FEDERAL MAGISTRATES' CONFERENCE

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THE FEDERAL JUDICIARY IN AUSTRALIA

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I am delighted to have an opportunity to join you at your Conference. It seems to me that I may be able to make a contribution by pointing out some features of the history of the Federal judiciary in Australia, of which your recently created Court is a part.

The defining feature, in fact the reason for existence, of the Australian Constitution, is Federalism. The constitutional system in Australia as it was before Federalism formed the historical context in which the Federal judiciary was created.

Before Federation, Australia consisted of a number of British colonies which had achieved different levels of self-government. Each colony had its own Supreme Court, and other courts, and a legal profession regulated by the Supreme Court. To this day, the Australian legal profession is organised along State lines, and legal

practitioners are officers of a State or Territory Supreme Court. It was the colonial, later State, Supreme Courts that admitted lawyers to practice, regulated matters relating to their qualifications, and exercised the ultimate power of taking away their right to practice. The ultimate sanction in disciplinary proceedings against the lawyer is still referred to as striking off the roll, "the roll" in question being the roll of practitioners maintained by a State or Territory Supreme Court. Under Federal legislation, it is by virtue of their status as accredited State practitioners that lawyers have a right to appear in a federal court.

In most colonies, before Federation, there was a three-tier court system, comprising a Supreme Court, District or County Courts, and Magistrates Courts. Typically, the Supreme Court consisted of a Chief Justice and, by modern standards, a small number of other judges. The District or County Courts were created during the 19th century for the purpose of decentralisation of the administration of justice, and in an attempt to combat those two universal and perennial problems of justice: cost and delay.

Colonial magistrates, from the earliest days of European settlement, exercised administrative as well as judicial functions, and, during the 19th century, and as State magistrates for most of the 20th century, were part of the colonial or State public service. In New South Wales, for example, during the 19th century, and for a large part of the 20th century, appointment to the magistracy was a

career path in the public service. Until 1955, New South Wales magistrates did not have to be qualified to practise as legal practitioners. Their terms and conditions of service were like those of other public servants, and they were subject to performance review, which affected the level of their remuneration, by the Attorney General's Department. It was not until 1986, with the enactment of the *Judicial Officers Act* 1986 (NSW), that the New South Wales magistracy was taken out of the executive branch of government and located firmly within the judicial branch. Insufficient acknowledgement has been made of the role of Mr Clarrie Briese, then Chief Stipendiary Magistrate, in securing this historic change in the role and status of magistrates.

At the time of Federation, and for many years thereafter, appeals lay from Australian courts, in civil and criminal matters, to the Privy Council in London. It was the Privy Council that was at the apex of the Australian judicial system.

At the end of the 19th century there were only three models of Federalism to which the framers of our Constitution could look: Switzerland, Canada and the United States of America. The Swiss model provided no guidance. The Canadian model was rejected because it gave more power to the central government than would have been accepted in some of the Australian colonies. In particular, the division of legislative power in Canada gave enumerated heads of power to the Provinces and residual power to the Federal

Government. Furthermore, at the time, the Federal Government had a veto over provincial legislation. It was the United States model that attracted the framers of the Australian Constitution. In that model, enumerated powers were given to the central government, and residual powers were left with the States. State judges were appointed by the States.

The United States Constitution reflected a more rigid separation of powers than existed in the United Kingdom, or in the Australian colonies. Article I dealt with the legislature. Article II dealt with the executive. Article III dealt with the judicature. That model was followed in Australia: Chapter I of our Constitution dealing with the Parliament, Chapter II dealing with the Executive Government; and Chapter III dealing with the Judicature. Of course, there were significant differences from the United States. Australia adhered to the Westminster form of responsible government, under which executive power was exercised by ministers who were members of the Parliament, and responsible to it. Furthermore, Australia was to be a Federal union under the Crown.

When Alfred Deakin, in 1902, introduced the Judiciary Bill into the Federal Parliament, providing for the creation of the High Court of Australia, he explained to Parliament the distinctive and crucial role of a Federal judiciary. The agreed division of legislative and executive powers, between the States and the central authority, would inevitably give rise to disputes over the limits of those

powers. Such disputes would occur between citizens and governments, and between governments themselves. This, as he foresaw, was inevitable. It was to the Federal judiciary, and ultimately to the High Court, that there would be given the responsibility of interpreting and upholding the constitutional settlement. It was essential that the States, and the people of the Commonwealth, should have confidence in the independence of the Federal judiciary. That confidence was to be reinforced by the separateness of the judiciary from the legislature and the executive. Furthermore, the Constitution rests upon an assumption of the rule of law. All Federal power, legislation, executive, or judicial, has its source in the Constitution. The assumption that the law of the Constitution will be maintained and enforced is fundamental to the Federal structure.

Your role is defined by Chapter III of the Constitution.

Chapter III begins with section 71, which provides that the judicial power of the Commonwealth shall be vested in a Federal supreme court, to be called the High Court of Australia, and in such other Federal courts as the Parliament creates, and in such other courts as it invests that Federal jurisdiction.

The reference to other courts invested with Federal jurisdiction is a reference to a distinctively Australian expedient. For most of the 20th century, there were very few Federal judges. Most Federal

jurisdiction was exercised, and much Federal jurisdiction still is exercised, by State courts invested with Federal jurisdiction. For example, most criminal law enacted by the Federal Parliament has been, and still is, administered by State judges and magistrates. This specific provision in the Constitution for vesting State courts with Federal jurisdiction is not matched by any corresponding provision for vesting Federal courts with State jurisdiction; a matter that caused problems with some aspects of cross-vesting legislation. These problems had been foreseen, and warned against at the time of the enactment of the legislation.

