152 CLR 570.

2 Geoffrey Lindell, *Cowen and Zines's Federal Jurisdiction in Australia* (Federation Press, 4th ed, 2016).

3 (2011) 245 CLR 1.

of the *Judiciary Act* the State law creating the offence of which he was charged was picked up as a federal law which attracted the application of s 80 of the Constitution and thus requiring that his conviction be based on a unanimous jury verdict. He was convicted on a majority verdict. The Court of Appeal found that the State law applied of its own force and that s 80 of the Constitution was not engaged. I will say nothing more about the appeal to the High Court, although when it comes on for hearing I will have left the Court and joined Geoff on the spectators' benches. I promised myself that I will not move from those benches into the commentators' box, although Geoff may well do so and I hope he does because what he has written in this book indicates that he still has much to contribute to scholarship in this field and constitutional law generally.

As is explained in its Preface, the fourth edition retains much of what appeared in its predecessors subject to the extensive updating and modification which has been made necessary by developments in the law since 2002. A number of new chapters have been added which significantly enhance the book as a legal resource. Chapter 1 offers an overview of the meaning and purpose of federal jurisdiction and discussion of the concept of 'the matter' which I have often thought of as the jurisprudential equivalent of a fundamental particle in physics. Despite being fundamental, many fundamental particles have been found to be splittable. So too was 'the matter' in *Abebe v Commonwealth*[4] in which, as is noted at p 128, the Court recognised the ability of the Parliament to split matters which could be dealt with by federal courts. That ability was reaffirmed in *MZXOT v Minister for Immigration and Citizenship*[5] in which legislation, introduced in 2005 to qualify the power of the High Court to remit matters under s 44 of the *Judiciary Act*, was held to be valid.

In a new Chapter 7 there is an expanded discussion of *Kable* and its sequelae and consideration of the need to clarify the scope of the so-called *Kable* principle in the future. Chapter 8, which is also new, looks to the question I have already mentioned about the law to be applied by courts exercising federal jurisdiction and the operation of ss 79 and 80 of the *Judiciary Act*. There is a new Chapter 9 which analyses the appellate jurisdiction of the High Court and its character which in the author's view is federal jurisdiction. Chapter 10, entitled 'Epilogue', offers some closing reflections on the principal developments that have occurred

---

4 (1999) 197 CLR 510.

5 (2008) 233 CLR 601.

and are likely to occur in relation to federal jurisdiction in this country and a credit and debit ledger of beneficial aspects of the current state of the law and its shortcomings.

All of the chapters take their place in a logical arrangement of topics beginning in Chapter 1 with 'The Nature, Origin and Significance of Federal Jurisdiction'. The succeeding chapters each deal with a specific subject — the original jurisdiction of the High Court, the diversity jurisdiction involving residents of different States, the federal courts, the Territory courts and the character of their jurisdiction, the investment of State courts with federal jurisdiction, the *Kable* and *Kirk* cases and their effect on legislative powers, the laws applicable in the exercise of federal jurisdiction, the appellate jurisdiction of the High Court and the Epilogue.

The text is detailed and comprehensive. It is also, in a good sense, conversational. It does not simply state the law — a rather challenging task in relation to federal jurisdiction. It sets out suggestions, possibilities and debates about unresolved issues or controversial propositions and Geoffrey's own view on the issue or proposition.

In the last chapter Geoffrey creates a kind of federal jurisdictional ledger. He lists twelve of what he calls beneficial and satisfactory outcomes followed by a page and a half of shortcomings. He begins by making the point that Sir Owen Dixon made: that the concept of a separation of federal and State jurisdictions is not itself essential to the working out of a federal system of government. All that may be accepted without any real qualification. As Dixon said:

> It would not have been beyond the wit of man to devise machinery which would have placed the courts, so to speak, upon neutral territory where they administered the whole law irrespective of its source.[6]

Nevertheless it seems to be beyond the wit of man or woman to change the system now established. However, it is fair to say that we have come a long way in the development of an integrated national judiciary. The expansive concept of the accrued jurisdiction has overcome a number of areas of difficulty.

