

ARTICLES

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THE NEW STRUCTURE OF AUSTRALIAN COURTS

1. Introduction

Writing in 1959, Zelman Cowen described the law of federal jurisdiction as "technical, complicated, difficult and not infrequently absurd".¹ An almost direct casualty of this complexity was the structure of federal courts (and of State courts invested with federal jurisdiction); and the absurdities have been extended into the realm of State jurisdiction with the partial abolition of appeals to the Privy Council. Of course, in any complex society the structure of tribunals is also likely to be complex; this is not necessarily an evil if particular tribunals are given a mandate to specialize in distinct, self-contained, areas of the law. But the multiplicity of appeals, the competing notions of State and federal jurisdiction, the mystery of the *inter se* matter, made the Australian system (or rather, systems, for there are seven, excluding the federal territories) mildly reminiscent of the jurisdictional chaos of the English courts prior to the Judicature Acts of 1873 and 1875.²

As a result there has been a steady movement for reform, in various directions. High Court judges complained of the oppressive burden of original and appellate jurisdiction;³ and of the absurdity of an alternate appeal either to the High Court or the Privy Council.⁴ "States-righters" complained of the "centralism" of the High Court,⁵ and (in the smaller States) of the insularity of High Court appointments practice. Federal parliamentarians spoke of the need for the Commonwealth "to sue and be sued in its own Courts".⁶ And so the period since 1967 has seen substantial changes to the structure of superior courts in Australia, and to the law of federal jurisdiction. It is the purpose of this article to discuss the more important of those changes. Some mention will also be made of the debate about the desirability of a single hierarchy of Australian courts, neither federal nor State.

2. The Federal Court of Australia

Since the establishment of the High Court in 1903,⁷ there has been a limited number of purely federal courts. The most notable of these, of course, was the Industrial Court in its various forms. But the United States' system of wholly separate federal and State court systems was not adopted: one

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1. *Federal Jurisdiction in Australia* (1959), ix.
2. The best short account of Australian courts before the 1976 changes is Sawyer, *Australian Federalism in the Courts* (1967), chs. 3 and 4. But there is no equivalent Australian work to Jackson, *The Machinery of Justice in England* (6th ed., 1972).
3. E.g., *Moller v. Roy* (1975) 6 A.L.R. 321, 330 per Gibbs J.; *Ritter v. North Side Enterprises Ltd.* (1975) 49 A.L.J.R. 202, 204 per Gibbs, Stephen, Murphy JJ. Cf. Barwick, (1976) 50 A.L.J. 433.
4. E.g., Barwick, "The State of the Australian Judicature" (address to the 19th Australian Legal Convention, 1977), (1977) 51 A.L.J. 480; noted *id.*, 504-507.
5. For a recent complaint, Bennett, "The High Court of Australia — Wrong Turnings", (1977) 51 A.L.J. 5.
6. Senator Murphy, 58 *Parl. Debs. (Senate)*, 12th December, 1973, 2725.
7. Judiciary Act, 1903, s.4.

of the few substantial changes from the United States pattern for a judicial system was the Commonwealth Parliament's capacity to invest State courts with federal jurisdiction.⁸ This forestalled the need for any federal superior court of general jurisdiction.

However, successive Commonwealth Attorneys-General, beginning with Sir Garfield Barwick in 1964,⁹ proposed that such a court be created. Proposals to that effect were introduced into Parliament in 1967,¹⁰ 1973¹¹ and 1974,¹² but either lapsed or were defeated. In fact these Bills were not based on a single conception of a federal superior court. There were instead two distinct strands of thought. The first, represented by proposals made by Byers and Toose in 1963,¹³ and by the Labor Bills of 1973-1974, saw the problem primarily in terms of the inadequacy of the system of investing State courts with federal jurisdiction. Delays, lack of uniform interpretation or application (especially in matters of procedure, which would not in many cases reach the High Court for scrutiny¹⁴), and lack of Commonwealth administrative control over court-room facilities and the number (and perhaps appointment) of judges, were complained of.¹⁵ According to this conception, what was needed was a federal court to administer the great bulk of federal law, leaving only incidental or ancillary matters to State courts.¹⁶ As a result, there was strenuous criticism that State Supreme Courts would be reduced in status, and that the new structure would be cumbersome, expensive and productive of unnecessary jurisdictional disputes, as well as duplicating judicial facilities.¹⁷

The second approach, represented by the Barwick proposals of 1964¹⁸ and by the 1967 Bill,¹⁹ rejected the "federal courts for federal law" view, and instead emphasized the need to relieve the High Court of its burden of original jurisdiction, inherent and invested. According to this view, the Superior Court would be given co-ordinate or exclusive jurisdiction over matters previously within the High Court's original jurisdiction, as well as perhaps some specialized federal and appellate jurisdiction. The 1967 Bill adopted this view in its entirety: the Court was to be given original jurisdiction, exclusive or concurrent, over most of the matters within the High Court's original jurisdiction, and specialized jurisdiction in taxation and industrial property.²⁰ But it was to have only a very restricted appellate

8. Commonwealth of Australia Constitution, 1901-1977, s.77(iii) (hereafter referred to as "the Constitution"); Cowen, *op. cit.* (*supra*, n.1), ch. 5; Bailey, "The Federal Jurisdiction of State Courts", (1940) 2 *Res Judicatae* 109.

9. "The Australian Judicial System: The Proposed New Federal Superior Court", (1964) 1 *Fed. L.R.* 1.

10. Superior Court of Australia Bill, 1967.

11. Superior Court of Australia Bill, 1973 (No. 254 of 1973).

12. Superior Court of Australia Bill (No. 1), 1974; Superior Court of Australia Bill (No. 2), 1974.

13. "The Necessity for a New Federal Court", (1963) 36 *A.L.J.* 308.

14. *Id.*, 314. Problems of the exercise of matrimonial jurisdiction by the Master in South Australia were instanced: *id.*, 316, n.21. See now *Kotsis v. Kotsis* (1971) 122 *C.L.R.* 69; *Knight v. Knight* (1971) *id.*, 114.

15. Byers & Toose set out the arguments: *loc. cit.* (*supra*, n.13), 313-316.

16. *Id.*, 319-329.

17. *E.g.*, Burt, (1963) 36 *A.L.J.* 323-324; Editorials in (1974) 3 *Aust. Tax Rev.* 1; (1974) 12 *N.S.W. Law Soc. J.* 121; Senator Wright, 63 *Parl. Debs. (Senate)*, 26th February, 1975, 452-456. And see especially Sawyer, "Judicial Administration: The Subject and Some Applications", (1964-5) 8 *J.S.P.T.L.* 301, 311-314.

18. *Supra*, n.9.

19. Bowen, "Some Aspects of the Commonwealth Superior Court Proposal", (1967) 41 *A.L.J.* 336; Lane, "The Commonwealth Superior Court", (1969) 43 *A.L.J.* 148.

20. Editorial, (1967) 41 *A.L.J.* 69.

jurisdiction (under the [then] Commonwealth Employees' Compensation Act, 1930-1962), not even extending to appeals from Territory Supreme Courts. And matrimonial causes jurisdiction was to be retained by State Supreme Courts.

The view that prevailed in the Federal Court of Australia Act, 1976 (Cth.), clearly involved acceptance of the arguments for a restrictive rather than extensive jurisdiction of a superior court.²¹ No attempt was made to confer on the Court jurisdiction concurrent with the inherent original jurisdiction of the High Court under s.75 of the Constitution. Nor was it given any extensive jurisdiction, whether exclusive or concurrent with the invested jurisdiction of State Supreme Courts, over matters of federal law generally, such as was contemplated by the Bills of 1973-1974. Instead, the Federal Court took over from the Australian Industrial Court and the Federal Court of Bankruptcy their "functional" jurisdiction under a variety of laws. Relief for the High Court was provided, not by the assumption of original jurisdiction, but by an extensive conferral of appellate jurisdiction from Territory Supreme Courts, and from single judges of State Supreme Courts in certain matters. In relation to its appellate jurisdiction, at least, the Act quite closely reflects the Barwick proposals of 1964. The lack of original jurisdiction, on the other hand, accords more with the opponents of a federal superior court than any of its previous proponents.

However, this novel resolution of the conflict of conceptions of a superior court may well be temporary, since further jurisdiction, both original and appellate, can readily be conferred on the Federal Court (subject of course to the various constitutional restrictions); and it may be that the Court will, by a process of accretion, come to resemble the more extensive proposals rejected before 1975.²² Any such process, in the absence of a unified court structure,²³ would be undesirable, for the reasons referred to already.

(i) Original Jurisdiction

The Federal Court consists of two Divisions, Industrial and General.²⁴ Neither Division was given any substantive original jurisdiction by the Federal Court of Australia Act, 1976 itself:²⁵ this was left to be conferred by other Acts. In fact a number of such Acts were passed together with, and came into operation on the same day as, the Federal Court of Australia Act.²⁶ Their effect, briefly, is as follows.

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21. Bowen, "The Federal Court of Australia", (1977) 8 *Sydney L.R.* 285-293; Ellicott, "The Exercise of Federal Jurisdiction — A Revision of the Federal Judicial Structure", (1977) 1 *Crim. L.J.* 2; Editorial, (1977) 51 *A.L.J.* 55.
 22. *Cf.* Bowen (the first Chief Judge of the Federal Court), *loc. cit.* (*supra*, n.21), 292: "The Court . . . bears the immediate responsibility for the interpretation and enforcement of . . . Commonwealth legislation which directly regulates three major areas of regulation of the Australian community . . . [O]ne cannot regard as the sole, perhaps not even as the primary, rationale for the establishment of the Federal Court, that it is to relieve the High Court of its workload." See also Barwick, *loc. cit.* (*supra*, n.4), 491.
 23. *Infra*, p.230.
 24. Federal Court of Australia Act, 1976 (Cth.), s.14(1).
 25. *Id.*, s.19. But see ss.31 (contempt of court), 32 (jurisdiction in associated matters).
 26. *Viz.*, Federal Court of Australia (Consequential Provisions) Act, 1976; Australian Capital Territory Supreme Court Amendment Act, 1976; Northern Territory Supreme Court Amendment Act, 1976; Conciliation and Arbitration Amendment Act (No. 3), 1976; Bankruptcy Amendment Act, 1976; Patents Amendment Act, 1976; Trade Marks Amendment Act, 1976; Income Tax Assessment Amendment (Jurisdiction of Courts) Act, 1976.

The Industrial Division has to deal with the basic "industrial" jurisdiction of the Australian Industrial Court.²⁷ Except as provided by an Act, the original jurisdiction of the Industrial Division is to be exercised by a Full Court (s.20(1)(a)). The 'non-industrial' jurisdiction of that Court, on the other hand, has been transferred to the General Division of the Federal Court;²⁸ along with the jurisdiction of the Federal Court of Bankruptcy (which will continue to be exercised concurrently with State courts exercising federal bankruptcy jurisdiction).²⁹

Initially, then, the General Division of the Federal Court was given only original jurisdiction over bankruptcy, and the non-industrial jurisdiction of the Industrial Court.³⁰ Since the enactment of the Federal Court of Australia Act, 1976, it has acquired one further major jurisdiction: the review of many federal administrative decisions under the Administrative Decisions (Judicial Review) Act, 1977 (Cth.).³¹

(ii) Appellate Jurisdiction

As has already been pointed out, the significantly "new" jurisdiction of the Federal Court is its appellate jurisdiction. The appellate jurisdiction of the Court's General Division under s.24 falls into three categories. First, there is an appeal from "judgments" (which is taken to include decisions on interlocutory matters³²) of a single judge of the Court:³³ this is the only such appeal.³⁴ Secondly, and significantly, the Court becomes a general court of appeal, both in civil and criminal matters, from the Supreme Courts of the five federal territories;³⁵ although the extent of the right to appeal (or to seek special leave) is left to be determined by the relevant territorial law.³⁶ The Court's role as a territorial court of appeal will relieve the High Court of what has sometimes been a significant workload.³⁷ Finally, the Federal Court will act as the court of appeal, to the exclusion of the Full State Supreme Courts, in bankruptcy, patents, trade-marks and

27. Conciliation and Arbitration Amendment Act (No. 3), 1976, s.3.

28. Federal Court of Australia (Consequential Provisions) Act, 1976, Schedule. This jurisdiction includes "appeals" from the Administrative Appeals Tribunal; and jurisdiction under the Prices Justification Act and the Trade Practices Act.

29. Bankruptcy Amendment Act, 1976, s.4. Neither the Federal Court of Bankruptcy nor the Australian Industrial Court have been abolished. They retain jurisdiction over "proceedings the hearing of which had commenced" before 1st February, 1977 and which have not been transferred into the Federal Court: see Conciliation and Arbitration Amendment Act (No. 3), 1976, s.3; Bankruptcy Amendment Act, 1976, ss.5, 7; Federal Court of Australia (Consequential Provisions) Act, 1976, s.4. The two courts are not to be abolished until "no person holds office as a Judge" of them; after which proceedings will be transferred into the Federal Court: Conciliation and Arbitration Amendment Act (No. 3), 1976, ss.4, 5; Bankruptcy Amendment Act, 1976, ss.8, 9.

30. *Supra*, n.28.

31. See ss.3(1), 5, 8, 16. The Court's jurisdiction is exclusive of that of State courts (s.9(1)), but does not of course exclude the High Court's original jurisdiction under s.75(v) of the Constitution in relation to matters "in which a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth". Further on the Act see Whitmore & Aronson, *Review of Administrative Action* (1978), 15-20, 511-512.

32. Bowen, *loc. cit.* (*supra*, n.21), 288-289 (suggesting that appeals in interlocutory matters should lie only by leave).

33. Federal Court of Australia Act, 1976, s.24(1)(a).

34. *Id.*, s.33(2).

35. *Id.*, s.24(1)(b), (2)-(4).

36. *Id.*, s.24(4).

