Peter Nygh Memorial Lecture 2012
15th National Family Law Conference

Two Chapters about Judicial Power

Chief Justice Robert French AC

15 October 2012, Hobart

Peter Nygh began his academic career in this city. His first appointment was in 1960 as a lecturer at the University of Tasmania. While teaching at that University he gained a Masters Degree in Law from Sydney University on the topic of International Recognition of Change of Status. In 1964, he was awarded an SJD from the University of Michigan, which he attended on a Fulbright Scholarship. He moved to Sydney University in 1965 to take up an appointment as a lecturer at the Law School. In 1969, he became an Associate Professor and shortly afterwards a full Professor of Law at that University where he remained until 1973. In 1974, he was appointed a Professor of Law and the first Dean of Macquarie University Law School. In 1979, he was appointed a Justice of the Family Court of Australia, in which office he served until July 1993.

Beyond his work as a Family Court Judge, Peter Nygh had a national and international reputation which persists in his textbook on *Conflict of Laws in Australia* which is now in its 8th edition, co-authored by Martin Davies, Andrew Bell and Paul Brereton. He represented Australia at the Hague Conference on Private International Law and that involvement took up much of his time following his retirement from the Family Court.

In a book of essays on *Intercontinental Cooperation through Private International Law*, published in his honour in 2004, it was said of him that he was 'a great internationalist'. The Foreword to the book recorded that:

> He was one of the very few scholars with excellent knowledge of both the common law and civil law legal systems, a deep understanding of their differences and similarities and, no less important, had linguistic access to all primary sources of these systems.[1]

Peter Nygh was a great Australian lawyer and judge and it is an honour to have been asked to deliver this lecture in his memory. He was a Judge of the Family Court with the broad perspectives and legal skill set necessary to deal with its complex and multi-dimensional jurisdiction, which is belied by the inappropriate characterisation of it as 'specialist'. I believe that Peter Nygh and I met once or twice, but I cannot claim to have known him well. However, we are linked in one particular way. We each contributed a chapter to a book published in 2000 entitled *The Australian Federal Judicial System*, edited by Brian Opeskin, now at Macquarie University, and Fiona Wheeler who is a Professor at the Australian National University.[2] My chapter was entitled 'Federal Courts Created by Parliament'. Peter Nygh's chapter was entitled 'Choice of Law in Federal and Cross-vested Jurisdiction'. Building on that link, I thought it appropriate to revisit some of what we said over ten years ago in those two chapters about federal courts and choice of law respectively.

The Australian judicial system under the Australian Constitution

By s 71 of the Constitution the judicial power of the Commonwealth is vested in the High Court of Australia, 'such other federal courts as the Parliament creates', and 'such other courts as it invests with federal jurisdiction.' The Constitution does not, however, contain any express power to create federal courts.[3] In 1901, Quick and Garran said of the phrase 'such other federal courts as the Parliament creates':

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1 Talia Einhorn and Kurt Siehr (eds) *Intercontinental Cooperation through Private International Law: Essays in Memory of Peter E Nygh* (TMC Asser Press, 2004) v.

2 Brian Opeskin and Fiona Wheeler, *The Australian Federal Judicial System* (Melbourne University Press, 2000).

3 Cf *United States Constitution* art 1, § 8.

> These words impliedly give the Federal Parliament a power to create other federal courts besides the High Court.[4]

In their discussion of the proposed s 71 at the Australasian Conventions, the colonial delegates who drafted the Constitution did not want to 'overload the federal constitution with judicial machinery'.[5] It was thought sensible to use existing state courts to exercise federal jurisdiction, rather than to create additional federal courts. This practical and economic arrangement was referred to in the *Boilermakers' case* as the 'autochthonous expedient'.[6] It is a term not much in use these days unless you want to impress people at dinner parties. In summary, s 71 and the other provisions of Ch III of the Constitution mandated the creation of a High Court and conferred on the parliament a discretionary power to create other federal courts and a discretionary power to invest State and Territory courts with federal jurisdiction.[7]

The delegates at the Australasian Conventions had more faith in their state courts than the framers of the United States Constitution in theirs. One of the founding fathers of the United States Constitution, Alexander Hamilton was worried about parochialism and lack of independence in their state courts. Where judges held office at pleasure, or from year-to-year, such courts would be 'too little independent to be relied upon for an inflexible execution of the national laws.'[8] The framers of the Australian Constitution, however, regarded the Supreme Courts of the colonies, which were to become the States of Australia, as having high standards and as courts upon which they could confidently confer federal jurisdiction.