---

[6] O Dixon, 'The Law and the Constitution' (1935) 51 *Law Quarterly Review* 590.

In his list of beneficial and satisfactory outcomes, Geoffrey Lindell includes:

1. The place of the High Court at the apex of the Australian court system following the final abolition of Privy Council appeals.

2. The acceptance of the authority of the Parliament to authorise the Court to remove matters in its jurisdiction to other courts.

3. The wide interpretation of the jurisdiction to deal with matters arising under laws made by the Parliament.

4. Mitigation of the effects of the High Court's exclusion of advisory opinions from its jurisdiction through its approach to standing.

5. Clarification of the source of the Commonwealth's liability in tort.

6. The wide scope accorded to the jurisdiction to review the actions of Commonwealth officers under s 75(v) of the Constitution.

7. The use of the removal procedure to provide a speedy resolution of constitutional proceedings.

8. The wide interpretation of statutory provisions enabling Parliament to vest federal jurisdiction in State courts.

9. The creation of important federal superior courts, namely the Federal Court and the Family Court and the widening of their jurisdictions and the expanded interpretation of the accrued jurisdiction.

10. The wide interpretation of the appellate jurisdiction of the High Court under s 73 of the Constitution and the Court's control of that jurisdiction through the special leave process and of its original jurisdiction through the remitter mechanism.

11. Clarification of the operation and interpretation of the 'gap filling' provisions of ss 79-80A of the *Judiciary Act* concerning the law applicable to the exercise of federal jurisdiction.

12. The extension of the operation of safeguards created by Chapter III to State courts and later Territory courts.

There is a debit side to the ledger, relevantly the following shortcomings:

1. The need to resolve the question whether all Territory jurisdiction has become federal jurisdiction.

2. The need to resolve the question which arises with increasing frequency of whether State tribunals are courts of the States capable of being invested with federal jurisdiction.

3. The need for a judicial compass to inform and guide future developments of the *Kable* principle.

4. The costs and delay experienced by litigants arising out of the existence of a dual system of courts. This is a matter which would no doubt benefit from some empirical research.

Our system of Federal and State jurisdictions has undoubtedly generated a complex body of law which we could do without. There have been a number of attempts over the years to propose unification or rationalisation of the system. Sir Owen Dixon proposed, in 1927, the creation of a unified system of courts which would be neither Federal nor State and which would have authority to decide legal questions brought before them regardless of the source of the rights or obligations in issue. Others have made similar suggestions. It is not necessary now to recount the history of such proposals. Much can be done through cooperative arrangements such as the use of the referral power applied in relation to corporations jurisdiction to overcome boundary problems which arise from time to time. Importantly there is an increasing sense among the members of the Australian judiciary that they are part of a national integrated judicial system, as the High Court has called it.[7] At an

[7] *Wainohu v New South Wales* (2011) 243 CLR 181, 192 [7] (French CJ and Kiefel J).

institutional level that is reflected in the evolving role of the Council of Chief Justices. There are opportunities for cooperative arrangements between intermediate appeal courts under which appeals of common interest across a number of State boundaries might be heard by the Appeal Court of one State composed of members of that Court and the courts of one or more other States and a judge of the Federal Court. The product of such cooperation might be regarded as a kind of ad hoc de facto national intermediate Court of Appeal which could be constituted from time to time as required according to protocols agreed between Chief Justices.

Wholesale constitutional reform is unlikely in the short term and might involve such an unscrambling of the federal jurisdictional omelette that its costs would outweigh its benefits.

It is comforting against that background for judges, legal practitioners and academics to be able to look to a comprehensive and detailed text which builds upon and, as Sir Anthony Mason suggests in his Foreword, surpasses the work of the author's distinguished predecessors. I am delighted to launch the fourth edition of *Cowen and Zines's Federal Jurisdiction in Australia*. I congratulate Geoffrey Lindell and the publishers, Federation Press, for bringing to the Australian judiciary and legal profession as well as the academy an important book on a matter of continuing significance to the working of our judicial system.