37. See Tables B and C in Barwick, *loc. cit.* (*supra*, n.9), 7.

taxation matters.³⁸ These appeals are the only matters in which State Supreme Courts are deprived of jurisdiction by the 1976 legislation. However, the provision of an exclusive³⁹ right of appeal from a State court to a federal court is capable of raising constitutional problems, since it is clear that no federal court (other than the High Court) can be given appellate jurisdiction from a State court exercising State jurisdiction.⁴⁰ The point is that some actions involving patents or trademarks may also involve related claims (e.g., for passing off) under State law. Presumably the incidental power (s.51 (xxxix)) would support the conferral of jurisdiction on the Federal Court to decide matters which really are incidental or ancillary to the particular federal issue.⁴¹ But it is perfectly possible for independent claims to arise between the same parties on the same facts in the same action, involving federal and State law. S.33 of the Federal Court of Australia Act refers to "associated" matters, which may go beyond matters "incidental" to the decision of the federal issues in a case, in which event a case might fall to be dealt with in different appeal courts (the Full Supreme Court in respect of the State matter; the Federal Court in respect of the federal matter). The problem has not gone unremarked,⁴² and might be resolved by a liberal interpretation of the incidental power such as that adopted, for example, by Jacobs J. in a number of recent cases.⁴³ Otherwise, resolution of such problems would necessarily fall to the High Court, perhaps by granting special leave.⁴⁴

The appellate jurisdiction of the Industrial Division, on the other hand, is much more restricted. In most cases the original jurisdiction of the Industrial Division is exercised by a Full Court. Where a single judge does exercise jurisdiction, new s.118B(1)(a) of the Conciliation and Arbitration Act, 1904-1976 (Cth.), prevents appeals to the Full Industrial Division.⁴⁵

3. The Family Court of Australia

Under the Matrimonial Causes Act, 1959-1966 (Cth.), jurisdiction in divorce and related matters was invested in State Supreme Courts. Complaints were sometimes made about divergent administration of the Act by the different Supreme Courts, but the early proposals for a federal superior court did not involve even a concurrent investment of matrimonial causes

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38. Federal Court of Australia Act, 1976, s.24(1)(c); Bankruptcy Amendment Act, 1976, s.6 (inserting new s.38 in the Bankruptcy Act, 1966); Patents Amendment Act, 1976, s.7 (inserting new s.148 in the Patents Act, 1952); Trade Marks Amendment Act, 1976, s.7 (inserting new s.114 in the Trade Marks Act, 1955); Income Tax Assessment Amendment (Jurisdiction of Courts) Act, 1976, ss.3, 5.
 39. That is, exclusive of Full State Supreme Courts. The right to apply direct to the High Court for special leave is retained in the case of the income tax, patents and trade marks, but not in bankruptcy: see the provisions listed *supra*, n.38, and *infra*, n.120.
 40. That is, by Commonwealth legislation: *Collins v. Charles Marshall Pty. Ltd.* (1955) 92 C.L.R. 529. It may be, however, that State legislation could validly confer appellate jurisdiction in State matters on a federal court, although presumably the consent of the Commonwealth Parliament would be required. Alternatively, s.51(xxxviii) of the Constitution might be used.
 41. Wynes, *Legislative, Executive and Judicial Powers in Australia* (5th ed., 1976), 369-371. Cf. Federal Court of Australia Act, 1976, s.22.
 42. Cowen, *op. cit.* (*supra*, n.1), 114-115; Bowen, *loc. cit.* (*supra*, n.19), 339. Cf. the situation in *Cockle v. Isaksen* (1957) 99 C.L.R. 155.
 43. E.g., *Victoria v. Cth. (Australian Assistance Plan Case)* (1975) 7 A.L.R. 277, 327-328, 340-342.
 44. This may have been the reason for retaining the appeal by special leave direct from State Supreme Courts to the High Court in patents and trade mark matters (*supra*, n.39).
 45. Appeals to the High Court are by leave only; *infra*, text to n.124.

jurisdiction.⁴⁶ In the event, when the law of divorce underwent a fundamental re-examination in the period 1973-1975 it was decided to create a new specialist court to exercise federal family law jurisdiction. This was done by Part IV of the Family Law Act, 1975, which came into force on 5th January, 1976. The specialist nature of the Court is clear from s.32(2)(b) of the Act, which requires of any prospective Family Court judge that . . .

“by reason of training, experience and personality, he is a suitable person to deal with matters of family law.”

For a time the Family Court exercised its jurisdiction concurrently with that of State Supreme Courts under s.39 of the Act. In addition, courts of summary jurisdiction in each State are invested with jurisdiction in relation to proceedings under the Act, other than those for principal relief (that is, other than proceedings for dissolution, nullity, or declarations of validity, dissolution or annulment).⁴⁷ As from 1st June, 1976, proceedings under the Act can no longer be instituted in State Supreme Courts.⁴⁸ Previously instituted proceedings can be transferred into the Family Court on the application of a party.⁴⁹ A very significant step has thus been taken towards the centralizing of all proceedings for principal relief in the Family Court.

The area of family law is undoubtedly one in which specialist tribunals can usefully be created. There is a substantial volume of work, involving broadly similar issues of law and fact. The sorts of proceedings instituted are restricted in number. Under the Family Law Act, the exclusively legal issues that can arise in those proceedings are limited by the simplicity of no-fault single-ground divorce. What is of much greater importance is the exercise of an informed discretion, on broadly social grounds, in matters of custody, maintenance, property and the like. The Act's emphasis on the special aptitudes of judges in family law matters (s.32(2)(b)) is thus entirely appropriate. Whether appropriate non-legal training can be provided in the family law area, either in Law Schools or as part of continuing legal education programmes, may be less certain; although it may be that the experience of practitioners specializing in family law matters will provide its own training.⁵⁰ In practice, too, the Family Court appears to have adopted a distinctively reformist and sympathetic attitude to the general aims of the Act,⁵¹ an attitude not entirely shared by some Supreme Courts.⁵²

However, the creation of a specialized family law jurisdiction, although probably justified in principle, has created the sorts of jurisdictional anomalies and conflicts experience should have taught us to expect where jurisdiction is divided between different courts. The conflicts here have

46. Barwick, *loc. cit.* (*supra*, n.9), 3-4. Cf. Watson, (1967) 41 *A.L.J.* 345-346.

47. Family Law Act, 1975 (Cth.), s.39(6).

48. Proclamation of 27th May, 1976, pursuant to Family Law Act, 1975, s.40(3): *Australian Government Gazette* No. G22, 1st June, 1976.

49. Family Law Act, 1975 (Cth.), s.40(6).

50. The Act itself establishes a Family Law Council (s.115) and an Institute of Family Studies (s.116).

51. *E.g.* *Duff v. Duff* (1977) F.L.C. (CCH) 190-217; discussed by Palk & Bailey, "Property and Discretionary Trusts under s.79 of the Family Law Act", (1977) 6 *Adel. L.R.* 131.

52. Cf. the controversy about the "wigs and gowns" provision: Family Law Act, 1975, s.97(4), which was an issue in *Russell v. Russell* (1976) 9 *A.L.R.* 103. ,

arisen essentially from the fact that the Commonwealth does not have constitutional power over the entire field of "family law" (even if one excludes from that field matters such as adoption or affiliation). S.51 (xxii) of the Commonwealth Constitution restricts the Parliament to making laws with respect to . . .

"Divorce and matrimonial causes; and *in relation thereto*, parental rights, and the custody and guardianship of infants." (Emphasis added.)

Unlike its predecessor, the Matrimonial Causes Act, 1959-1966, the Family Law Act, 1975 claimed for the court jurisdiction over custody, maintenance and property independently of suits for principal relief ("divorce and matrimonial causes").⁵³ Only an extended view of the "marriage" power (s.51 (xxi)) could support that jurisdiction, and the problem was that the restrictions upon ancillary power in s.51 (xxii) ("in relation thereto") might be thought to have excluded by implication any more extensive power in s.51 (xxi). This type of implication has been adopted in relation to other provisions: thus the substantive s.51 powers do not, despite their amplitude, extend to laws for the acquisition of property, which can only be made under s.51 (xxxi),⁵⁴ or to laws for the establishment of courts or jurisdiction over the particular subject matter, which can only be made under Chapter III.⁵⁵ The inference was, however, rejected by a majority of the High Court in *Russell v. Russell*,⁵⁶ when jurisdiction over independent claims for maintenance or custody between parties to a marriage was upheld under the "marriage" power. Claims to property, however, even between parties to a marriage, would in many cases have insufficient connection with the marriage, and in this respect the provisions of the original Act were held to be invalid.⁵⁷ The "property" jurisdiction is now, in general, limited to "proceedings in relation to concurrent, pending or completed proceedings for principal relief" between the parties to the marriage.⁵⁸

Even given this extensive interpretation of Commonwealth power, there remain a number of *lacunae* in the jurisdiction of the court. "Independent" property proceedings, claims between *de facto* partners, claims by persons other than husband or wife to custody are perhaps the most obvious. A less obvious example would be a claim for maintenance by or on behalf of the child of one of the parties to a marriage against the other.⁵⁹ As a result, situations will still arise which may require proceedings in two different courts for complete resolution; and there may be uncertainty and dispute over the proper forum. Before 1873, when such conflicts of jurisdiction occurred, legal fictions were used to extend the competence of particular courts. An interesting, though short-lived, example of a similar device was Watson S.J.'s decision in *In the marriage of Read*,⁶⁰ holding that the Court's property jurisdiction could be validly invoked by an application for a declaration of validity of a marriage, although the marriage was

53. Family Law Act, 1975, s.4, definition of "matrimonial cause", ss.31-32.

54. See the cases cited by Howard, *Australian Federal Constitutional Law* (2nd ed., 1972), 396 n.15.

55. *Cf. Boilermaker's Case* (1957) 95 C.L.R. 529.

56. (1976) 9 A.L.R. 103.

57. *Ibid.*

58. Family Law Act, 1975, s.4(1), definition of "matrimonial cause" (ca), inserted by Family Law Amendment Act, 1976, s.3.

59. Broun & Fowler, *Australian Family Law & Practice* (CCH) I, 453.

60. (1977) F.L.C. (CCH) 90-201; Broun & Fowler, *op. cit.* I, 37-047.

patently valid and the declaration sought only to attract the property jurisdiction. The decision in *Read's* case was disapproved by the South Australian Full Supreme Court in *Tansell v. Tansell*.⁶¹ In that case a husband had sought an order for the sale of the jointly-owned matrimonial home, and the division of proceeds, under s.69 of the Law of Property Act, 1936-1977 (S.A.). Five days later the wife sought an order from the Family Court, *inter alia* that she and her children be granted exclusive occupancy of the home. No proceedings for principal relief were instituted at this stage. Subsequently, however, the wife applied for a declaration of the validity of the marriage (although its validity was uncontested), and for an order for the transfer of the husband's interest in the home to her, or alternatively, for a grant of occupancy to her for life. The principal question for the Full Court was whether either application ousted the jurisdiction of the Land and Valuation Division under the South Australian Act. The Court held, by a majority (Sangster J. dissenting), that its jurisdiction was ousted by virtue of s.109 of the Constitution. However, they agreed that the application for a declaration of validity could not itself attract the property jurisdiction of the Family Court. Referring to *Read's* case, Bray C.J. said:

"With all respect to Watson S.J., I do not think that contemporary courts should resurrect John Doe and Richard Roe or entertain actions based, for example, on a transaction in Central Africa alleged by a fiction to have taken place in the Hundred of Adelaide. Fictions are essential tools of legal expertise and legal development in an age when legislative interference with the ordinary civil law is unusual and sporadic, but in the present age of copious and incessant legislation the courts, in my view, can safely and should properly leave it to Parliament to effect changes which the courts can only make by the employment of fictions."⁶²

When the matter came before the Full Family Court itself, much the same view was taken.⁶³ Their Honours described the application for a declaration of validity . . .

"as a sham or a fictitious device having no real validity or substance. In the present application under s.113 there is no issue or dispute between the parties, there is no doubt or uncertainty about the validity of the marriage and there is no right in doubt whose existence ought to be declared. Watson J. in *Read's* case referred to the use of legal fictions in days past. They were principally if not entirely cases of the use of legal fictions to overcome procedural difficulties in which the common law had found itself in times when it was most unlikely that the legislature would or could intervene. The times are different now. We live in a time of almost incessant intervention by the legislature in the various fields of law. It seems wholly inappropriate that the Court should attempt to gather to itself a jurisdiction which Parliament has not otherwise given it by resurrecting the ancient use of legal fictions. Further to that there appears to be a substantial difference between using such fictions as a means of circumventing or overcoming *procedural* difficulties on

61. (1977) F.L.C. (CCH) 90-280.

62. *Id.*, 76,495. Sangster J. (at 76,502) and Jacobs J. (at 76,504) agreed.

63. *In the marriage of Tansell* (1977) F.L.C. (CCH) 90-307 (Evatt C.J., Demack & Fogarty JJ.).

the one hand and on the other attempting to do so in order to give to a Court a jurisdiction which under its Statute and perhaps constitutionally it does not otherwise possess.”⁶⁴

Although, then, the declaration of validity had only a brief career as a jurisdictional fiction,⁶⁵ this litigation demonstrates vividly the jurisdictional problems that can arise from the co-existence of two systems of courts since the Family Law Act, 1975 (Cth.).⁶⁶ In Sangster J.’s words:

“No one can deny that it is undesirable that there be, concurrently, two sets of proceedings between the same parties upon the same subject matter but in different courts with neither having any control over the proceedings in the other. It may well be that in some circumstances such a situation may arise, and, if it does, that one court or the other will need to stay its own proceedings whilst the proceedings in the other court are suitably prosecuted.”⁶⁷

Indeed the Family Court has on several occasions felt obliged to refuse to consider orders directing parties not to proceed in State courts, on grounds of judicial comity;⁶⁸ although of course the *effect* of Family Court proceedings must usually, if not invariably, be to deny State court jurisdiction over the matter in issue.

In this context, these difficulties are added to by the fact that neither the South Australian Full Court nor the Family Court decided exactly when the latter’s jurisdiction over the matrimonial home prevailed under s.109. Two views were expressed in the South Australian Full Court, neither commanding a majority.⁶⁹ If anything, the Full Family Court seemed to prefer what is clearly, with respect, the less desirable view of Jacobs J.⁷⁰ So jurisdictional doubts and difficulties remain.

Several solutions to these problems would appear to be available. First, the Act itself contemplates the creation of State Family Courts to exercise federal as well as State jurisdiction in family law matters. Such courts are

64. *Id.*, 76,627-76,628.