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4 John Quick and Robert Garran, *The Annotated Constitution of the Australian Commonwealth* (The Australian Book Co, 1901) 725.

5 *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 28 January 1998, 268 (Patrick Glenn).

6 *R v Kirby; Ex parte Boilermakers' Society of Australia (Boilermakers' case)* (1956) 94 CLR 254, 268 (Dixon CJ, McTiernan, Fullagar and Kitto JJ) – an expedient not entirely autochthonous as State Courts in the United States can exercise concurrent federal and state jurisdiction; *Felton v Mulligan* (1971) 124 CLR 367, 393 (Windeyer J).

7 *New South Wales v Commonwealth* (1915) 20 CLR 54, 89 (Isaacs J).

8 Alexander Hamilton, James Madison and John Jay, *The Federalist Papers* (Harvard University Press, first published 1787, 2009 ed) No 81, 534.

That is not to say that the independence of the state courts at federation was secured by the Constitutions of the States. Generally speaking, those constitutions did not entrench the independence of the courts or protect the tenure or remuneration of their judges.[9] They were susceptible to amendment by state legislatures. The independence of the courts and the separation of powers in the States was largely a matter of political convention. The constitutional position of state courts, however, has been strengthened since 1996 by implications drawn from Ch III of the Australian Constitution as explained in a series of decisions in the High Court commencing with *Kable v Director of Public Prosecutions (NSW)*.[10] Those decisions, some of which have been made quite recently in connection with organised crime legislation, have established the following propositions:

1. A state legislature cannot enact a law which purports to abolish the Supreme Court of a state.[11]

2. A state legislature cannot exclude any class of official decision made under a law of the state from judicial review by the Supreme Court for jurisdictional error.[12]

3. A state legislature cannot validly enact a law which would effect an impermissible executive intrusion into the processes or decisions of a state court.[13]

4. A state legislature cannot enact a law which would authorise the executive to enlist a court to implement decisions of the executive in a manner incompatible with that court's institutional integrity.[14]

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9 *McCawley v The King* [1920] AC 691, 713 (Lord Birkenhead LC).

10 (1996) 189 CLR 51.

11 *Kable v Director of Public Prosecutions (NSW)* 1996) 189 CLR 51, 103 (Gaudron J), 111 (McHugh J), 139 (Gummow J); *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501, 543-544 [151]-[153] (Gummow, Hayne, Heydon, Crennan and Kiefel JJ).

12 *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531.

13 *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319.

14 *South Australia v Totani* (2010) 242 CLR 1, 52 [82] (French CJ), 66 [149] (Gummow J), 160 [436] (Crennan and Bell JJ), 173 [481] (Kiefel J).

5. A state legislature cannot confer upon any court a function (judicial or otherwise) incompatible with the role of that court as a repository of federal jurisdiction.[15]

6. A state legislature cannot enact a law conferring upon a judge of a state court a non-judicial function which is substantially incompatible with the function of the court of which the judge is a member.[16]

The *Kable* doctrine as developed in subsequent decisions protects the defining or essential characteristics of state courts as courts. Those characteristics, attributable to all courts, include:

- the reality and appearance of the court's independence and impartiality;[17]
- the application of procedural fairness;[18]
- adherence, as a general rule, to the open court principle;[19]
- the provision of reasons for decisions.[20]

Those characteristics apply equally to federal courts created by the Parliament, which are subject also to the constraints imposed by the separation of legislative and executive from judicial power which is prescribed by the structure of the Constitution.

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15 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.

16 *Wainohu v New South Wales* (2011) 243 CLR 181, 210 [47] (French CJ and Kiefel J).

17 *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45, 77 [66] (Gummow, Hayne and Crennan JJ).

18 *Leeth v Commonwealth* (1992) 174 CLR 455, 469-470 (Mason CJ, Dawson and McHugh JJ); *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319, 354-355 [55] (French CJ), 379-380 [141] (Heydon J).

19 *Dickason v Dickason* (1913) 17 CLR 50; *Russell v Russell* (1976) 134 CLR 495, 520 (Gibbs J).

20 *Wainohu* (2011) 243 CLR 181, 213-215 [54]-[57] (French CJ and Kiefel J) and authorities there cited.

