Federal Circuit Court – History Repeats Itself

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In the course of a long judicial life I have had few moments of what I would call "peak judicial happiness". One of those moments came to me when the jurisdiction of the Federal Magistrates Court was enlarged to enable it to hear applications for judicial review of the decisions of the Refugee Review Tribunal and the Migration Review Tribunal. Before that change the bulk of such applications were heard by single Justices of the Federal Court of Australia and on appeal by Benches of three comprising Full Courts of that Court. Many, if not most, of the applicants in the first instance hearings in the Federal Court were unrepresented and many unsuccessful applicants appealed to the Full Court of the Federal Court in the hope of a better outcome. In one year some 68% of the Full Court list related to migration appeals. When the Federal Magistrates Court assumed responsibility for hearing and determining those judicial review applications at first instance, they were able to be dealt with on appeal by single Judges of the Federal Court unless the matter warranted hearing by a Full Court. The capacity of what was then the Magistrates Court to take on that high volume and challenging jurisdiction was a vindication of the vision of those who established it. By 2003 over 50% of migration matters and 40% of family law custody and property applications were completed in the Federal Magistrates Court. Former Chief Justice Murray Gleeson observed of the Court in that year[1]:

> "…in the short time since it was created it has become even more apparent that there is a great deal of work suitable for its attention. In time it will become one of Australia's largest courts."

It is interesting to look briefly at the history of the Court. There are parallels with that of the Federal Court. The establishment of each of the courts had powerful proponents and powerful opponents. Their initial jurisdictions were relatively narrow. But, once established, each grew in reputation and in jurisdiction. The renaming of the Federal Magistrates Court as the Federal Circuit Court is more than merely cosmetic. Although predictions about institutional development are always hazardous, the future of the Federal Circuit Court as a

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[1] Murray Gleeson, "*The State of the Judicature*" (speech delivered at the 13th Commonwealth Law Conference, Melbourne, 17 April 2003).

national civil trial court exercising federal jurisdiction seems assured. As the Explanatory Memorandum for the Federal Circuit Court of Australia Legislation Amendment Bill observed, "the change of name of the Court and of its Judges better reflects their important role in the judicial system."

The Senate Legal and Constitutional Legislation Committee considered the proposed establishment of the Federal Magistrates Court in 1999. It recorded in its report that the Law Council of Australia had expressed its opposition and that of its constituent bodies, the Bar Associations and Law Societies of Australia, to the creation of the Court. Their concern was that the new court might create two separate classes of justice, a "superb" justice system for the wealthy and a "rough" justice system for the poor and legally aided. As lawyers are wont to do, the professional bodies raised a plethora of other points including problems with joint registries, the possibility of forum shopping and the inability of generalist Magistrates to cope adequately with family law matters which were seen as requiring a high level of expertise. Similar things, of course, have been said about other areas of the law including industrial law, intellectual property, human rights, native title, taxation and competition law. Each of these areas has been said, at various times, to be better serviced by specialist rather than generalist judges. Supporters of the proposed court argued that if it worked well it would provide a high quality and efficient service which would increase access to justice. Victoria Legal Aid, told the Committee that the establishment of an efficient Federal Magistracy which dealt with its business in a timely, quick and cost effective manner, could redress some of the problems of cost, slowness and inaccessibility affecting Australia's justice system. The Federal Court was concerned to avoid any administrative or other integration with the proposed new Court. The Chief Justice of the Federal Court argued that if the new court were closely connected with an existing court, it would be difficult for the new court to establish a separate culture and separate practices. In the event, the Committee recommended that the Bill to establish the Court be passed without amendment.

The idea of creating a Federal Magistracy had been around for some years before it actually happened. The Attorney-General had first announced the Government was considering the establishment of the Court in May 1996. It did not further progress until after the 1998 election and in a context of concerns about delays in the Family Court. Its establishment was formally announced as part of the 1998-1999 budget. It should have come as a surprise to no one that, once established, the Magistracy grew and its workload

expanded. In its beginnings and in its expansion, the history of this Court has to some extent mirrored the history of the Federal Court.

The creation of Federal courts has been a process which has from time to time been affected by concerns about the protection of particular sectorial interests and their effects upon the role and status of state courts. The first attempt to create a statutory federal court brought into the existence the Commonwealth Court of Conciliation and Arbitration in 1904. Its President was one of the justices of the High Court who was empowered to appoint any justice of the High Court or a judge of a State Supreme Court to be his deputy. Although that Court was subjected to some constitutional challenges, it endured until the High Court held, in the *Boilermakers' Case*, that its combination of arbitral and judicial functions offended against the separation of judicial and executive powers mandated by Chapter III of the Constitution[2]. As a result of that decision the Commonwealth Court of Conciliation and Arbitration was split into two institutions: one of them the Commonwealth Industrial Court established in 1956 as a purely judicial body and the other, the Conciliation and Arbitration Commission as an arbitral body. The Commonwealth Industrial Court was renamed the Australian Industrial Court in 1973.

When the Federal Court was created in 1976 it acquired the jurisdiction of the Australian Industrial Court which was to be abolished. It also took over the functions of the Federal Court of Bankruptcy which was abolished after the last judge of that Court, Justice Sweeney, retired in 1995 from the Federal Court. With the ebb and flow of political fortunes, the Industrial Relations Court of Australia was created in 1993 to assume, as a separate court, the industrial relations jurisdiction of the Federal Court. The tide went in, the tide went out. In 1996 the jurisdiction of the Industrial Relations Court was reinvested in the Federal Court. The Federal Circuit Court also exercises industrial jurisdiction.