65. The Family Court in the passage cited, although adopting without acknowledgement one of Bray C.J.’s arguments, did not take his point that before the Judicature Acts legal fictions were used as often for jurisdictional as for procedural purposes: *cf.* his allusion (*loc. cit.*, *supra*, n.62) to the Bill of Middlesex, a conspicuous example.

66. For a more detailed discussion of these problems see Walker, “Matrimonial Property Proceedings: Problems of a Divided Jurisdiction”, *infra*, 253, esp. 262ff.

67. (1977) F.L.C. (CCH) 90-280, 76,504.

68. *In the marriage of Stone* (1976) F.L.C. (CCH) 90-134, 75,640 *per* Strauss J.; *In the marriage of McCarney* (1978) 16 A.L.R. 220, 230 (F.C.); *In the marriage of Tansell* (1977) F.L.C. (CCH) 90-307, 76,633 (F.C.).

69. Bray C.J. thought that State jurisdiction was ousted when a valid application with respect to the property was made to the Family Court: (1977) F.L.C. (CCH) 90-280, 76,493. Jacobs J. disagreed: in his view, State jurisdiction was ousted “if it is made to appear to the State court that a marriage has *de facto* broken down, and that the fate of the matrimonial home is in issue . . .” (*id.*, 76,506). Sangster J. expressed no opinion on the point: *cf. id.*, 76,503.

70. In *In the marriage of Tansell* (1977) F.L.C. (CCH) 90-307, 76,632-76,634, the Full Family Court referred to both views, without clearly adopting either. Of course, the matter is essentially one for the Supreme Court, whose jurisdiction is being excluded. For discussion see Walker, *loc. cit.* (*supra*, n.66), 266. In the present writer’s view, Bray C.J.’s solution is to be preferred, since it provides a clear, identifiable act from which the exclusion of the State Court’s jurisdiction will date. That of Jacobs J., in view of the uncertainty of the notion of *de facto* breakdown of marriage (and quite apart from its evidentiary formulation), seems to involve an oscillating or indeterminate State jurisdiction, which can hardly have been contemplated.

to be established by agreement with the Commonwealth Government, on the following terms:

- (a) "the Commonwealth Government will provide the necessary funds for the establishment and administration of those courts (including the provision of counselling facilities for those courts)" (s.41(1));
- (b) "arrangements [should be] made under which Judges will not be appointed to that court except with the approval of the Attorney-General of the Commonwealth" (s.41(4)(a));
- (c) "Judges appointed to that court are by reason of training, experience and personality, suitable persons to deal with matters of family law and cannot hold office beyond the age of 65 years" (s.41(4)(b)); and
- (d) "counselling facilities will be available to that court" (s.41(4)(c)).

In fact only one such Court has been established, in Western Australia pursuant to the Family Court Act, 1975-1976 (W.A.).⁷¹ In addition to its federal jurisdiction the Court has extensive State jurisdiction (to the exclusion of the Western Australian Supreme Court), in matters such as adoption, affiliation, and the custody of ex-nuptial children. As a result, the jurisdictional problems referred to above will not occur when the Court is exercising original jurisdiction. On appeal, however, the nemesis of federal jurisdiction reappears: appeals under the Family Law Act, 1975 (Cth.) go to the Full Family Court of Australia,⁷² while appeals in matters of State jurisdiction go to the Full Supreme Court of Western Australia.⁷³ This unfortunate system of "hemispherical appeals" might have been avoided if the Western Australian Parliament had invested *State* appellate jurisdiction in the Full Family Court of Australia, either generally or as an alternative to the Full Supreme Court in cases involving both federal and State elements.⁷⁴ In the absence of a unified Australian judicial system,⁷⁵ the expedient of State Family Courts under s.41 may be only a partial solution.

The non-acceptance of a system of State Family Courts has led to proposals to give the Commonwealth general power over family law by reference of power under s.51 (xxxviii) or by constitutional amendment. The matter was discussed at the three Constitutional Conventions held between 1973 and 1976,⁷⁶ but nothing has yet been done.

4. The High Court

Reference has been made earlier to dissatisfaction at the extent of the High Court's jurisdiction, both original and appellate.⁷⁷ This, it was felt, diverted the High Court from its main functions of constitutional interpretation and consideration of basic issues of legal principle on appeal from State and Territory Courts. One solution⁷⁸ would have been to increase the

71. Broun & Fowler, *op. cit.* (*supra*, n.60) I, 53-400.

72. Family Law Act, 1975 (Cth.), s.94.

73. Family Court Act, 1975-1976 (W.A.), ss.32-33.

74. *Cf. supra*, n.43. The Family Law Act, 1975 (Cth.), s.33 ("Jurisdiction in associated matters") expressly extends to appeals: its validity would depend upon considerations referred to already (*supra*, text at n.43).

75. *Infra*, pp.230-233.

76. *Proceedings of the Australian Constitutional Convention, Sydney, 1973, Agenda Item 9; Proceedings of the Australian Constitutional Convention, Melbourne, 1975, Agenda Item 5; Proceedings of the Australian Constitutional Convention Hobart, 1976, Agenda Item 5.*

77. *Supra*, n.3

78. Advocated, *e.g.*, in editorials of the *A.L.J.*: (1976) 50 *A.L.J.* 324 and refs.

number of High Court justices in order to deal with the burden of jurisdiction, a course which might also have resulted in a more equitable geographical distribution of High Court appointments. But any such course was strenuously resisted by influential members of the High Court itself,⁷⁹ and was not accepted. Instead, a variety of means have been adopted to reduce the burden of jurisdiction.

(i) *Original Jurisdiction*

(1) REDUCTION IN INVESTED JURISDICTION UNDER CONSTITUTION, S.76 (ii)

S.76 of the Federal Constitution enables the Parliament to invest original jurisdiction on the High Court in a variety of matters. This was done by a large number of Acts, with a rather miscellaneous range of subjects.⁸⁰ Some of the investments of jurisdiction under s.76 seem appropriate to the High Court: for example, the remaining two paragraphs of s.30, Judiciary Act, 1903-1976,⁸¹ and the High Court's exclusive jurisdiction as the Court of Disputed Returns under the Commonwealth Electoral Act, 1918-1977 (Cth.), Pt. XVIII.⁸² Others do not, and steps have already been taken to reduce the load. For example, the original jurisdiction of the High Court in industrial property matters has been transferred back to State and Territory Supreme Courts (with the Full Federal Court of Australia acting as the intermediate court of appeal).⁸³ Further revision of the extent of invested jurisdiction is apparently to be expected.

(2) DEMISE OF THE "INTER SE" QUESTION

One of the most useful reforms brought about by the Judiciary Amendment Act, 1976, is the abolition of the "automatic investment" provisions for *inter se* matters in ss.38A, 40A of the Judiciary Act. These provisions were inserted in 1907, to avoid the by-passing of the High Court in *inter se* matters through direct appeal to the Privy Council from State Supreme Courts.⁸⁴ S.74 of the Constitution requires a certificate of the High Court for an appeal from the High Court to the Privy Council "upon any question, howsoever arising, as to the limits *inter se* of the Constitutional powers of the Commonwealth and those of any State or States, or as to the limits *inter se* of the Constitutional powers of any two or more States",⁸⁵ but says nothing as to appeals direct from State Supreme Courts. The Commonwealth's aim to prevent such direct appeals might have been thought sufficiently fulfilled by the amendments to s.39 of the Judiciary Act, although the "federal jurisdiction" that could be invested under Constitution s.77(iii) was not entirely co-extensive with *inter se* questions.⁸⁶ The latter

79. *E.g.*, Barwick, (1976) 50 *A.L.J.* 436; and *loc. cit.* (*supra*, n.4), 488.

80. See the list in Byers & Toose, *loc. cit.* (*supra*, n.13), 311-312.

81. "In addition to the matters in which original jurisdiction is conferred on the High Court by the Constitution, the High Court shall have original jurisdiction—
(a) in all matters arising under the Constitution or involving its interpretation;
and

(c) in trials of indictable offences against the laws of the Commonwealth."

82. Normally this jurisdiction is exercised by the Full Court, but not always: *In re Senator Webster* (1975) 6 *A.L.R.* 65.

83. Patents Amendment Act, 1976, s.7; Trade Marks Amendment Act, 1976, s.7. See also *supra*, n.39.

84. As in *Webb v. Outrim* (1906) 4 *C.L.R.* 356.

85. The High Court's certificate has been granted in only one case: *Colonial Sugar Refinery Co. Ltd. v. Attorney-General (Commonwealth)* (1912) 15 *C.L.R.* 182; and then with unfortunate results.

86. A question "as to the limits *inter se* of the Constitutional powers of any two or more States", arising between private litigants, might not be a matter of federal jurisdiction. It is hard to think of any such questions that might actually arise in practice.

were apparently regarded as important enough to demand the immediate attention of the High Court, and the effect of ss.38A and 40A was to remove automatically, by direct operation of those provisions and without any order of the State court, the entire cause where an *inter se* issue arose, whether on the facts or during the course of argument. Apart from the difficulty of defining *inter se* questions,⁸⁷ this vanishing jurisdiction was inconvenient, especially where the case might have been decided without determining the *inter se* question. The repeal of ss.38A and 40A (rendered doubly unnecessary by the abolition of appeals to the Privy Council in all matters of federal jurisdiction⁸⁸) is thus welcome. All constitutional matters, whether or not involving *inter se* questions, may now be decided by State and federal courts, subject to the new removal provisions in Part VII of the Judiciary Act⁸⁹ (which operate not automatically but on application of a party or the Commonwealth or a State Attorney-General). Sir Garfield Barwick has warned that:

"One consequence, however, of the repeal of s.40A and decision by the courts of the States of constitutional questions, particularly of questions *inter se* and with respect to the operation of s.92, is that the Australian Attorney-General will need to be vigilant in the use of his powers under ss.40 and 78A of the Judiciary Act, to ensure that no doubtful decision of a State court on a matter of constitutional law, against which the parties have no interest to appeal, should become entrenched by the passage of time."⁹⁰

Perhaps one should say that the price of centralism is eternal vigilance!

(3) PROBLEMS OF THE HIGH COURT'S INHERENT ORIGINAL JURISDICTION:
CONSTITUTION, S.75

S.75 of the Constitution invests the High Court with inherent original jurisdiction in respect of various matters.⁹¹ As a constitutional jurisdiction, of course, this can only be abolished by amendment under Constitution s.128.⁹² Some of the heads of original jurisdiction seem appropriate to the highest federal court: in particular, matters in which the States and

87. Howard, *op. cit.* (*supra*, n.54), 214-218 and authorities there cited.

88. Privy Council (Limitation of Appeals) Act, 1968-1973. It is generally assumed that the appeal in *inter se* matters under s.74 of the Constitution has survived the abolition of appeals: e.g., Barwick C.J., *Western Australia v. Hamersley Iron Pty. Ltd.* (No. 2) (1969) 120 C.L.R. 78, 81; but *cf.* the more reserved view of Gibbs J. in *Commonwealth v. Queensland* (1975) 7 A.L.R. 351, 363. However it is arguable that s.74 does not give a right of appeal in *inter se* matters, but merely restricts and regulates a right assumed to exist *aliunde* the Constitution. It would be odd if s.74 indirectly preserved the *inter se* appeal but allowed abolition of appeals in all other matters. On that view, the 1968 Act having abolished appeals in all future matters of federal jurisdiction, there remained virtually no question (the case mentioned in n.86 apart) for the first two paragraphs of s.74 to affect. The difficulty with this argument is the second paragraph of s.74 ("thereupon an appeal shall lie . . . without further leave"): this would have to be interpreted merely as removing the need for further leave after the grant of a certificate, rather than as establishing a right to appeal consequent upon such grant. But if the latter view is the correct one, it is clear that no further certificate will be granted: see *Deakin v. Webb* (1904) 1 C.L.R. 585; *O'Sullivan v. Noarlunga Meat Ltd.* (No. 2) (1956) 94 C.L.R. 367; *Whitehouse v. Queensland* (1961) 104 C.L.R. 635; *Western Australia v. Hamersley Iron Pty. Ltd.* (No. 2) (1969) 120 C.L.R. 74. In *Viro v. R.* (1978) 18 A.L.R. 257, both Barwick C.J. and Gibbs J. referred to the *inter se* appeal as a merely "theoretical" possibility: *id.*, 260, 282. Murphy J., on the other hand pointed out that "its theoretical operation may have ended with the 1968 Act": *id.*, 317.

89. Inserted by Judiciary Amendment Act, 1976, s.9.

90. *Loc. cit.* (*supra*, n.4), 485.

91. See Cowen, *op. cit.* (*supra*, n.1), ch. 1.

92. *Bank Nationalization Case* (1948) 76 C.L.R. 1.

the Commonwealth are the parties (s.75(iii), (iv)). Indeed, many of the s.75 matters have been brought within the *exclusive* jurisdiction of the High Court under s.38 of the Judiciary Act, 1903-1976 (Cth.).⁹³ But, as we have seen, there has been much criticism of the extent of original jurisdiction conferred by s.75.⁹⁴ The main objection of substance to s.75 has been to the diversity jurisdiction: matters "between residents of different States, or between a State and a resident of another State" (s.75(iv)). The ambit of s.75(iv) was early restricted by the decision that corporations were not, for these purposes, "residents" of States.⁹⁵ But the jurisdiction between natural persons, partnerships and the like remains.

No attempt has been made to confer concurrent s.75 jurisdiction upon the Federal Court.⁹⁶ Instead the major change that has been made is the substitution of a new remittal section (s.44) for old s.45 of the Judiciary Act. S.45 allowed the High Court to remit to a lower State court, at the request of a party to the proceedings, any matter pending in its original jurisdiction. New s.44 goes very much further:

"Any matter that is at any time pending in the High Court, whether originally commenced in the High Court, or not, may, upon the application of a party or of the High Court's own motion, be remitted by the High Court to any federal court, court of a State or court of a Territory that has jurisdiction with respect to the subject-matter and the parties, and, subject to any directions of the High Court, further proceedings in the matter shall be as directed by the court to which it is remitted."