The single common law and choice of law

The courts of the States which can be invested with federal jurisdiction, and from which appeals ultimately lie to the High Court, have been characterised by the High Court as elements of a national integrated judicial system for which the Constitution provides. In reasoning to that conclusion in *Kable*, McHugh J said that there is a single common law of Australia as opposed to a distinct common law for each of the States. That flows from the existence of a final appellate court which determines the common law for all of Australia. Among Justice McHugh's supporting references was the 6th edition of Peter Nygh's work, *Conflict of Laws in Australia*.[21]

Nygh discussed the single common law thesis and its implications for choice of law rules in his chapter in the Opeskin and Wheeler book. He referred to s 80 of the *Judiciary Act 1903* (Cth) ('the Judiciary Act'). As enacted in 1903, that section provided for the application of the common law of England by courts exercising federal jurisdiction to fill the gaps where the laws of the Commonwealth were not applicable or where their provisions were insufficient to carry them into effect. In 1988, s 80 was amended to refer to the 'common law in Australia' in lieu of 'the common law of England'. Nygh observed that the formula 'the common law *in* Australia' had appeared to leave open the question whether there was in truth one common law of Australia, or whether each State and Territory and even the Commonwealth had its own common law. That question was answered by the High Court in *Lange v Australian Broadcasting Corporation*:

> There is but one common law in Australia which is declared by this Court as the final court of appeal.[22]

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21 *Kable* (1996) 189 CLR 51, 113 fn 224.

22 (1997) 189 CLR 520, 563 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

That doctrine had implications for the relationship between ss 79 and 80 of the Judiciary Act. Section 79 relevantly provides, in words which have been productive of some difficulty, that:

> The laws of each State or Territory, including the laws relating to procedure, evidence and the competency of witnesses, shall, except as otherwise provided by the Constitution or the laws of the Commonwealth, be binding on all courts exercising federal jurisdiction in that State or Territory in all cases to which they are applicable.

In 1999, Gleeson CJ and Gummow J said in *Northern Territory of Australia v GPAO*, a family law case:

> The objective of s 79 is to facilitate the particular exercise of federal jurisdiction by the application of a coherent body of law, elements in which may comprise the laws of the State or Territory in which the jurisdiction is being exercised, together with the laws of the Commonwealth, but subject always to the overriding effect of the Constitution itself.[23]

Where a court exercising federal jurisdiction sits in a particular State or Territory of Australia, ss 79 and 80 of the Judiciary Act operate to determine how the law of the State or Territory and the common law apply to the exercise by the court of its jurisdiction. *Northern Territory v GPAO*[24] is an example. An application for a sole parenting order was filed in the Darwin Registry of the Family Court by the mother of a child. The mother alleged sexual abuse on the part of the father. On the application of the father, a subpoena was issued out of the Court requiring the provision by the Protection Service Unit of the Northern Territory of files and records relating to the child. There was a section of the *Community Welfare Act* (NT) ('the Community Welfare Act') which prohibited authorised persons from producing in a court a document that had come into his possession or under his control. The High Court held, by majority, that the section of the Community Welfare Act was binding on the Family Court by operation of s 79 of the Judiciary Act. The way in which s 79 worked, as explained

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[23] (1999) 196 CLR 553, 588.

[24] (1999) 196 CLR 553.

by Gleeson CJ and Gummow J, was to pick up the provision of the Community Welfare Act and turn it into a surrogate federal law to operate alongside the provisions of Pt VII of the Family Law Act.[25] Sections 79 and 80 are part of the statutory infrastructure of the national integrated judicial system for which the Constitution provides. The development and fleshing out of that system is reflected in the establishment and creation of federal courts. It is useful to reflect briefly on their history.

The development of the federal courts' system

Because the Commonwealth Parliament was given power by the Constitution to confer federal jurisdiction on state courts, it was not thought that there would be a need, for some time, to create inferior federal courts.[26] Indeed, there was a significant degree of opposition to the creation of the High Court. Henry Higgins argued that its establishment could be deferred and the supervision of the Constitution left to the State Supreme Courts. Zelman Cowen wrote of the Judiciary Act, which established the High Court:

> ... it had to be fought for every inch of the way in a climate of opinion that had grown steadily more unfavourable towards it. State resentment of Commonwealth powers was increasing; and severe nationwide drought brought new demands for retrenchment and fresh antagonism towards any federal 'luxuries'.[27]

Over formidable opposition, Alfred Deakin, the first Attorney-General of the Commonwealth, secured the passage of the Act. His Second Reading Speech, which is said to have gone for three hours, was described by his biographer, Professor JA La Nauze, as 'a celebrated example of the best parliamentary speaking of his generation.'[28] When Deakin

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25 (1999) 196 CLR 553, 575 [33].