That little bit of history points to the political sensitivities that can attach to the creation of specialist courts particularly, but not only, in the highly charged area of industrial relations. When the Industrial Relations Court of Australia was set up in 1993 the then Opposition Leader, John Howard, described it as "unnecessary" and said:

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2 *R v Kirby: Ex parte Boilermakers Society of Australia* (1956) 94 CLR 254.

> "Specialist Courts are always a little suspect because the concern is that they will do special deals for special groups."

As Darryl Williams prophetically pointed out at the time, small specialist courts created to serve particular social purposes could be vulnerable to abolition following a change of government. They had a tendency to develop a limited outlook which would not affect courts of broader jurisdiction.

Where a court is given, from the outset, or can move, as the Federal Circuit Court has, to a broad jurisdiction, it becomes less vulnerable to the changing tides of political fortune and becomes a convenient repository for additional jurisdiction. As the well-known statement of Jesus, recorded in the Gospel of Matthew, says:

> "For whosoever hath, to him shall be given, and he shall have more abundance, but whosoever hath not, from him shall be taken away even that he hath."

The history of the Federal Court is instructive in this respect. A proposal for the creation of a national federal court was first announced in February 1963 when the then Solicitor-General for the Commonwealth informed the 13th Legal Convention that the Attorney-General, Sir Garfield Barwick, had been authorised by Cabinet to design a new federal court. The idea of the court was to ease the burden on the High Court. Criticism followed immediately. Francis Burt QC who was the leader of the Western Australian Bar and later became Chief Justice of Western Australia, predicted that a two channel system of State and Federal courts would breed "complexity and black motor cars", it would seriously reduce the status of State Supreme Courts and accentuate an imbalance in the Australian judicial system under which too much inferior work was being done by superior courts. Similar comments were made from time to time by other leading State Judges. Support for the proposal came from Gough Whitlam QC who was then Deputy Leader of the Opposition who argued that on principle federal judges should interpret and apply federal laws. Sir Garfield Barwick supported the establishment of a national federal court and continued to do so even after his appointment as Chief Justice of the High Court although he predicted, wrongly, that the jurisdiction of the Federal Court would as a rule, be limited to special matters.

In 1967 one of Barwick's successors as Attorney-General, Nigel Bowen, later to become first Chief Judge of the Federal Court, made a ministerial statement about a proposed Commonwealth superior court. It was to be a relatively small court of quality and standing. Its initial jurisdiction was to be part of the original jurisdiction of the High Court. Wider jurisdiction could be conferred if experience demonstrated that it were desirable. The government introduced a Commonwealth Superior Court Bill in November 1968. It was to incorporate the Commonwealth Industrial Court and the Federal Bankruptcy Court. In the event, the Bill was allowed to lapse. In 1972, the then Attorney-General, Senator Ivor Greenwood, announced that the project was being abandoned. The government had decided to confer federal jurisdiction on State Supreme Courts and the Supreme Courts of mainland Territories in certain additional matters in respect of which the High Court was exercising federal jurisdiction.

The tide had ebbed but then it flowed in again. Following a change of government in 1972, the new Attorney-General, Senator Lionel Murphy, introduced another Superior Court of Australia Bill. That Bill was defeated in the Senate. Another change of government followed in 1975 and another Attorney-General, RJ Ellicott QC, introduced a Federal Court of Australia Bill into the Parliament in October 1976. The stated purpose of the new court was to put the existing Federal Court system on a more rational basis and to relieve the High Court of some of the workload it bore in matters of federal and territory law. There is a parallel here with the stated purpose of the creation of the Magistrates Court, nearly 25 years later, which was to relieve the workloads of the Federal and Family Court. Mr Ellicott said that the government believed that only where there were special policy or perhaps historical reasons for doing so, should original federal jurisdiction be vested in the Federal Court. Matters such as industrial law, bankruptcy, trade practices and judicial review of administrative decisions answered those criteria. In the end the Federal Court came into existence in 1976. It is unnecessary to recount to this audience the history of its growth and expansion through the conferral over the years of additional statutory jurisdictions involving also, as they did, the accrued jurisdiction to deal with claims arising at common law or under the laws of the States and Territories if they were part of the federal matter in which the Court had jurisdiction. A particularly significant area of jurisdiction was that conferred under Part 5 of the *Trade Practices Act* which, by creating a cause of action for misleading or deceptive conduct, created a jurisdiction to deal with a very wide range of commercial

disputes which would previously have been dealt with in State courts through common law actions in contract and tort. As a result the Federal Court, in many respects, resembles a court of general jurisdiction save for criminal jurisdiction which is presently limited to cartel matters.

The history of the Federal Magistrates Court has been analogous to that of the Federal Court and its rebadging as the Federal Circuit Court of Australia marks its coming to maturity as a significant national institution. Its jurisdiction has grown over the years since it first came into existence. Predictions in this area are not particularly reliable. However, my prediction, for what it is worth, is that the Court will evolve into a major national trial court at least in civil jurisdiction.

The Court, like all courts, faces some major challenges in relation to ongoing funding arrangements and the working out of its institutional relationship with the Family Court. However, the future of the Court as an established part of the Australian national judicial system seems as secure as that of the other major elements of the national federal judicature.

One interesting question which will greatly affect the future shape of this Court and its infrastructure is whether it will be given some criminal jurisdiction in relation to offenses against laws of the Commonwealth. The further question is whether such jurisdiction would extend to indictable offenses. That would require major infrastructure changes necessary to accommodate the jury trials mandated by s 80 of the Constitution. Whatever direction its development takes, I am sure it has an interesting future.

I thank you for your invitation to join you tonight and for the opportunity to address you and wish the Court well.