S.44 thus allows remittal to a federal or territorial court as well as to a State court. and it applies to cases of appellate as well as original jurisdiction (although, especially in view of changes in the High Court's appellate jurisdiction,⁹⁷ the likelihood of there being an appropriate lower appellate court is much less). S.44 has also been interpreted as allowing remittal of cases already pending in the High Court (thus involving a form of retrospectivity).⁹⁸ But the most significant feature of s.44 is that it allows the High Court to act *ex proprio motu*, without the consent of any party. To a High Court determined to reduce the burden of its original jurisdiction s.44 thus offers a potent weapon, and there is every indication that the Court is so determined:

"The amendment of the terms of the former s.45, allowing as it does the remission *ex mero motu* of any pending case, will permit a

93. A number of s.75 matters are not made exclusive by s.38: *viz.*, matters arising "indirectly" under any treaty (s.75(i)); matters affecting consuls or other representatives of other countries (s.75(ii)); suits between the Commonwealth and private persons (s.75(iii)); suits between a State and a resident of another State, or between residents of different States (s.75(iv)), and suits in which an injunction is sought against an officer of the Commonwealth (s.75(v)).

94. Cowen, *op. cit.* (*supra*, n.1), 3-4, 21ff. and authorities there cited. For suggested reform, see *infra*, n.190.

95. *T. & G. Mutual Life Assurance Soc. v. Howe* (1922) 31 C.L.R. 290.

96. As with the 1967 Bill: *supra*, text to n.19.

97. *Infra*, pp.215-220.

98. *Beecham Group Ltd. v. Bristol Myers Co.* (1977) 14 A.L.R. 591, esp. 594 (H.C.). These four cases (one "appeal" from the Commissioner and three actions for infringement in the High Court's original jurisdiction) were brought under the Patents Act, 1952 (Cth.); that is, they were matters of invested jurisdiction under s.76. The Court was not required to, and did not, consider the validity of s.44 in relation to its inherent original jurisdiction under s.75.

very considerable reduction in the workload in the Court's original jurisdiction. It has been thought to be of convenience to litigants to resort to the diversity jurisdiction of the Court. The mobility which the motor car and the improvement of Australian roads has given the citizen, coupled with the frequency with which road collisions occur, has given rise to actions for negligence between residents of different States. Often the accident giving rise to the action occurs in a State other than the State of the residence of either participant. Consequently a considerable number of actions for negligence have been commenced in the High Court. The State courts, by reason of s.39 of the Judiciary Act, have the federal diversity jurisdiction but practitioners have appeared cautious about relying on that circumstance to ensure the jurisdiction of a court in a State in which the accident did not occur, in which the defendant party does not reside, or perhaps in which he cannot be served. Before the amendment, the High Court had no certain means of remitting such cases to a State court for disposal. The amendment now allows of this.

The Court has begun the practice of remitting all such cases, at least so soon as they are set down for hearing, but also at times, at earlier stages of the litigation, to a State court for disposal. In addition, there are other causes of action between residents of different States which are sought to be litigated in the original jurisdiction of the High Court. These can also now be remitted to State courts.⁹⁹

Two points should be made about s.44.

First, its constitutional validity is not beyond question. S.75 of the Constitution might well be read as conferring rights upon plaintiffs in diversity cases to choose the High Court rather than the appropriate State court. Any such right could not of course be taken away either directly by Commonwealth legislation, or indirectly pursuant to a provision such as s.44 or its predecessor. This was the view previously taken by the United States Supreme Court,¹⁰⁰ and advocated by Cowen.¹⁰¹ On the other hand, the United States Supreme Court has subsequently asserted the power to decline to hear a case on the ground of *forum non conveniens*,¹⁰² and Sir Garfield Barwick has argued strenuously that a provision such as s.44 would in any event be merely declaratory of the common law position, and therefore, *a fortiori*, valid.¹⁰³ In other respects s.75 of the Constitution has been held not to create substantive rights, as distinct from jurisdiction;¹⁰⁴ and it seems most unlikely that the High Court would reject as unconstitutional the assistance afforded by s.44. By these indirect means, diversity jurisdiction under s.75(iv) thus seems likely to amount in practice to a

99. Barwick, *loc. cit.* (*supra*, n.4), 489.

100. *Cohens v. Virginia* 6 Wheat. 264; 5 L.ed. 257 (1821).

101. *Op. cit.* (*supra*, n.1), 68-73.

102. *Massachusetts v. Missouri* 308 U.S. 1 (1939).

103. Barwick, *loc. cit.* (*supra*, n.9), 10-15. See further Lindell, "Duty to Exercise Judicial Review" in Zines, ed., *Commentaries on the Australian Constitution* (1977), 150, 151-157; Howard, *op. cit.* (*supra*, n.54), 193-197, and authorities there cited.

104. *Werrin v. Commonwealth* (1938) 59 C.L.R. 150; and the cases cited by Hogg, *Liability of the Crown* (1971), 216 n.9. *Contra*, *Commonwealth v. N.S.W.* (1923) 32 C.L.R. 200.

right to "apply" to have a matter heard by the High Court in its original jurisdiction, with a possible penalty in costs if the "application" fails.¹⁰⁵

Secondly, the exercise of the power in s.44 to remit to the appropriate lower court may have to be exercised with some care. Problems of federal conflicts of laws might make the choice of a lower court determinative of the result of a particular case. For example, in a road accident case is the matter to be remitted to the court of the defendant's residence, or the court of the State where the plaintiff was resident and where the accident occurred? Both will apply their own substantive law,¹⁰⁶ which may be different. What if there are two defendants, residents of different States? These difficulties are of course familiar:¹⁰⁷ s.44 could justify itself if it provided the opportunity for the High Court to deal with them.

(ii) Appellate Jurisdiction

Apart from s.44 of the Judiciary Act, 1903 (Cth.), the changes in the appellate jurisdiction of the High Court brought about by the recent legislation are of much greater practical significance.

(1) APPEALS FROM A SINGLE JUDGE OF THE HIGH COURT

At present, there is an appeal "from all judgments whatsoever of any Justice or Justices, exercising the original jurisdiction of the High Court whether in Court or Chambers".¹⁰⁸ No changes in this position have been made.

(2) APPEALS FROM STATE SUPREME COURTS

Here, significant changes have been made. Before 1976, appeals lay in certain circumstances as of right from a single Supreme Court judge to the High Court.¹⁰⁹ Under new s.35(2) of the Judiciary Act, such appeals may be brought only with the special leave of the High Court.¹¹⁰ The right to appeal from Full State Supreme Courts is also restricted: the monetary limit on the right to appeal has been increased from \$3,000 to \$20,000;¹¹¹ and there is no appeal as of right, even in a case involving more than \$20,000, "on a ground that relates to the quantum of any damages in respect of death or personal injury".¹¹² But there are no restrictions on the right to appeal "where the ground of appeal, or one of the grounds of appeal, involves the interpretation of the Constitution";¹¹³ provision being made for cases where no substantial constitutional point is found to require decision.¹¹⁴

105. On a number of occasions before 1976, the High Court either threatened to or did in fact award reduced costs or no costs at all where in its view the case should have been brought in a State court. See *Faussett v. Carroll* (1917) 15 W.N. (N.S.W.) No. 12 Cover Note; *Marlow v. Tatlow*, noted (1965-6) 39 *A.L.J.* 140; *Cadet v. Stevens*, noted (1966-7) 40 *A.L.J.* 361; *Morrison v. Thwaites* (1969) 43 *A.L.J.R.* 452 (note).

106. *Phillips v. Eyre* (1870) L.R. 6 Q.B. 1; *Chapman v. Boys* [1971] A.C. 356.

107. Keeler, "Torts in Australian Private International Law", (1972) 4 *U.Tas. L.R.* 17; Pose, "The Proper Law of the Tort — Some Recent Australian Developments", (1976) 50 *A.L.J.* 110.

108. Judiciary Act, 1903 (Cth.), s.34, pursuant to Constitution, s.73(i).

109. Judiciary Act, 1903 (Cth.), s.35(1).

110. Such leave is only likely to be granted "in exceptional circumstances": Mason, "Where Now?", (1975) 49 *A.L.J.* 576.

111. Judiciary Act, 1903 (Cth.), s.35(3). S.35 is stated to apply both to civil and criminal appeals. *Quaere* whether a fine of \$20,000 or more would give the defendant a right to appeal under s.35(3). Usually, of course, criminal appeals proceed by special leave only.

112. *Id.*, s.35(4).

113. *Id.*, s.35(6).

114. *Id.*, s.35(7).

The validity of new s.35 depends of course on s.73 of the Constitution, which allows the Parliament to prescribe "exceptions" to and "regulations" concerning the appellate jurisdiction of the High Court (*inter alia*) from State Supreme Courts. S.73 has been interpreted as imposing two distinct restrictions on this power. First, unlike the term "limiting" in s.74,¹¹⁵ the "exceptions" and "regulations" of s.73 seem to preclude exclusion of all appeals, and probably exclusion of any one of the separate heads of s.73.¹¹⁶ There can be no doubt that new s.35 does not "eat up or destroy"¹¹⁷ the appellate jurisdiction of the High Court from State Supreme Courts in this way. In fact, it will be argued that s.35 does not go far enough.¹¹⁸

Secondly, s.73 by paragraph 2 provides that . . .

"no exception or regulation . . . shall prevent the High Court from hearing and determining any appeal from the Supreme Court of a State in any matter in which at the establishment of the Commonwealth an appeal lies from such Supreme Court to the Queen in Council."

This has been interpreted to require only that an appeal lie to the High Court by leave or special leave,¹¹⁹ a view which seems amply justified by the words "prevent . . . from hearing and determining" in s.73. Where special leave is refused, it is the High Court and not Parliament that has prevented the hearing and determination of the matter. It was no doubt for this reason that the appeal by special leave from a single Supreme Court judge was retained,¹²⁰ although a more constructive use of s.35(2) will be suggested.¹²¹

(3) APPEALS FROM THE FEDERAL COURT OF AUSTRALIA

Appeals from the General Division of the Federal Court of Australia to the High Court are restricted in the same way as those from State Supreme Courts,¹²² with two exceptions. First, there is no appeal from a single judge of the Court, either as to right or by special leave, except as provided by

115. *Infra*, n.160.

116. *Cockle v. Isaksen* (1957) 99 C.L.R. 135; *Collins v. Charles Marshall Pty. Ltd.* (1955) 92 C.L.R. 529; Howard, *op. cit.* (*supra*, n.54), 200-202.

117. (1957) 99 C.L.R. 155, 165-166.

118. *Infra*, p.219.

119. *Parkin v. James* (1905) 2 C.L.R. 315.

120. Judiciary Act, 1903-1976, s.35(2). In 1901 there was a right of appeal to the Privy Council where the matter involved an amount of £500 or more (in the case of the mainland States), or £1,000 or more (in the case of Tasmania). See the Instruments listed in Appendix C in Barwick, *loc. cit.* (*supra*, n.4), 500. Otherwise appeal was by special leave. It seems likely that the reference in s.73 to an appeal which "lies to the Queen in Council" includes appeals by leave. But s.35(5) of the Judiciary Act, 1903 (as amended in 1976), provides for "special provision made by an Act other than this Act, whether passed before or after the commencement of this section, preventing or permitting appeals from the Supreme Courts of the States in particular matters". So far only one such "special provision" has been made: Bankruptcy Amendment Act, 1976 (Cth.), s.6; *cf. supra*, n.39. The validity of this provision must depend on whether the proviso in the second paragraph of s.73 extends only to matters actually existing "at the establishment of the Commonwealth": *i.e.*, a form of *contemporanea expositio*. There was of course, *ex hypothesi*, on 1st January, 1901 no "matter" arising under federal bankruptcy legislation, and so no appeal in such a matter to Her Majesty in Council. But since the purpose of the second paragraph was to guarantee the position of the High Court as a general court of appeal for Australia, such a strict interpretation is not inevitable. *Cf.* also Judiciary Act, 1903, s.39(2)(c), which may have been *pro tanto* repealed by the specific provision for appeals made by Bankruptcy Amendment Act, 1976, s.6.

121. *Infra*, p.220.

122. Federal Court of Australia Act, 1976, s.33.

another Act.¹²³ Secondly, there is no right of appeal on constitutional grounds, the matter being left to depend on independent rights of appeal, applications for special leave, or removal of causes under Part VII of the Judiciary Act. The reason for this latter difference between the Federal Court and Supreme Courts is not apparent.

In contrast, appeals from the Industrial Division of the Court (whether exercised by a Full Court or single judge) are by leave of the High Court only; in some cases there is no appeal whatever.¹²⁴

(4) APPEALS FROM TERRITORY SUPREME COURTS

Under s.24 of the Federal Court of Australia Act, 1976, appeals from Supreme Courts of Territories go as of right (subject to restrictions imposed by any other Act) to the Full Federal Court, and thence, of course, to the High Court pursuant to s.33. The previous right to appeal direct from a Territory Supreme Court to the High Court (like its equivalent in relation to State Supreme Courts) has become a right to seek special leave to appeal.¹²⁵ The various Territory Supreme Courts will thus exercise only original jurisdiction.

(5) APPEALS FROM THE FAMILY COURT OF AUSTRALIA

S.95 of the Family Law Act, 1975 (Cth.), provides as follows:

“Notwithstanding anything contained in any other Act, an appeal does not lie to the High Court from a decree of a court exercising jurisdiction under this Act, whether original or appellate, except—
 (a) by special leave of the High Court; or
 (b) upon a certificate of a Full Court of the Family Court that an important question of law or of public interest is involved.”¹²⁶

This provision is both appropriate for a specialized jurisdiction and of more general interest. The possibility of an appellate court certifying a matter as worthy of the consideration of the High Court is novel in Australia, and might well be extended.¹²⁷ The two methods of seeking leave have been treated as equally available, although the Full Family Court would no doubt refuse to grant a certificate under s.95(b) after the High Court had refused leave to appeal.¹²⁸

(6) APPEALS FROM THE SUPREME COURT OF NAURU

The Nauru (High Court Appeals) Act, 1976 (Cth.), purports to invest appellate jurisdiction in the High Court from decisions of the Supreme Court of Nauru, pursuant to an agreement between the Governments of Australia and Nauru.¹²⁹ There are a number of similar arrangements for the highest court of a former administering power to act as court of appeal from a newly independent territory.¹³⁰ However, this is the High Court's first

123. *Id.*, s.33(2). Cf. *supra*, nn.32-33.

124. Conciliation and Arbitration Act, 1904-1976 (Cth.), s.118B(2).

125. Federal Court of Australia Act, 1976, s.24(2). Again, the reason for so distinguishing Territory Supreme Courts from first instance decisions of the General Division of the Federal Court is not apparent.