26 Quick and Garran, above n 4, 726.

27 Zelman Cowen, 'Deakin, Alfred' in Tony Blackshield, Michael Coper and George Williams, *The Oxford Companion to the High Court of Australia* (Oxford University Press, 2001) 193.

28 JA La Nauze, *Alfred Deakin* (Melbourne University Press, 1965) Vol 1, 289.

finished his speech, the Acting Leader of the Opposition moved the adjournment with words of grace and civility, which we would be surprised to hear in a contemporary parliament:

> I may be allowed to say how much we recognise the great ability and eloquence of the Attorney-General. A more comprehensive speech than that which he has just delivered, both in regard to the principles and details of a great Bill, has not been heard in this House.[29]

After the passage of the Bill Deakin, applying a nautical metaphor, said:

> No measure yet launched in the Federal Parliament was so often imperilled, skirted so many quicksands, or scraped so many rocks on its very uncertain passage.[30]

It is good to listen to a few of the words of the lawyer-statesmen Deakin expressing his vision of the High Court in the course of his Second Reading Speech:

> ... the nation lives, grows, and expands. Its circumstances change, its needs alter, and its problems present themselves with new faces. The organ of the national life which preserving the union is yet able from time to time to transfuse into it the fresh blood of the living present, is the judiciary, the High Court of Australia ... It is as one of the organs of Government which enables the Constitution to grow and to be adapted to the changeful necessities and circumstances of generation after generation that the High Court operates. Amendments achieve direct and sweeping changes, but the Court moves by gradual, often indirect, cautious, well considered steps, that enable the past to join the future, without undue collision and strife in the present.[31]

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[29] Commonwealth, *Parliamentary Debates*, House of Representatives, 18 March 1902, 10989 (William McMillan).

[30] Cowen, above n 27, 194.

[31] Commonwealth, *Parliamentary Debates*, House of Representatives, 18 March 1902, 10967-10968 (Alfred Deakin).

The establishment of the High Court by the Judiciary Act was the first step in a long history of the creation of federal courts which led to the establishment of the Family Court of Australia, the Federal Court of Australia and the Federal Magistrates Court.

The creation of federal courts – first steps – arbitration and bankruptcy

The first purported federal court was the Commonwealth Court of Conciliation and Arbitration created by the *Conciliation and Arbitration Act 1904* (Cth). The President of the Court was to be appointed from among Justices of the High Court for a term of seven years.

The first President of the Court of Conciliation and Arbitration was Justice O'Connor who occupied that office from 1905 to 1907. The second was Justice Higgins. In *Alexander's case*,[32] decided in 1918, the High Court held that the Court of Conciliation and Arbitration could not exercise judicial powers, having regard to the limited tenure of its members. In 1926, the Act was amended to provide for appointments to the Court to be made in accordance with Ch III of the Constitution, which required appointments to be made by the Governor-General in Council and to be for life. The functions of the Court of Conciliation and Arbitration were arbitral and judicial. In 1956 the High Court, in the *Boilermakers' case*, held that arbitral and judicial functions could not be combined in a federal court.

As a result of the decision in the *Boilermakers' case*, the judicial and arbitral functions previously carried out by the Conciliation and Arbitration Court were divided between a court and a commission respectively. A new federal court called the Commonwealth Industrial Court was established in 1956 and renamed as the Australian Industrial Court ('the Industrial Court') in 1973. The Conciliation and Arbitration Commission was created as the arbitral body. The Industrial Court was subsumed by the Federal Court upon its creation in

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[32] *Waterside Workers' Federation of Australia v JW Alexander Ltd* (1918) 25 CLR 434.

1976 with industrial and general divisions. A separate Industrial Relations Court of Australia was created in 1994, but again subsumed into the jurisdiction of the Federal Court in 1997.