Sir Owen Dixon once expressed the opinion that it was not inevitable that the Constitution would divide judicial power into Federal power and State power, along the same lines as the division made in respect of the other two branches of government. However, the division was made by the Constitution.

Until the 1970s, section 72 of the Constitution provided that Federal judges should be appointed for life. That might explain why, for most of the 20th century, the Federal Parliament was so economical in its appointment of Federal judges. Apart from the members of the High Court, and a small number of specialist jurisdictions, there were no Federal judges. Federal judicial power was mainly exercised by State courts invested with federal jurisdiction. This changed with the creation, in the 1970s, of the Federal Court and the Family Court. The Family Court, of course,

was itself a specialist jurisdiction. The primary reason for the creation of the Federal Court was to take over what had previously been the first instance or original jurisdiction of the High Court.

When the High Court was established in 1903, there was no clear, common understanding of its future role. If you look at Alfred Deakin's speech in support of the Judiciary Bill, it is obvious that there was considerable resistance, in the early days, to the creation of a permanent and separate High Court. One politician of the time remarked that Australia needed a High Court in the same way as a cart needs a fifth wheel. At the time, and for many years thereafter, it was the Privy Council in London that was the ultimate court of appeal for the Australian legal system. Deakin was able to persuade Parliament, and the public, that a separate, permanent, Federal Supreme Court was essential to the Australian Constitution. It was to be, he said, the keystone of the Federal arch.

Just as, when the High Court was created, different people had different ideas about its future, so, when the Federal Court was created, there were different views as to what its role in the future might be. The same, I believe, is true of the Federal Magistrates Court. This provides no particular cause for concern. The role of your court, like the role of the Federal Court, and that of the High Court before, will gradually evolve.

At the time of proposals to establish the Federal Court, Mr Whitlam, who was then Leader of the Opposition, made a speech at a legal conference in the course of which he said that the Federal Government should appoint the judges who interpret Federal legislation. That proposition, it might be remarked, has an obvious corollary in relation to the question of who should appoint judges who interpret State legislation. From time to time, in different contexts, proposals are put forward for the creation of a new Australia-wide court. An obvious question to be answered concerns the method of appointment of the members of any such court. The largest single body of judicial officers in Australia is the New South Wales magistracy. It is not easy, at the moment, to envisage the New South Wales Government delivering to Canberra the power to appoint New South Wales magistrates. And, consistently with the view expressed by Mr Whitlam, it is not easy to envisage the Federal Government surrendering its power to appoint the judges who interpret Federal laws.

From the point of view of your Court, the key provision of Chapter III of the Constitution is Section 77, which empowers the Federal Parliament to make laws defining the jurisdiction of any Federal court other than the High Court, with respect to any of the matters mentioned in Sections 75 and 76. Sections 75 and 76 define the original jurisdiction of the High Court.

Section 75(v) is a key provision. It confers original jurisdiction on the High Court (and potentially, therefore through Section 77, on other Federal courts) in certain kinds of proceedings against the officers of the Commonwealth. This provision is fundamental to maintenance of the rule of law, because it empowers the Federal judiciary to compel the Commonwealth executive to observe the rule of law.

Another provision of practical importance is section 76(ii) which confers jurisdiction in matters arising under laws made by the Federal Parliament.

I mentioned earlier that, at least to date, Federal criminal jurisdiction has been exercised by State courts. Section 80 of the Constitution provides that trials on indictment for offences against a law of the Commonwealth shall be by jury. This has caused some problems. In some States, nowadays, even the most serious offences can, in certain circumstances, be tried by a judge sitting alone, at least with the consent of the parties. It has been held that it is for Parliament to decide what offences should be tried summarily. The limits of Parliament's capacity to provide for summary trial of even the most serious offences are yet to be decided. Whether, in the future, the Commonwealth Parliament will change direction, and decide that Federal criminal jurisdiction should be exercised, at least to some extent, by Federal courts, is a matter that may well affect the future of your court.

Unlike State courts, Federal courts have been treated as separate from the executive for purposes of financial administration. This, I think, owes more to history than to ideology. Because there were so few Federal judges during most of the 20th century the Federal Attorney-General's Department, unlike its State counterparts, never developed a major involvement in court administration. Offering administrative autonomy to Federal courts involved no territorial loss.

The importance of the independence of the Federal judiciary, emphasised by Alfred Deakin at the time of the creation of the High Court, applies to all Federal courts, including your own.

International instruments, including the Universal Declaration on Human Rights, the International Covenant on Civil and Political Rights, and the European Convention on Human Rights, now declare that, in the determination of civil rights and obligations or criminal responsibility, all people are entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The Beijing Statement of Principles of the Independence of the Judiciary states that independence is essential to the proper exercise of the judicial function in a free society observing the rule of law.

In the State sphere, the long history of association of the magistracy with the public service gave rise to some practical

difficulties when the magistracy was taken out of the executive branch of government and placed within the judicial branch. Those difficulties will sort themselves out over time. The newly created Federal magistracy came into existence by the exercise by the Federal Parliament of a power given by Chapter III of the Constitution. Its place within the judicial branch of government is clear. It never was within the Executive branch. Parliament had a choice either to create it as a part of the Judicature, or not to create it at all.

I wish you a successful Conference.