126. But there is no appeal from a decree of dissolution of marriage which has become absolute: s.93.

127. *Infra*, pp.219-220.

128. *Duff v. Duff* (1977) F.L.C. (CCH) 90-217; Broun & Fowler, *Australian Family Law Practice* (CCH) I, 53-930.

129. Nauru (High Court Appeals) Act, 1976, s.5 and Schedule. Under the Agreement, appeal lies as of right in a wide variety of cases; otherwise the High Court may grant special leave. See also H.C.R. Order 70A (Nauru Appeal Rules): S.R. 1977 No. 41.

130. *E.g.*, Western Samoa, Cook Islands and Niue (New Zealand).

experience of such arrangements, and the constitutional aspects of the Act are worth at least brief mention. The Commonwealth Government apparently regards the Act as conferring appellate jurisdiction on the High Court under the foreign affairs power (s.51 (xxix)).¹³¹ The problem is that s.73 of the Constitution is probably an exhaustive enumeration of the appellate jurisdiction of the High Court under laws made pursuant to ss.51 or 52.¹³² The Supreme Court of Nauru is neither a federal court nor a court exercising federal jurisdiction under s.73(ii), and the Nauru (High Court Appeals) Act, 1976 might therefore seem invalid.

Two alternative possibilities exist. First, the territories power (s.122) has been held to authorize investment of appellate jurisdiction in the High Court independently of s.73.¹³³ However, Nauru is not now (as it was before 1968) a "territory . . . placed by the Queen under the authority of and accepted by the Commonwealth", even if the 1976 Act can be described as "for the government of" Nauru. S.122 would thus appear not to help.¹³⁴

A more interesting possibility is that the jurisdiction vested in the Court by the 1976 Act is not appellate but original. It is settled that the validity of a law investing jurisdiction in the High Court is not to be tested by the labels "original" or "appellate". Thus the jurisdiction of the Court on so-called "appeals" from administrative tribunals such as Taxation Boards of Review has been upheld as an investment of original ("supervisory") jurisdiction.¹³⁵ Such characterization (*ut res magis valeat quam pereat*) need not affect the actual extent of jurisdiction to be exercised: the "appeal" may extend to merits as well as jurisdiction. In this context, two provisions would authorize investment of this form of "appellate" jurisdiction in the Court. Most obviously, s.76(ii) allows conferral of original jurisdiction "in any matter . . . arising under any laws made by the Parliament". In view of the precedents mentioned above,¹³⁶ there can be little doubt that the 1976 Act (problems of investment of jurisdiction apart) is a valid exercise of power under s.51(xxix) or (xxx). An alternative and more intriguing possibility is that the jurisdiction derives from s.75(1) (matters "arising under any treaty"). Clearly, the Agreement with Nauru is a treaty, and the Court's jurisdiction "arises" under it. It is unlikely that s.75(i) displaces the well-established rule that treaties *per se* do not confer rights or impose duties in Australian law, but the necessary municipal Act could be regarded as incidental to the implementation of the treaty and so valid. If so, then the 1976 Act is an example, long sought for, of the mysterious category of matters "arising under any treaty"¹³⁷

131. 101 *Parl. Debts. (H. of R.)*, 7th October, 1976, 1647 (Ellicott).

132. *Spratt v. Hermes* (1965) 114 C.L.R. 226.

133. *Porter v. R., ex parte Yee* (1926) 37 C.L.R. 432; *Spratt v. Hermes* (1965) 114 C.L.R. 226.

134. It seems clear that the High Court would not adopt the maxim "once a territory always a territory", for the purposes of legislation applying to former territories which have become independent by Act of Parliament. The terms "accepted" and "acquired" in s.122 should be regarded as requiring continued possession or control of the territory in question; although Parliament might perhaps, under s.122, pass legislation incidental to the process of granting independence to a former territory after the formal date of independence. Even then, it is submitted, the proper source of power would be s.51(xxix).

135. See the cases cited by Howard, *op. cit.* (*supra*, n.54), 204 n.55.

136. *Supra*, n.130.

137. To adapt the terminology of Judiciary Act, s.38(a), this is a matter arising "indirectly" under a treaty. *Cf.* Cowen, *op. cit.* (*supra*, n.1), 24-31.

(iii) *Further Reform of the Appellate Jurisdiction of the High Court.*

The changes made in the last few years to the High Court's appellate jurisdiction would seem to have been based on two premisses: first, that the High Court should be able to concentrate on important matters of constitutional law or of general legal principle, to the exclusion of less important cases in either original or appellate jurisdiction; secondly, that there should always be an intermediate appeal as of right before a matter reaches the High Court.¹³⁸ Both propositions call for brief comment.

The system for hearing constitutional cases appears now to be satisfactory. The most important constitutional cases are likely to commence in the High Court under s.75 of the Constitution, or to be removed there under Part VII of the Judiciary Act. Improved provision for intervention by Commonwealth or State Attorneys-General has also been made.¹³⁹ The problems of automatic removal of cases involving *inter se* questions have disappeared.

So far as the High Court's non-constitutional appellate functions are concerned, the position is less satisfactory. The importance of a case does not depend on the amount at stake, and even if it did, \$20,000, which is the relevant figure both for State and Territory Supreme Courts and the Federal Court, is by present standards not a large amount.¹⁴⁰ No doubt the amount at stake in an appeal may be relevant to the granting of special leave, but there does not seem any compelling reason for granting a right to appeal, even on a trivial or straightforward point of law, merely because a sum of money greater than \$20,000 is in some way involved. Both the House of Lords¹⁴¹ and the United States Supreme Court¹⁴² hear cases only by way of a system equivalent to special leave. This is also the position with the Family Court of Australia.¹⁴³

It is submitted that appeal to the High Court, in non-constitutional matters, ought to be by leave or special leave only. This is in effect the position in criminal appeal,¹⁴⁴ despite the importance of many criminal appeals and the traditional value of the "liberty of the subject". It seems most unlikely that such an "exception" would be invalid under s.73, since because of the power to grant special leave a substantial appellate jurisdiction, applying to virtually all cases in federal and State courts, would exist. Consideration should also be given to a system of certification, by Full State Supreme Courts or the Full Federal Court, of a case as involving points of law of general public importance, as can now be done under s.95(6) of the Family Law Act, 1975 (Cth.), and by the English Court of appeal.¹⁴⁵ This would reduce the need to apply to the High Court itself for

138. E.g., Mason, "Where Now?", (1975) 49 *A.L.J.* 570, 576.

139. Judiciary Act, 1903 (Cth.), Pt. XI, Div. 1A, inserted by Judiciary Amendment Act, 1976, s.17. Div. 1A only relates to intervention, not to the *locus standi* of State Attorneys-General to commence proceedings. But for suggestions for general reform of *locus standi* rules in (*inter alia*) constitutional cases see Australia, Law Reform Commission, Working Paper No. 7, *Access to Courts — I Standing: Public Interest Suits* (1977), 40-46, 51-54.

140. New s.35 is even more liberal than this: it is sufficient that the judgment appealed from is for the sum of \$20,000. The amount at stake in the appeal may be less: cf. s.35(3)(a) and (b). This was also the position prior to 1976: *Moller v. Roy* (1975) 49 *A.L.J.R.* 311.

141. Administration of Justice (Appeals) Act, 1934 (U.K.); Jackson, *op. cit.* (*supra*, n.2), 113.

142. David & Brierley, *Major Legal Systems in the World Today* (1968), 361-362.

143. *Supra*, p.217.

144. But cf. *supra*, n.111.

145. *Supra*, n.141.

special leave; a situation which from the point of view of counsel and parties is not always satisfactory. The High Court could then be empowered to withdraw or cancel the certificate if it disagreed with the lower court's assessment of the case, or if it found it unnecessary to decide the point of law in question.

The notion that there should always be an intermediate appeal before a matter reaches the High Court has been strongly supported by members of the Court,¹⁴⁶ but, with respect, seems less secure the more one accepts the function of the Court as the review of issues of major importance. It may well be helpful, in Sir Garfield Barwick's words, for the High Court to have "the benefit of the views of the Full Court or Court of Appeal of the State".¹⁴⁷ But from the point of view of the litigant, the precedent his case is establishing is usually of secondary importance: what is important is its resolution. A party successful in both lower courts but defeated on a close vote in the High Court may not think highly of the "benefit of the views" of the lower appeal court. It should be clear that the reason for a second-tier appellate court such as the High Court is likely to become is the development and review of the law, not the resolution (whether in agreement with or dissent from lower courts) of a relatively few disputes. A. P. Herbert wittily criticized an equivalent position in England prior to 1969:

"The institution of one Court of Appeal may be considered a reasonable precaution; but two suggest panic."¹⁴⁸

As a result of this type of criticism, a limited "leap-frogging" scheme was introduced by the Administration of Justice Act, 1969 (U.K.).¹⁴⁹ Certain cases involving points of substantial public importance can now be taken direct to the House of Lords, avoiding the Court of Appeal. Such arrangements are valuable, for example, where the disposition of a case depends on a precedent binding the intermediate appeal court.¹⁵⁰ Either "leap-frogging" provisions, on the English model, should be introduced for all superior courts exercising federal jurisdiction; or at least the High Court should announce its willingness to give special leave in particularly important cases so as to obviate a second appeal.¹⁵¹

Alternatively, if it is thought desirable to have a second appeal in all or most cases, serious consideration should be given to the establishment of an Appeal Costs Fund,¹⁵² or to the provision on a generous scale of legal aid for selected appeals. The advantages of a second appeal are essentially public, and arrangements for costs should reflect that.

5. The Privy Council

(1) ABOLITION OF APPEALS

The status of the appeal to the Judicial Committee of the Privy Council was the one substantial issue which divided the colonial representatives and

146. Barwick, *loc. cit.* (*supra*, n.4), 489; Mason, *loc. cit.* (*supra*, n.138), 576.

147. *Loc. cit.* (*supra*, n.4), 489.

148. *Uncommon Law* (1935), 257.

149. See Blom-Cooper & Drewry, *Final Appeal: A Study of the House of Lords in its Judicial Capacity* (1972), 149-151.

150. *Cf.* Administration of Justice Act, 1969 (U.K.), s.12(3)(b).

151. At present an appeal by special leave is not available from a single judge of the Federal Court, but is available from State and Territory Supreme Courts (except in bankruptcy).

152. *Cf.* South Australia, Law Reform Committee, *31st Report Relating to the Enactment of an Appeal Costs Fund Act* (1974). And see *Davis v. Johnson* [1978] 2 W.L.R. 553, 577 *per* Lord Salmon.

the British Government in their negotiations prior to the passage of the Commonwealth of Australia Constitution Act, 1900 (U.K.).¹⁵³ The result was a compromise: the Privy Council appeal was retained, but in *inter se* matters only upon the certificate of the High Court; the Parliament might make laws "limiting" the matters in which special leave to appeal to the Privy Council might be asked.¹⁵⁴ In view of the proposition that, such "limitation" apart, the Constitution "shall not impair" the prerogative appeal, it might have been expected that the power to limit would be interpreted in the same way as the power to prescribe "exceptions and . . . regulations" in s.73: that is, as a power to limit but not exclude.¹⁵⁵

The abolition of Privy Council appeals has proceeded by stages. In 1907, amendments to the Judiciary Act excluded the direct appeal to the Privy Council from State Supreme Courts in matters of invested federal jurisdiction,¹⁵⁶ and in particular, in *inter se* matters.¹⁵⁷ In 1968, the Privy Council (Limitation of Appeals) Act precluded future appeals in matters of federal jurisdiction.¹⁵⁸ Then, in 1975, the Privy Council (Appeals from the High Court) Act excluded future appeals from the High Court to the Privy Council, in all matters of State jurisdiction. The validity of the 1975 Act depends, probably, upon whether the exclusion of virtually all appeals is a "limitation" under s.74. The Privy Council in *Kitano v. Commonwealth*¹⁵⁹ expressly left the point open, but their advice gives virtually no comfort to those who would argue for a restrictive interpretation of the power to "limit" appeals.¹⁶⁰

Assuming, then, that the 1975 Act is valid, there remains the appeal direct to the Privy Council from State Supreme Courts exercising State jurisdiction.¹⁶¹ There can be no doubt that an alternate final appeal in

153. Quick & Garran, *Annotated Constitution of the Australian Commonwealth* (1901), 229-249; La Nauze, *The Making of the Australian Constitution* (1972), ch. 16.

154. Constitution, s.74.

155. *Supra*, n.116.

156. Judiciary Act, s.39(2)(b), held valid in *Lorenzo v. Carey* (1921) 29 C.L.R. 243; *Commonwealth v. Limerick Steamship Co. Ltd.* (1925) 35 C.L.R. 69.

157. Judiciary Act, ss.38A, 40A, held valid in *Pirrie v. McFarlane* (1925) 36 C.L.R. 170.

158. Held valid in *Kitano v. Cth.* (1975) 5 A.L.R. 440.

159. *Id.*, 442.

160. In *Commonwealth v. Queensland* (1975) 7 A.L.R. 351, the validity of the 1975 Act appears to have been assumed by Gibbs J. (with whom Barwick C.J., Stephen, Mason JJ. agreed) and Murphy J.: *id.*, 363, 381. See also *Queensland v. Commonwealth (Second Territories Representation Case)* (1977) 16 A.L.R. 487, 500 *per* Stephen J., 522 *per* Aickin J. ("this court is now in all respects a court of ultimate appeal"); repeated in *Viro v. R.* (1978) 18 A.L.R. 257, 324-325. In *Viro's* case the entire Court assumed the validity of the 1975 Act, although only Mason J. referred to the point, "not out of any desire to raise doubts as to the validity of the law, but merely because the meaning of the concept of limitation in s.74 was left open in *Kitano's* case and because no argument was addressed to us upon the question": *id.*, 295-296. See further Blackshield, "Judges and the Court System", in Evans ed., *Labour and the Constitution 1972-1975* (1977), 107-109, citing Jacobs J. in *Commonwealth v. Queensland* (1975) 7 A.L.R. 351, 374. The argument that s.74 permits limitation only by reference to "matters", and that a restriction by reference to jurisdiction was not a law limiting "matters", was rejected in *Kitano's* case, (1975) 5 A.L.R. 440.