The earliest validly created federal court was the Federal Court of Bankruptcy, which was established in 1930, six years after the enactment of the *Bankruptcy Act 1924* (Cth). Section 18 of that Act had given power to the Governor-General, by proclamation, to designate state courts which were authorised to exercise jurisdiction under the Bankruptcy Act. In *Le Mesurier v Connor*[33] the High Court held that state courts could not be invested with federal jurisdiction by executive proclamation. The Court held that the natural meaning of the words of s 77 of the Constitution required that Parliament should by law identify any state court in which federal jurisdiction was invested.[34] In the event, the Bankruptcy Act was amended in 1929 to invest federal bankruptcy jurisdiction in the Supreme Courts of all States and Territories, save for Victoria and South Australia where the jurisdiction was invested in the Courts of Insolvency of those States. The Federal Court of Bankruptcy was created in 1930 by a further amendment to the Bankruptcy Act 1924. It was to consist of not more than two judges. It only sat in New South Wales and Victoria where state courts could not deal with the increased workload resulting from the Great Depression.

In *R v Davison*[35] the High Court held that Ch III of the Constitution prevented a Registrar in Bankruptcy from making a sequestration order which would operate as an order of the Federal Court of Bankruptcy. The High Court nevertheless accepted that judicial functions could be executed subject to judicial confirmation or review by an officer of the court such as a Master. This question was to be revisited later in relation to the Family Court of Australia in a series of cases resulting in acceptance of the delegation of powers to court officers subject to their supervision and control by Ch III judges.[36]

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33 (1929) 42 CLR 481.

34 (1929) 42 CLR 481, 500 (Knox CJ, Rich and Dixon JJ).

35 (1954) 90 CLR 353.

36 *Harris v Caladine* (1991) 172 CLR 84; *Commonwealth v Hospital Contribution Fund* (1982) 150 CLR 49.

In 1977 the jurisdiction of the Bankruptcy Court was transferred to the newly established Federal Court of Australia.

A long time was to elapse between the creation of the Bankruptcy Court in 1930 and the creation of the Family Court and the Federal Court of Australia in the 1970s. Those two important national courts have different and interesting establishment histories, each of which is connected with the politics of the time.

The Family Courts of Australia

Before 1961 each State of Australia had its own laws which were broadly based on the *Matrimonial Causes Act 1857* (UK). The earliest Commonwealth law on matrimonial causes appears to have been the *Matrimonial Causes (Expeditionary Forces) Act 1919* (Cth). It gave effect to an Imperial Act relaxing restrictions upon the doctrine of domicile in proceedings in matrimonial causes.[37]

The *Matrimonial Causes Act 1959* (Cth) and the *Marriage Act 1961* (Cth) were to represent the first full exercise of the Commonwealth's constitutional power over marriage and divorce. A uniform law throughout Australia for divorce and related property, maintenance and custody issues was established by the Matrimonial Causes Act. That Act was a consolidation of existing law, and jurisdiction under both Acts was vested in the State and Territory Supreme Courts.

The Matrimonial Causes Act authorised the courts exercising jurisdiction under that Act to deal with matters such as maintenance, property, custody and access as ancillary to principal relief referable to heads of constitutional power in relation to divorce and the

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[37] Lisa Young and Geoff Monahan, *Family Law in Australia* (LexisNexis, 7th ed, 2009) [3.8].

validity or nullity of marriages. Absent proceedings invoking that federal jurisdiction, the ancillary matters were within state jurisdiction. However, given that the federal jurisdiction was conferred on state courts, they could deal with both federal and state aspects. There was no urgent imperative to create a separate federal court to deal with matrimonial causes.[38]

Proposals for the creation of a federal Family Court were made in the 1960s and early 1970s. In 1972 the Senate Standing Committee on Constitutional and Legal Affairs began a review of the Matrimonial Causes Act. It supported the establishment of a 'specialist court' on the basis that that measure would reduce the scope for legal dispute. The path to enactment was not smooth. The Labor Government, which had been elected to power in 1972, and wanted to establish the new court, lacked a majority in the Senate. There was a complication arising out of a double dissolution of the Commonwealth Parliament in April 1974. However, in May 1975 a revised version of the Bill passed through both Houses and, following Royal Assent, the Bill came into force on 5 January 1976.