161. It has been argued that the 1975 Act by implication abolished *all* appeals to the Privy Council: see *Commonwealth v. Queensland* (1975) 7 A.L.R. 351, 378-382 *esp.* 381, *per* Murphy J.; repeated in *Viro's* case: (1978) 18 A.L.R. 257, 317-318; Blackshield, *loc. cit.* (*supra*, n.160), 108-109. The argument seems to be as follows: (a) the Constitution authorizes exclusion of all appeals from the High Court; (b) it is inconsistent (within the meaning of s.109) for two courts to have at the

matters of State jurisdiction is an absurdity.¹⁶² The possibility is thereby raised of irreconcilable Privy Council and High Court decisions confronting a subsequent Supreme Court,¹⁶³ and whichever decision the Supreme Court decided to follow, the defeated litigant would no doubt appeal to the *other* court. It is even possible for the *same* case to end up in both courts; for example in the case of an appeal to the High Court by one party, and a cross-appeal to the Privy Council by the other.¹⁶⁴ No doubt judicial statesmanship would fashion a solution to such problems; most probably the Privy Council would defer to the High Court, if necessary postponing the hearing of a pending appeal before it until the High Court had delivered judgment.¹⁶⁵ There is even the possibility that the Privy Council would refuse to entertain a pending appeal at all, in circumstances like these, on the ground of *forum non conveniens*. Certainly the availability of a "local remedy" in the form of a final appeal to the High Court would be grounds for refusing leave to appeal. Their Lordships could even, in certain circumstances,¹⁶⁶ bring about the *de facto* abolition of appeals by refusing on these grounds ever to grant special leave.

All these expedients, whatever their intrinsic merits, are made necessary by the failure of governments and parliaments in Australia to take effective action to terminate all appeals to the Privy Council. This is not the place

same time jurisdiction over the same matter: *cf. Frost v. Stevenson* (1937) 58 C.L.R. 528, 573 *per* Dixon J.; *Felton v. Mulligan* (1971) 124 C.L.R. 367; *Tansell v. Tansell* (1977) F.L.C. (CCH) 90-280 (*supra*, nn.69-70); (c) the inconsistency is a *fortiori* where the two courts in question are final appeal courts with no possibility of further recourse; (d) therefore, upon the passage of the 1975 Act, State laws granting an alternate appeal to the Privy Council became invalid under s.109; Imperial Acts (as a result of the Statute of Westminster, 1931 (U.K.)) and the prerogative appeal were excluded in the same way by a process of implied repeal. The novelty in the argument is two-fold: a combination of the form of s.109 inconsistency in *Victoria v. Commonwealth* (1937) 58 C.L.R. 618, with inconsistency under the "covering the field" test; and the application of these s.109 doctrines to inconsistency with previous Imperial laws. The argument has not been put to their Lordships in any Privy Council appeal since the 1975 Act took effect, and in what follows it will be assumed that the alternate appeal in State matters continues to exist. For the status of the *inter se* appeal see *supra*, n.88.

162. *Cf. Barwick, loc. cit. (supra, n.4), 481-488; Mason, "The Courts and their Role in changing the World Today", address to the World Congress on Law and Social Philosophy (1977, typescript), 9:*
 "A bizarre situation now obtains, a situation in which a disappointed litigant in a State Court may appeal at his option either to the High Court or to the Privy Council there being no appeal from the High Court to the Privy Council. The duality of ultimate appellate jurisdiction is bound to lead to difficulties; indeed they are already becoming apparent. One has only to contrast the recent High Court decision in *Bisticic v. Rokov* (1976) 11 A.L.R. 129, that the United Kingdom *Merchant Shipping Amendment Act, 1958* was not in force in Australia, with the Privy Council decision in *Oteri v. The Queen* [1976] 1 W.L.R. 1272, that the United Kingdom *Theft Act, 1968* was in force aboard a small fishing boat twenty-two miles off the Australian coast, to realize that." See also *Viro v. R.* (1978), 18 A.L.R. 257, 282 *per* Gibbs J.; 290-291 *per* Stephen J.; 306-307 *per* Jacobs J.; 326-327 *per* Aickin J.
163. *Cf. the two cases cited by Mason (previous note), though the cases are arguably distinguishable.*
164. *Cf. Castles, (1977) 7 Hong Kong L.J. 110-113.*
165. *Cf. Pirrie v. McFarlane* (1925) 36 C.L.R. 170, when the High Court in such a situation *accelerated* judgment. See also *Ebert v. Union Trustee Co. of Aust. Ltd.* (1961) 35 A.L.J.R. 70.
166. *I.e., the repeal of the Imperial Orders-in-Council giving rights to appeal: Barwick, loc. cit. (supra, n.4), 487.*

for full discussion of the issues, but abolition could or might be brought about by one or other of the following means.¹⁶⁷

(a) United Kingdom legislation, at the request and consent of the States. There is of course no legal requirement of State consent for United Kingdom legislation in matters of purely State concern, but there is a conventional requirement to that effect.¹⁶⁸ However, it is not clear whether the United Kingdom authorities would act at the request of some only of the States, and in present circumstances a unanimous State request is unlikely.

(b) State legislation purporting directly to exclude the appeal. Such legislation might validly exclude the right of appeal arising under the relevant Order-in-Council, but it seems most unlikely,¹⁶⁹ in view of the combined effect of the Judicial Committee Acts of 1833 and 1844 and the Colonial Laws Validity Act, 1865, s.4, that it could validly exclude the prerogative appeal by special leave.

(c) United Kingdom legislation, at the request and consent of the Commonwealth Parliament, pursuant to s.4 of the Statute of Westminster, 1931. This was one of two approaches adopted in the Privy Council (Abolition of Appeals) Bill, 1975, rejected in the Senate on a combination of constitutional and "States-rights" arguments.¹⁷⁰ Probably, s.9(2) of the Statute of Westminster protects the States from a combination of Commonwealth and British legislation in this way; this was apparently the view taken by the British Government, after representations by the States, in 1975.¹⁷¹

(d) Direct Commonwealth legislation purporting to abolish all appeals. This was the other approach taken in the Privy Council (Abolition of Appeals) Bill, 1975. It is generally assumed that the Commonwealth lacks power itself to abolish State appeals, but it is not clear that this is so. S.9(1) of the Statute of Westminster leaves the matter open, since the question is one of the extent of the authority of the Commonwealth Parliament, not the effect of the Statute of Westminster itself.¹⁷² Various powers may be argued to support Commonwealth competence: for example, the external affairs power (especially in the extended interpretation given it in the *Seas and Submerged Lands Act Case*¹⁷³); or the putative "national affairs" power, "matters incidental to the existence of the Commonwealth and its emergence as a nation-State".¹⁷⁴ The reasoning of some members of the

167. *Id.*, 487-488; Mason, "The Limitation of Appeals to the Privy Council . . ." (1968) 3 *Fed. L.R.* 1; Nettheim, "The Power to Abolish Appeals to the Privy Council from Australian Courts", (1965) 39 *A.L.J.* 39; Sawyer, "The British Connection", (1973) 47 *A.L.J.* 113.

168. It is arguable that such legislation would also require the consent of the Commonwealth Parliament, since although it would relate only to appeals in matters of State jurisdiction, it would "extend . . . to a Dominion as part of the law of that Dominion" under s.4 of the Statute of Westminster, and it cannot be said with certainty that the exclusionary provision (s.9(2)) would apply.

169. *Cf.* Barwick, *loc. cit.* (*supra*, n.4), 487-500; Finnis, [1974] *A.S.C.L.* 27-30.

170. 63 *Parl. Debs.* (Senate), 25th February, 1975, 413-429.

171. See O'Connell, "Monarchy or Republic?", in Dutton, ed., *Republican Australia?* (1977), 23-43.

172. What the Statute (s.2) does is to preclude invalidity of Commonwealth laws on grounds of repugnancy, e.g., with the Judicial Committee Acts, 1833 and 1844.

173. (1975) 8 *A.L.R.* 1; *cf.* Sawyer, *loc. cit.* (*supra*, n.167), 115-116 (but *n.b.*, *id.*, 116; "unless action . . . is taken to abolish the appeal by . . . s.128 . . . , it can only be ended through action at Westminster").

174. See Zines, "The Growth of Australian Nationhood and its Effect on the Powers of the Commonwealth", in Zines, ed., *Commentaries on the Australian Constitution* (1977), 1-49; Byers, in Evans, ed., *Labor and the Constitution 1972-1975* (1977), 67-71.

High Court in *Queensland v. Commonwealth*¹⁷⁵ may give additional support to these arguments. But in the writer's view, the power (if it exists) is to be found in s.73 itself, giving the High Court "jurisdiction . . . subject to such regulations as the Parliament prescribes, to hear and determine appeals from *all* judgments, decrees, orders and sentences" *inter alia* of Supreme Courts (emphasis added). This is, clearly, a power "vested by this Constitution . . . in the Federal Judicature" under s.51 (xxxix). Surely, in the anomalous situation where the Privy Council and the High Court have mutually exclusive and conflicting jurisdictions, it is incidental to the execution of the High Court's constitutional position as an Australian court of final appeal for the Parliament to exclude conflicting appeals to other courts?

(e) Commonwealth legislation "at the request or with the concurrence of the Parliaments of all the States directly concerned" under s.51 (xxxviii) of the Constitution. Each of the methods canvassed above involves political or legal uncertainties of some magnitude. The States collectively have opposed Commonwealth action in this field, ostensibly in order to protect their constitutional status against possible future attack in other areas of greater importance.¹⁷⁶ Nonetheless no State has yet taken independent action to remove the source of the trouble. This is particularly surprising in that s.51 (xxxviii) provides a thoroughly constitutional method of change, consistent both with notions of Australian autonomy and with States' rights. Indeed, it has been convincingly argued that individual States can take steps to abolish the Privy Council appeal from their own Supreme Court under s.51 (xxxviii),¹⁷⁷ irrespective of other States' attitudes. It is hard to see, for example, how Queensland is "*directly concerned*" with the fate of Privy Council appeals from the South Australian Supreme Court.

(2) ABOLITION OF PRIVY COUNCIL APPEALS: THE EFFECT ON PRECEDENT

In *Commonwealth v. Queensland* Gibbs J. described the Privy Council as . . .

"The highest [judicial body] in the hierarchy of Australian courts, the supreme tribunal by whose decisions, speaking generally (and putting to one side the possible effect of the Privy Council (Limitation of Appeals) Act 1968 and the Privy Council (Appeals from the High Court) Act 1975), all Australian courts are bound."¹⁷⁸

But even in 1975 the partial abolition of appeals to the Privy Council had begun to affect the rules of precedent in Australia. In *inter se* matters the High Court had long ago decided that it was not bound by decisions of the Privy Council.¹⁷⁹ The same development might have been predicted for matters of federal law since 1968.¹⁸⁰ The Chief Justice had made it clear, both judicially¹⁸¹ and extrajudicially,¹⁸² that in his view the High

175. (1975) 7 A.L.R. 351.

176. O'Connell, *loc. cit.* (*supra*, n.171), 28.

177. Graycar & McCulloch, "Gilbertson v. S.A.: The Case for s.51(xxxviii)??", (1977) 6 *Adel. L.R.* 136, 147-153.

178. (1975) 7 A.L.R. 351, 360.

179. *Baxter v. Commissioners of Taxation* (1907) 4 C.L.R. 1087.

180. *Cf. Re Joske, ex parte Australian Building Construction Employees* (1974) 48 A.L.J.R. 42, 44 *per* Barwick C.J., 48 *per* Gibbs, Mason JJ. (*re the Boilermakers' Case*).

181. *Favelle Mort Ltd. v. Murray* (1976) 8 A.L.R. 649, 654, 657-658.

182. *Loc. cit.* (*supra*, n.4), 485.

Court was no longer bound by Privy Council decisions.¹⁸³ That view has now been unanimously affirmed by the whole Court in *Viro v. R.*¹⁸⁴

(a) *Viro's case: Privy Council decisions in the High Court*

In *Viro's* case, the question arose whether the High Court was bound to apply the Privy Council decision (on appeal from Jamaica) in *Palmer v. R.*¹⁸⁵ in preference to its own decision in *R. v. Howe*.¹⁸⁶ In *Howe's* case the Court had held that the defence of excessive self-defence was capable of reducing a murder charge to manslaughter, a view considered but rejected by the Privy Council in *Palmer*. *Palmer's* case had been followed in England and elsewhere,¹⁸⁷ but quite apart from the central question of the status of Privy Council decisions generally, its applicability in Australia might have been doubted on other grounds. In the first place, it was not necessarily a decision on Australian law: quite apart from the "local circumstances" argument,¹⁸⁸ the Privy Council had on a number of occasions deferred to a considered Australian view of a general principle, for example in the face of conflicting House of Lords authority.¹⁸⁹ Secondly, it might have been open to the High Court to regard itself as bound only by decisions of the Privy Council on appeal from Australia,¹⁹⁰ although, as Gibbs J. pointed out, the wider view was the more general one.¹⁹¹ In fact, the Full Supreme Court of South Australia had expressly refused to follow *Palmer*, although without stating any reasons.¹⁹²

In the event, and without considering these expedients, the Full High Court held unanimously that it was free to reassess the issue and if necessary to follow *Howe* rather than *Palmer*. Gibbs J. stated the argument in these terms:

"The Modern English rule is usually said to be that 'every court is bound to follow any case decided by a court above it in the hierarchy' . . . If this is the rule to be applied the result will be that this Court is no longer bound by decisions of the Privy Council, which now does not occupy a position above this Court in the judicial hierarchy . . . Although the rules of precedent are not immutable, it seems to me that when the Parliament made this Court an ultimate court of appeal, with the responsibility of deciding finally and conclusively every question that it is called

183. See further St. John, "The High Court and the Privy Council: the New Epoch", (1976) 50 *A.L.J.* 389.
 184. Reasons handed down on 11th April, 1978; (1978) 18 *A.L.R.* 257.
 185. [1971] *A.C.* 814.
 186. (1958) 100 *C.L.R.* 448.
 187. *R. v. McInnes* [1971] 1 *W.L.R.* 1600, 1608 (C.A.). See also *Edwards v. R.* [1973] *A.C.* 648.
 188. Referred to by Murphy J. in *Viro's* case: (1978) 18 *A.L.R.* 257, 313-314, 319. But *cf.* Jacobs J., *id.*, 306.
 189. *E.g.*, *Australian Consolidated Press v. Uren* [1969] 1 *A.C.* 590; *Geelong Harbour Trust Commissioners v. Gibbs Bright & Co.* [1974] *A.C.* 810; *Freight Lines & Construction Holdings Ltd., v. N.S.W.* [1968] *A.C.* 625. And see Maher, "The Common Law — Tears in the Fabric", (1969) 7 *M.U.L.R.* 97. But the practice was not invariable: see *e.g.* *Commissioner of Stamp Duties (N.S.W.) v. Bone* (1976) 9 *A.L.R.* 11, noted (1976) 50 *A.L.J.* 388. This was the last reported appeal from the High Court to the Privy Council.
 190. *Cf.* *Negro v. Pietro's Bread Co. Ltd.* [1933] 1 *D.L.R.* 490 (Ont. C.A.); *Viro's* case, (1978) 18 *A.L.R.* 257, 260 *per* Barwick C.J.; 318 *per* Murphy J.
 191. *Id.*, 281, *cf. id.*, 306 *per* Jacobs J.
 192. *R. v. Olasiuk* (1973) 6 *S.A.S.R.* 255, 258 *per* Bray C.J., Hogarth, Mitchell JJ. *Cf.* *R. v. McCafferty* [1974] 1 *N.S.W.L.R.* 89, 91 *per* Glass J., not followed in *R. v. Harding* [1976] *V.R.* 129, 154 *per* Nelson J.; 174 *per* Murphy J.

upon to consider, it must have intended that we should discharge that responsibility for ourselves, and that we should have the power and the duty to determine whether the decision of any other court, however eminent, should be followed in Australia. Part of the strength of the common law is its capacity to evolve gradually so as to meet the changing needs of society. It is for this Court to assess the needs of Australian society and to expound and develop the law for Australia in the light of that assessment. It would be an impediment to the proper performance of that duty, and inconsistent with the Court's new function, if we were bound to defer, without question, to every judgment of the Privy Council, no matter where the litigation in which that judgment was pronounced had originated, and even if we considered that the decision was inappropriate to Australian conditions or out of harmony with the law as it had been developed, and was being satisfactorily applied, in Australia."¹⁹³

Despite this unanimity, there were differing views about the future status of Privy Council decisions for the High Court. Thus Gibbs J. stated that Privy Council decisions ought to be regarded "as even more highly persuasive, if that is possible [than those of the House of Lords], by reason of the fact that its decisions remain binding on the States".¹⁹⁴ Murphy J., on the other hand stated that . . .

"previous decisions of the Privy Council, *given on appeal from the High Court*, should be treated for the present as equivalent to a High Court decision."¹⁹⁵

It is difficult to see how measures of persuasiveness of final appellate court decisions can be assessed, at least with any precision. Where a decision is not binding, its persuasiveness depends not only—perhaps not even primarily—on which court decided the case, but also on its composition, the cogency of the reasoning, and so on. If equations are necessary, it seems best to regard the Privy Council as on the same plane as the House of Lords, in view of their overlapping personnel;¹⁹⁶ but with the qualification that Australian appeals are decisions in which the relevant Australian law is the *lex fori*.¹⁹⁷ In Aickin J.'s words, decisions of both the House of Lords and the Privy Council remain . . .

"primary sources for guidance in the development of the common law and of its content from time to time".¹⁹⁸

In the event, a majority of the Court preferred *Howe's* case to *Palmer's* case;¹⁹⁹ but it is a measure of the present disunity of the

193. (1978) 18 A.L.R. 257, 282. Mason J. agreed; *id.*, 294. See also *id.*, 260 *per* Barwick C.J. 289 *per* Stephen J.; 306 *per* Jacobs J.; 318 *per* Murphy J.; 325 *per* Aickin J.

194. *Id.*, 282-283.

195. *Id.*, 318 (emphasis added).

196. *Cf. id.*, 325 *per* Aickin J.

197. *Cf. Cooper v. Southern Portland Cement* (1972) 128 C.L.R. 437, 438.

198. (1978) 18 A.L.R. 257, 325. *Cf. id.*, 290 *per* Stephen J. ("great weight"); 294 *per* Mason J. ("the highest respect"); 306 *per* Jacobs J. ("this Court would only differ from a decision of the Privy Council with the greatest reluctance"). Barwick C.J. made no express reference to the point.

199. Stephen J. (*id.*, 293) and Aickin J. (*id.*, 330) expressly agreed with the formulation of the four issues for the jury set out by Mason J. (*id.*, 303) Barwick C.J. "explained" *Howe's* case in terms that indicated some preference for *Palmer: id.*, 267. Gibbs J. would have preferred to overrule *Howe: id.*, 286-288. Murphy J., by

Court²⁰⁰ that in order to reach agreement, three of its members felt it necessary to defer to the view of a not obvious "majority" as expressed by Mason J.²⁰¹

(b) *Viro's case: Privy Council decisions in other Australian courts.*

The problems of the authority of Privy Council decisions in courts other than the High Court also caused considerable disagreement. Before *Viro's* case, the position had apparently been that State courts were bound by decisions both of the High Court and the Privy Council, and in the event of manifest conflict between them would normally have been expected to follow the Privy Council. But on the other hand State courts were not entitled to prefer *dicta* of the Privy Council to a decision of the High Court.²⁰² The position of federal courts since 1968 had apparently not been canvassed.

There was no criticism in *Viro's* case of the trial judge's failure to apply *Howe*.²⁰³ But each member of the High Court discussed the problem of State courts and Privy Council decisions. There was, of course, general agreement that State courts remained bound by decisions of the High Court and the Privy Council, unless there was clear conflict between them.²⁰⁴ The difficult problem was the position of a State court confronted by such a conflict of authority. Broadly speaking, three different views were taken, none of them commanding a majority.

The first view, adopted by Barwick C.J. and Murphy J., and perhaps also by Jacobs J., is that State Supreme Courts should always follow decisions of the High Court in preference to conflicting decisions of the Privy Council, unless perhaps the Privy Council decision was on an Australian appeal and expressly overruled or refused to follow the High Court decision.²⁰⁵ Perhaps the strongest expression of this view was that of Barwick C.J.:

"I do not agree that the State courts can choose between a decision of this Court and that of the Privy Council, possibly preferring the latter where the decision of this Court is what my brother Gibbs called "an old one". I do not think it can ever be left to a State court to decide whether or not it will follow a decision of this Court in a matter upon which this Court has pronounced whether recently

199. (Continued)

contrast, proposed abandonment of any element of an objective test, and thus of both *Howe* and *Palmer: id.*, 320-323. Jacobs J. would have preferred to apply the "reasonableness" test to qualify the defendant's actual state of mind (by excluding a wholly irrational intention), but not to substitute for it the hypothetical state of mind of a "reasonable" person: *id.*, 307-312. His view was therefore intermediate between that of Murphy J. and the "majority".

200. *Cf. Queensland v. Commonwealth (Second Territories Representation Case)* (1977) 16 A.L.R. 487; *Robinson v. Western Australian Museum* (1977) 16 A.L.R. 623, in neither of which is there a specific *ratio decidendi* supported by a majority of the Court.

201. (1978) 18 A.L.R. 257, 288 *per* Gibbs J.; 312, *per* Jacobs J.; 323 *per* Murphy J.

202. *Cf. Rejtek v. McElroy* (1965) 112 C.L.R. 517; *Jacob v. Utah Construction and Engineering Pty. Ltd.* (1966) 40 A.L.J.R. 306.

203. *Cf.* 261 *per* Barwick C.J..

204. *Id.*, 260 *per* Barwick C.J.; 283 *per* Gibbs J.; 290 *per* Stephen J.; 295 *per* Mason J. 306. *per* Jacobs J.; 326 *per* Aickin J. But *cf.* 318 *per* Murphy J.

205. Neither Barwick C.J. nor Jacobs J. expressly adverted to that problem. Murphy J. would have allowed later Privy Council decisions on appeal from the High Court to be treated as overruling earlier High Court decisions: *id.*, 318. Jacobs J. said only that State courts should "follow a decision of this Court in preference to a conflicting decision of the Privy Council": *id.*, 306.

or at some more remote point of time. It is for this Court alone to decide whether its decision is correct."²⁰⁶

Even if this view allows State courts to prefer a subsequent Privy Council decision *overruling* a previous High Court decision,²⁰⁷ the difficulty with it is that very many previous High Court decisions were made at a time when the High Court regarded itself as bound, not merely by decisions of the Privy Council but by those of the House of Lords also.²⁰⁸ The notion that an "old" decision of the High Court is necessarily a considered view of the law independent of the (then accepted) doctrine of precedent is simply false. Moreover, it is difficult to accept that State Courts should be required to ignore a current of authority, expressed in Privy Council (and perhaps House of Lords) decisions, the effect of which is to change the law for Australia established in an early High Court decision.²⁰⁹

Considerations of this sort no doubt led Gibbs and Mason JJ. to propose an alternative view, that State courts should be bound, as a general rule, to follow High Court decisions in preference to those of the Privy Council, but that in certain circumstances subsequent Privy Council decisions could properly be preferred. For example, Mason J. observed:

"it is no longer appropriate that decisions of the Privy Council should be accorded higher authority in the Australian judicial system than decisions of this Court. As this Court is the ultimate appellate court in Australia and as it has the advantages mentioned earlier in deciding what is the appropriate law for Australia, State courts should, as a general rule, follow decisions of this Court in case of conflict. Of course, every general rule has its exceptions or qualifications. Here an exception must be allowed for the case where the Privy Council, after taking into consideration a decision of this Court, has decided not to follow it. In such a case a State court should follow the Privy Council unless its decision appears to be based on considerations that are not relevant to Australian circumstances or conditions. If the State court follows the Privy Council in such a case it is more likely than not that an appeal will be brought to this Court, thereby enabling this Court to decide whether it will adhere to its earlier decision or whether it will adopt the later decision of the Privy Council . . . [T]he recognition of the potential for different development of the common law in various countries entails that there will be some cases in which Australian conditions and circumstances are such as to require a Supreme Court to decline to follow the Privy Council decision. In some cases it will appear from the terms of that decision that it is based on considerations that are inapposite to Australia, but in other cases this conclusion may be drawn from other materials."²¹⁰

206. *Id.*, 260-261.

207. *Cf. supra*, n.205. Murphy J.'s position is more restrictive than this: the Privy Council decision must be on appeal from the High Court. No specific mention was made of the problem of a Privy Council decision on appeal from the High Court reversing the decision of the High Court.

208. *Cf. Piro v. Foster* (1943) 68 C.L.R. 313; *Parker v. R.* (1963) 111 C.L.R. 610. *Cf.* also the earlier policy relating to English Court of Appeal decisions: *Sexton v. Horton* (1926) 38 C.L.R. 240; *Waghorn v. Waghorn* (1942) 65 C.L.R. 289.

209. On the influence of a "line of authority" in matters of precedent *cf. Queensland v. Commonwealth* (1977) 16 A.L.R. 487, 522 *per* Aickin J.

210. (1978) 18 A.L.R. 257, 295. *Cf. Gibbs J.; id.*, 283.

An objection to this view (and *a fortiori* to that of Barwick C.J.) is that it would paradoxically work to encourage appeals to the Privy Council. This, and perhaps the difficulty of a final court laying down rules of precedent for lower courts,²¹¹ led Stephen and Aickin J.J. to the conclusion that no rule could be stated, at least while the Privy Council appeal continues. For example Stephen J. said:

.....

“In my view the present situation is one incapable of remedy by any form of unilateral declaration of one or other of the two final courts of appeal. Until the matter is otherwise resolved the doctrine of binding precedent must . . . be regarded as a casualty of events whenever a conflict arises between decisions of this Court and of their Lordships. Moreover, despite its purportedly authoritative character, any unilateral declaration will lack effective sanction should the actual course of appeal in a particular case not lead to the Court which issues that declaration. It is a necessary feature of the present situation that there is absent that sanction upon which the doctrine of binding precedent depends, the power of the ultimate court of appeal to reverse decisions which do not conform to the doctrine. The irony of the situation is that only by directing Supreme Courts to prefer the precedents of the Privy Council to its own can this Court ensure that appeals come to it and become subject to that sanction.

So long as the present situation continues I would, for the foregoing reasons, be reluctant to join in any unilateral declaration by this Court directed to the course which Supreme Courts should follow. Unsatisfactory as it may appear, the lesser evil is, I think, to acknowledge the breakdown in the doctrine of binding precedent which now occurs when conflicting decisions exist and to leave it to the Supreme Courts to make their choice as between such decisions.”²¹²

Although this view goes against the recent tendency of the High Court to deny State courts any flexibility in matters of precedent,²¹³ there is, with respect, much to be said for it, at least until the Privy Council itself has had a chance to pronounce on the position. The general rejection of Privy Council decisions in favour of those of the High Court (on one view, whenever decided) might have sweeping, perhaps unforeseen, consequences. Supreme Courts may be better able to assess those consequences in the particular case.

In any event, since no one view commanded a majority in the High Court, Supreme Courts may well regard themselves as free to decide which precedent to follow. On the other hand there is no such problem in matters of federal jurisdiction: presumably Mason J.'s view should be taken as establishing the rule in such cases.²¹⁴

211. Such rules can never form part of the *ratio decidendi* of a final appellate court with freedom to depart from its own earlier decisions, since what a lower court should have done can never be a reason for deciding the case in the higher court. Cf. *Davis v. Johnson* [1978] 2 W.L.R. 553, 577 per Lord Salmon; Cross, “The House of Lords and the Rules of Precedent” in Hacker & Raz, eds., *Law Morality and Society. Essays in Honour of H. L. A. Hart* (Oxford, 1977), 145-160, 151-154.

212. (1978) 18 A.L.R. 257, 291-292; cf. *id.*, 326-327 per Aickin J.

213. See, e.g., the cases cited *supra*, n.202.

214. This is probably also the position for federal and territory courts, which were not considered in *Viro's* case.

What *Viro's* case does establish is that the abolition of all Privy Council appeals, whatever their political justification might otherwise have been, is now supported by overwhelming practical considerations.