The Family Court of Australia was established as a superior court of record by the *Family Law Act 1975* (Cth) ('the Family Law Act'). Its jurisdiction includes matters arising under that Act and the *Marriage Act 1961* (Cth) and in matters 'associated with matters ... in which [its] jurisdiction ... is invoked'.[39] The Family Law Act specifically provided that State Family Courts, if established, could be invested with federal jurisdiction. Only Western Australia set up its own State Family Court which was duly invested with federal jurisdiction.

The Family Court has had perhaps the most difficult history of any of Australia's federal courts. The Family Law Act has been described as '... the most heavily scrutinised, picked over and amended piece of legislation in Australian history.'[40] The Court has been the subject, during its existence, of intense social and political debate because of the kind of

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38 Ibid [2.5]-[2.6].

39 *Family Law Act 1975*, s 33.

40 Leonie Starr, *Counsel of Perfection – The Family Court of Australia* (Oxford University Press, 1996) 119-20.

jurisdiction that it has to administer. Its history has been marked by personal tragedies affecting its members. One of its members, Judge David Opas, was shot dead at the front door of his home in 1980. In March 1984, a bomb was detonated on the front steps of the home of his replacement, Judge Richard Gee. The Parramatta Registry was bombed in April 1984 and the wife of the senior judge of that Registry, Justice Watson, was killed by a bomb left at the front door of their home in July 1984.

In 1987, the Constitutional Commission's Advisory Committee on the Australian Judicial System expressed concern about the 'isolation of judges of the Family Court' from the 'mainstream' of the judiciary and 'an undesirable lack of variety in their work'. In 1988 the Family Law Act was amended to create the office of Judicial Registrar to exercise delegated powers in a wide range of the Court's work.[41] The Federal Court was authorised to transfer proceedings within its own jurisdiction to the Family Court in order to implement the recommendation of the Advisory Committee 'that the jurisdiction of the Family Court be extended so as to broaden the work of the Family Court judges.' It was designed to give judges 'some relief from the burdens of the highly emotive family law jurisdiction. This measure was not a great success and became a dead letter. The new Judicial Registrars and existing Registrars were empowered to determine certain contested applications and to make interim orders. The validity of those delegations was challenged, but upheld, by the High Court in *Harris v Caladine.*[42] The High Court also held that the delegation of judicial power to officers of a Ch III court must be consistent with control by the judges of the court's jurisdiction.

A Joint Committee of the Parliament in 1993 recommended that in the longer term consideration be given to a two-tier structure of judges and federal magistrates. It proposed instead a two-tier structure of judiciary and registrars, with existing judicial registrars appointed as part of the judiciary under Ch III. It also recommended that in the longer term,

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41 *Family Court of Australia (Additional Jurisdiction and Exercise of Powers) Act 1988* (Cth).

42 (1991) 172 CLR 84.

consideration be given to the Family Court becoming a division of the Federal Court and that the establishment of a Federal Magistracy be considered at that time.

The merger proposal never happened. The history of the development of the federal courts system has taken a different path. For myself, I have some skepticism about the notion that family law is to be narrowly confined by the designation 'specialist'. It intersects with a significant variety of areas of the law and, in fact, requires generalist skills on the part of its judicial members. Areas of intersection include constitutional law, international law, property law, corporations law, partnership law, contract and torts, equity and trusts, taxation, insolvency, evidence and crime, and judicial process including procedural fairness. Some intersections derive directly from the exercise of jurisdiction and powers under the Family Law Act and other Acts. Some of them come indirectly from the accrued jurisdiction to which I shall refer shortly. The first case I sat on as Chief Justice of the High Court involved questions of statutory interpretation, the concept of property in s 79 of the Family Law Act and the nature of a beneficiary's interest in a discretionary trust.[43] Family Law cases which have come to the High Court since that time have involved questions of international law,[44] parenting orders[45], and more recently, s 79 and the application of the Act to a marriage which had not broken down.[46]

The Federal Magistrates Court

The establishment of a Federal Magistrates Court was considered in a Joint Report of the Australian Law Reform Commission and the Human Rights and Equal Opportunity Commission published in May 1997. It was offered as a way of resolving state and federal jurisdictional difficulties in relation to the care and protection of children. Other options included cross-vesting arrangements, a full referral of power to the Commonwealth, a limited

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43 *Kennon v Spry* (2008) 238 CLR 366.

44 *LK v Director-General, Department of Community Services* (2009) 237 CLR 582.

45 *MRR v GR* (2010) 240 CLR 461.