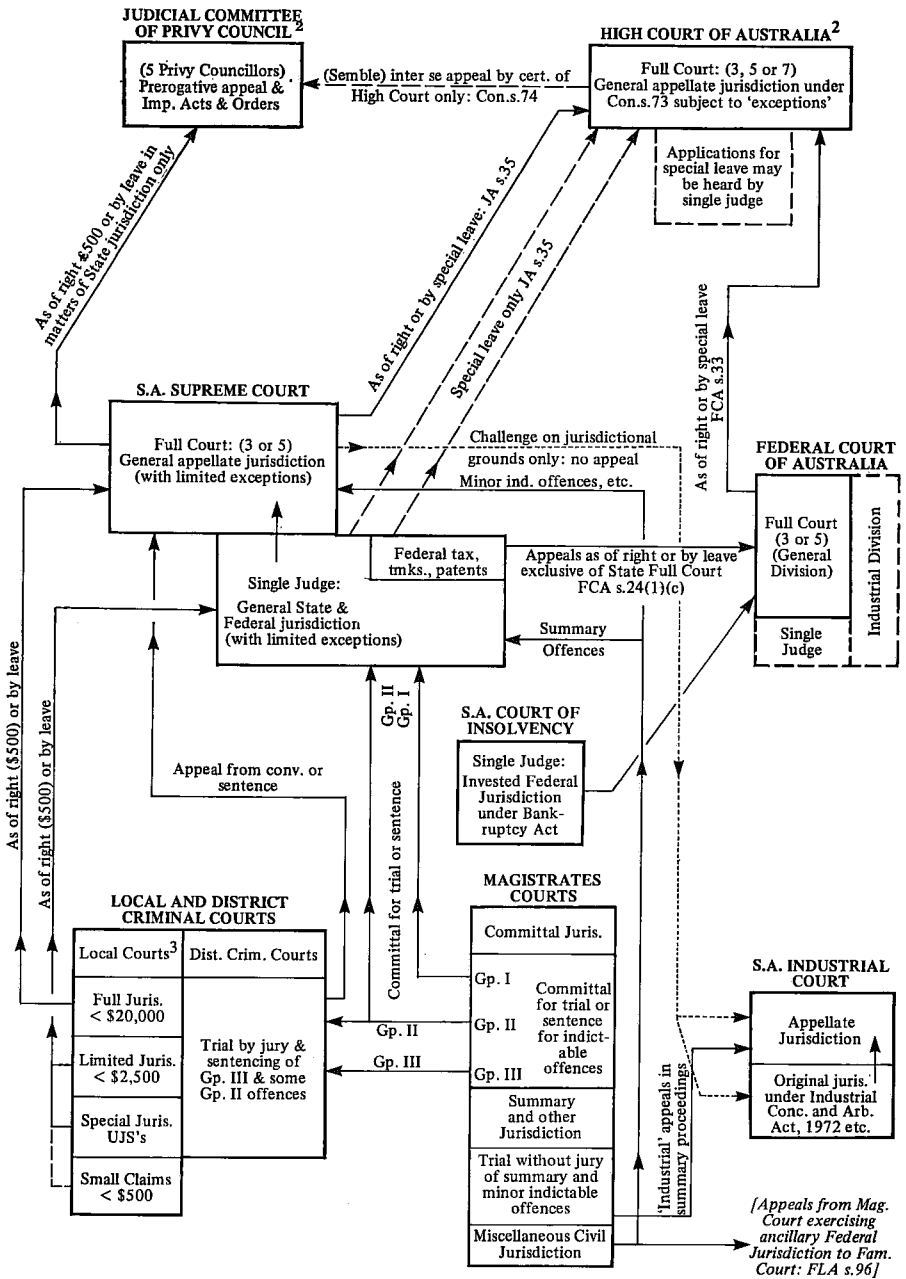
6. Conclusions: a Unified Australian Court Structure?

The changes in Australian courts brought about by the Commonwealth legislation of 1975-1977 are, for the reasons given here, generally to be welcomed. There can be little doubt that (the Privy Council appeal notwithstanding) they have brought about more rational relations between the superior courts.²¹⁵ But as Tables 1 and 2 demonstrate, it is still the case that the Australian court systems are complex (so much so that it is not possible to plot comprehensibly in a single diagram the superior court system even of a single State); that jurisdictional problems remain to confuse lawyers and baffle laymen;²¹⁶ and that the "system" involves a considerable risk of inefficiency as a result of conflicts of jurisdiction (original and appellate) between the various courts.²¹⁷ And many of the changes will have no impact at all on the basic issue of the litigant's costs of obtaining justice. Indeed, one central feature, the insistence on a double appeal in virtually all non-constitutional cases, may have a substantial effect in deterring private litigants from pursuing appeals against governments or corporations.

For some (but perhaps not all) of these reasons, the changes of 1975-1977 may prove to be an instalment only of reforms in the Australian judicial systems.²¹⁸ One further major change that is coming to be widely discussed is the proposal for a unified system of Australian superior courts. The argument was foreshadowed by Sir Owen Dixon in 1935:

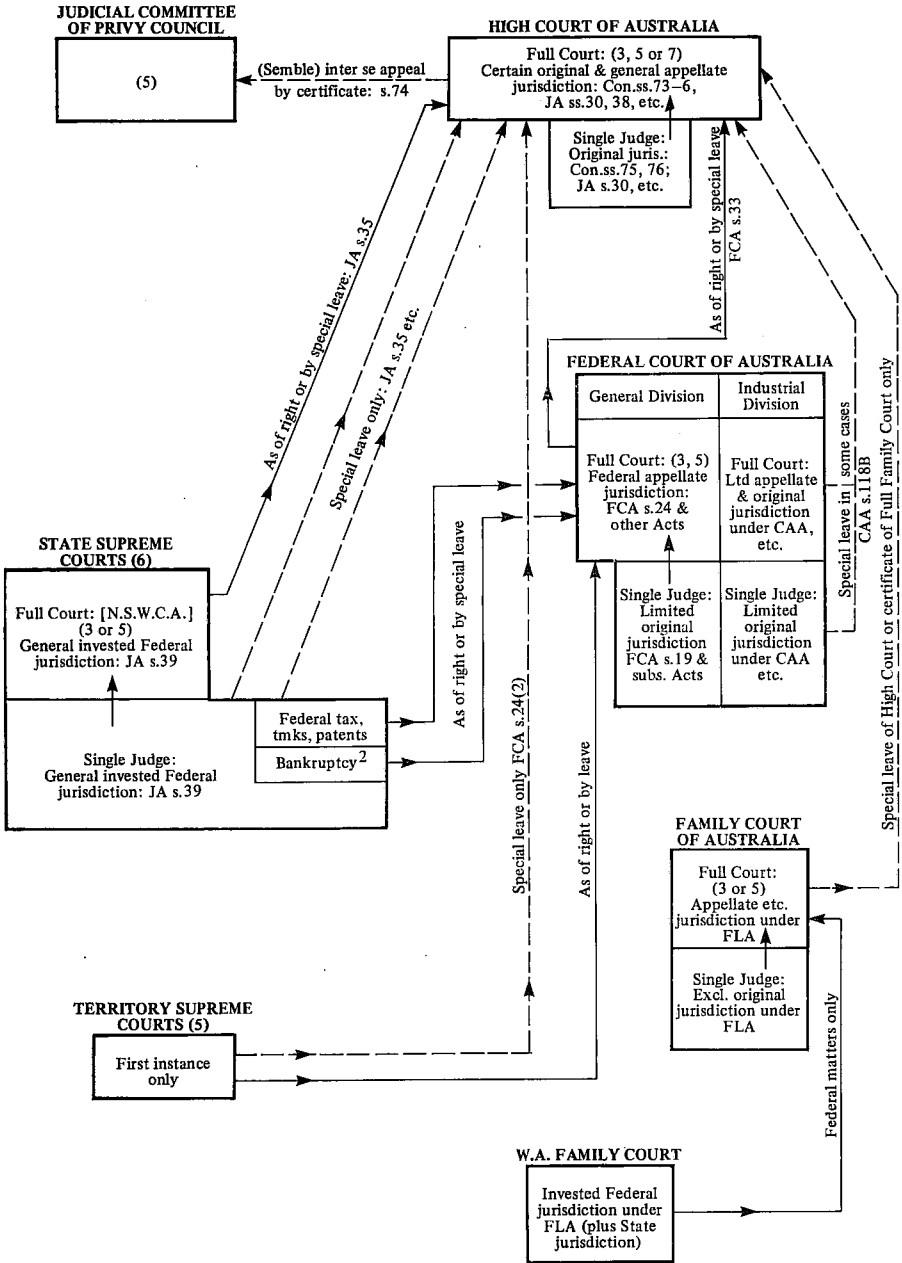
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215. Just as important, although outside the scope of this article, are the parallel changes in the field of federal administrative law: see the Administrative Appeals Tribunal Act, 1975 (Cth.); the Administrative Decisions (Judicial Review) Act, 1977 (Cth.), and the Ombudsman Act, 1976 (Cth.). Another change, whose long-term effect is uncertain, is the passage of the Constitution Alteration (Retirement of Judges), 1977, amending s.72 to allow for the retirement of federal judges at the age of 70 (in the case of High Court judges), or an age (not greater than 70) fixed by Parliament (in the case of other federal judges). The referendum has no application to appointments of judges made before 29th July, 1977.
216. For a recent example see *Pearce v. Cocchiario* (1977) 14 A.L.R. 440 (H.C.), reversing 14 A.L.R. 338 (S.A. Sup. Ct.).
217. Apart from the problems, already referred to, of Privy Council appeals (*supra*, text to nn.162-166), of State and federal jurisdiction in family law matters (*supra*, text to nn.60-70), and of the appellate jurisdiction of the Federal Court and "associated" matters (*supra*, text to n.41), problems remain in relation to the invested federal jurisdiction of State courts under s.39(2) of the Judiciary Act, 1903 (Cth.). For example, no court of summary jurisdiction can exercise federal jurisdiction if composed wholly or partly of justices of the peace: Judiciary Act, 1903 (Cth.), s.39(2)(d). But whether a matter is one involving federal jurisdiction may not be immediately (or at all) apparent, and at least since *Felton v. Mulligan* (1971) 124 C.L.R. 367, proceedings before justices would seem to be invalidated, for example, by the introduction of a defence involving federal law.
218. For example, the following further changes have been suggested: the granting of an advisory opinion jurisdiction to the High Court: see Crawshaw, "The High Court of Australia and Advisory Opinions", (1977) 51 A.L.J. 112; Senate Standing Committee on Constitutional and Legal Affairs, *Report on Advisory Opinions by the High Court* (1977); Australian Constitutional Convention, Judicature Committee, *Report to Standing Committee D* (1977), 18-28; a general revision of the provisions in Ch. III of the Constitution dealing with the appellate and original jurisdiction of the High Court: *id.*, 7-10, 11-16 (Recommendation), 37-56 (Opinions); and the establishment of a Judicial Commission to appoint judges to superior courts: Barwick, *loc. cit.* (*supra*, n.4), 494.

TABLE 1. South Australia: State Court Structure¹



1. Some courts (e.g., Juvenile Courts, the Licensing Court, Coroners inquests) are not shown.
2. Probably an appeal lies by leave or special leave, in the case of the Privy Council, by virtue of the prerogative from any State court exercising State jurisdiction; and in the case of the High Court, under Judiciary Act, 1903 (Cth.), s.39(2)(c) from any State court exercising federal jurisdiction (except where expressly excluded by federal legislation). See also *infra*, n.120.
3. The Local and District Criminal Courts Act Amendment Bill, 1978, proposes to increase jurisdictional limits in Local Courts as follows: Full jurisdiction, \$30,000; Limited jurisdiction, \$10,000; Small claims, \$2,500. Leave to appeal to the Supreme Court will be required where the amount in issue is less than \$2,500.

TABLE 2. Superior Federal Courts and Courts exercising Federal Jurisdiction.¹



1. Some courts (e.g., the Australian Industrial Court, the Federal Court of Bankruptcy) are excluded.
 2. In South Australia and Victoria, federal bankruptcy jurisdiction is invested in a State Court of Insolvency: Bankruptcy Act, 1966 (Cth.), s.27.

“[I]t would appear natural to endeavour to establish the Courts of justice as independent organs which were neither Commonwealth nor State. The basis of the system is the supremacy of the law. The Courts administering the law should all derive an independent existence and authority from the Constitution. Some practical difficulties would occur in carrying such a principle beyond the superior Courts, but it is not easy to see why the entire system of superior Courts should not have been organized and directed under the Constitution to administer the total content of the law. No doubt some financial provisions would be required for levying upon the various Governments contributions to the cost of administering justice. To make judicial appointments and deal with some other matters, it would have been necessary to create a joint committee. But 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.”²¹⁹

Although, then, the case for a unified Australian court structure is not a new one,²²⁰ it is of interest that both the Chief Justice²²¹ and the (then) Commonwealth Attorney-General²²² gave it considerable prominence in their remarks to the 1977 Australian Legal Convention. The matter has also been considered by the Australian Constitutional Convention.²²³ It is suggested that unification be effected either by the States (pursuant to agreements with the Commonwealth relating to appointment of judges, funding, etc.) conferring State appellate jurisdiction on the Federal Court, which would become the only intermediate court of appeal with general jurisdiction,²²⁴ or by a new arrangement to be entered into pursuant to s.51 (xxxviii) of the Constitution.²²⁵ At present the general conception of a unified court structure is what needs to be discussed; the constitutional details will no doubt prove soluble if the political will for judicial unification exists. Whether it does is doubtful, if one considers the experience of State Family Courts, and indeed the whole history of judicial administration in Australia.

219. “The Law and the Constitution”, (1935) 51 *L.Q.R.* 590, 607.

220. See, e.g., Else-Mitchell, “The Judicial System — The Myth of Perfection and The Need for Unity”, (1970) 44 *A.L.J.* 516 and refs.

221. *Loc. cit.* (*supra*, n.4), 490-491.

222. Ellicott, “Commentary by the Attorney-General on the Paper Presented by the Chief Justice of Australia” (19th Australian Legal Convention), (1977) 2 *Commonwealth Record* 885.

223. Judicature Committee, *loc. cit.* (*supra*, n.190), 28-30 (Recommendation), 60-71 (Working Paper).

224. Barwick, *loc. cit.* (*supra*, n.4), 491.

225. Ellicott, *loc. cit.* (*supra*, n.194), 886.