46 *Stanford v Stanford* [2012] HCATrans 206.

transfer of power to the Commonwealth, a single national court of appeal for care and protection matters, specialist state and territorial magistrates and a specialist Family Court magistracy.

In December 1998, the Federal Government approved, in principle, the creation of a Federal Magistracy to be appointed under Ch III of the Constitution and to relieve burdens upon both the Family and Federal Courts. The magistrates would exercise both family law and other federal jurisdictions. Proposals by the Chief Justice of the Family Court that Family Law Magistrates be appointed into the Family Court were not accepted. The magistrates to be appointed would do what their Federal Court and Family Court colleagues could not do namely, exercise jurisdiction freely in areas covered by both courts. The Act creating the Federal Magistrates Court, the *Federal Magistrates Act 1999* (Cth), came into operation on 23 December 1999.

The Federal Magistrates Court has lifted significant burdens from the Federal and Family Courts. In connection with the Federal Court, this was particularly so in relation to the judicial review of migration decisions which were able to be undertaken at first instance by a Federal Magistrate and be subject to appeal to a single Judge of the Federal Court.

There is an impending restructuring of arrangements in relation to the Federal Magistrates Court. A Bill to redesignate it as the Federal Circuit Court of Australia has passed the House of Representatives, but is yet to pass the Senate.[47] Further legislative change is anticipated in connection with the relationship between the Federal Circuit Court and the Family Court. I do not propose to comment on that change as it is a matter yet to come before the Parliament. I sense, however, that we are on the threshold of what will prove to be a very important development in the evolution of the national judicial system.

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[47] Federal Circuit Court of Australia Legislation Amendment Bill 2012 (Cth).

The Federal Court of Australia

In February 1963, the Solicitor-General for the Commonwealth, Sir Kenneth Bailey, informed the 13th Legal Convention of the Law Council of Australia that the Attorney-General, Sir Garfield Barwick KC, had been authorised by Cabinet to 'design a new federal court with a view to consideration by Cabinet for approval of legislative action.' Its purpose was to ease the burden on the High Court.

A lengthy process of false starts and lapsed Bills followed over 13 years and successive Federal Governments. Finally, the Federal Court of Australia Bill was introduced into the Parliament in October 1976. Its object, as explained by the then Attorney-General, Robert Ellicott QC, was to put the existing federal court system on a more rational basis and to relieve the High Court of some of the workload it bore in matters of federal and territorial law. The unreliable prognosis, as it turned out, that the future of the Court would be that of a specialist court with a narrow band of jurisdiction, was offered. The government believed that only where there were special policy or, perhaps, historical reasons for doing so, should original federal jurisdiction be vested in a federal court. The Bill was passed and the Federal Court of Australia began operating on 1 February 1977. Its creation was not without continuing criticism. In 1981 the Chief Justice of the High Court, Sir Harry Gibbs, found it 'difficult to discover any valid reason in principle, or any practical necessity, for bringing into existence the new federal court and conferring upon it its present jurisdiction.'[48]

The vision of a specialised federal court was short-lived. The jurisdiction of the Court expanded enormously in the decades following its establishment. The growth of its jurisdiction through a multiplicity of statutes was enhanced by the development of the doctrine of the accrued jurisdiction which enabled the Court to deal with non-federal claims which were part of the federal matter arising under the laws in respect of which it was given jurisdiction. The Federal Court of Australia now closely resembles a court of general jurisdiction. The recent conferral of criminal jurisdiction with respect to cartel offences

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[48] Sir Harry Gibbs, 'The State of the Australian Judicature' (1981) 55 *Australian Law Journal* 677, 677.

raises the question – has a door to a wider criminal jurisdiction been opened? This may also have implications for the future of the proposed Federal Circuit Court as a national trial court.

Accrued jurisdiction

It is desirable to conclude with some observations about accrued jurisdiction which is of general significance for all federal courts.

Subject to their particular statutes, federal courts and other courts exercising federal jurisdiction, may exercise an accrued jurisdiction over claims arising under State or Territory law, or at common law, which are part of the matter or controversy before the court exercising federal jurisdiction. Despite its name, the accrued jurisdiction is not some kind of add-on. It is an incident of federal jurisdiction derived from its constitutional definition which is in terms of 'matters'. In so saying, it is important to acknowledge that Parliament can define the matters in which it confers federal jurisdiction in such a way as to exclude particular claims or grounds for relief.[49]

The word 'matter' has been defined as 'a justiciable controversy, identifiable independently of the proceedings which are brought for its determination and encompassing all claims made within the scope of the controversy ...'[50]

The question of accrued jurisdiction in the Family Court has been the subject of consideration at the level of the Full Court of the Family Court, in particular in the decision of *In Marriage of Warby.*[51] There the Full Court stated that:

> ... the Family Court of Australia is not restricted to the determination of a family law claim or proceeding; it may exercise accrued jurisdiction to determine the non-federal

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49 *Abebe v Commonwealth* (1999) 197 CLR 510, 534 [48]-[49] (Gleeson CJ and McHugh J).

50 *Fencott v Muller* (1983) 152 CLR 570, 603 (Mason, Murphy, Brennan and Deane JJ).

51 (2001) 28 Fam LR 443.

> aspects of a justiciable controversy of which the family law claim or cause of action forms a part. The factual circumstances of the case will determine whether the [accrued] jurisdiction rises and whether it is appropriate to exercise the jurisdiction.[52]

Accrued jurisdiction is an important element of the constitutional framework which has created a national integrated system of federal and state courts in Australia. It increases the facility in federal jurisdiction for obtaining a resolution of all claims involved in a particular controversy or dispute. However, it brings its own challenges, particularly in the field of choice of law, a field of study close to Peter Nygh's heart.

There were uncertainties about the scope of the accrued jurisdiction and a perceived competition between federal and state courts in the 1980s which led to the development of a national cross-vesting scheme reflected in Commonwealth and State Acts passed in 1987. Under the cross-vesting Acts federal jurisdiction was vested in state courts and state jurisdiction in federal courts and provision made for the transfer of matters between them.

In the event, the provisions of the Scheme vesting jurisdiction under state law in the Federal Court were the subject of constitutional challenge.[53] In *Re: Wakim; Ex parte McNally*[54] the High Court held by a majority of six to one, that a state law conferring non-federal jurisdiction on a federal court was invalid. Otherwise, state law claims in proceedings in federal courts require the support of accrued jurisdiction. For what it is worth, in my view the uncertainties of the accrued jurisdiction had been overstated. The doctrine is settled and debates about its application are few.

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52 (2001) 28 Fam LR 443, 476 [79] (Nicholson CJ, Finn and Strickland JJ). See also Lee Aitken, 'Discretion, power and the accrued jurisdiction of the Family Court' (2009) 83 *Australian Law Journal* 694.

53 *Gould v Brown* (1998) 193 CLR 346.

54 (1999) 198 CLR 511.

In his chapter on 'Choice of Law' in the Opeskin and Wheeler book, Peter Nygh raised a question about the relevance of ss 79 and 80 of the Judiciary Act where state jurisdiction was vested in the Federal Court. Even though now in one sense academic because of the fall of state to federal courts cross-vesting, his question may have ongoing relevance in another context. Take the case of federal jurisdiction in respect of matters 'between a State and a resident of another State'. This is known as the diversity jurisdiction. There may be a question whether the court exercising diversity jurisdiction, applies state laws directly or whether they have to be picked up by operation of s 79 of the Judiciary Act. A similar question may arise when a federal court exercises accrued jurisdiction involving the application of a state statute. The point was mentioned in *Momcilovic v The Queen.*[55] That case involved a prosecution in Victoria of a person resident in Queensland. The Supreme Court of Victoria was found to be exercising federal diversity jurisdiction. The prosecution was brought under a state law. I raised the question, without expressing a concluded view, whether in the exercise of that jurisdiction the provisions of the State Drugs Act applied directly along with the statutory and common law rules affecting their interpretation. That is to say whether they applied without translation into surrogate federal laws by virtue of s 79 of the Judiciary Act.[56] It is not necessary to explore or debate that question further today, just to point out that it may be connected to questions of choice of law of the kind to which Peter Nygh referred in his essay in 2000.

To delve much further into the arcane reaches of federal and state jurisdiction and the application of the relevant provisions of the Judiciary Act in this presentation would extend its length beyond the tolerable. Peter Nygh's scholarship has continuing significance for some of those issues and will be a resource to be considered as they arise in the future. His voice will continue to be heard well beyond the bounds of his mortality.

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55 (2011) 245 CLR 1.

56 (2011) 245 CLR 1, 68-69 [99] (French CJ).