Australia's Federal Courts: Their Origins, Structure and Jurisdiction

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Australia’s Federal Courts: Their Origins, Structure and Jurisdiction

Mary Crock* and Ronald McCallum**

I. INTRODUCTION

The primary aim of this Paper is to explain for a North American audience the origin, structure, and jurisdictions of Australia’s network of federal courts.1 Together with the companion papers from America and Canada, the goal of this Paper is to set the scene for a more detailed examination of the federal judicial systems in the three countries. Readers will be able to draw out for themselves the similarities and differences between the various regimes. Nevertheless, in trying to capture the essence of the Australian system, mention will be made on occasion of how the Australian approach varies from that taken by the two federations with whom we share so much of our cultural and legal heritage.

To recount this story, it is necessary to spend a little time on Australia’s historical background and on our colonial antecedents. As the operation of the federal courts in the three countries depends upon the legislative powers of their federal governments, it is necessary to examine the constitutional division of powers between the Commonwealth or federal government and the state governments.

Australia was settled by Europeans toward the close of the 18th century in 1788. On January 1, 1901, the Australian Constitution, which originated as an act of the Parliament of the United Kingdom,2 came into force. For almost a century, Australians have grappled with the relationship between federal courts and federal jurisdiction on the one hand, and on the other, the

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1. See generally J. CRAWFORD, AUSTRALIAN COURTS OF LAW (3d ed. 1993). Throughout this paper, we refer constantly to this source, and we wish to acknowledge our indebtedness to this book. Persons wishing to read a detailed and thorough account of Australia’s system of courts could do no better than to read this scholarly little volume.

jurisdiction of the state supreme courts, whose origins antedate Australian federation. Ninety-four years after federation, despite a few problems, the federal and state courts work harmoniously together. This is due in the main to a cooperative approach by state and federal judges and governments.

In 1903 and in 1904, the Commonwealth Parliament established the High Court of Australia\(^3\) and the Commonwealth Court of Conciliation and Arbitration.\(^4\) The High Court is Australia’s highest curial body. It is the arbiter of the Australian Constitution, and it is the final court of appeal on all questions of Australian law. It not only hears appeals from federal courts, but it also is the final court of appeal from the judgments of the state courts. The Commonwealth Court of Conciliation and Arbitration was Australia’s first labor court. Over the last nine decades, it has undergone many changes. These alterations speak much about the Australian federation.

Unlike the United States of America, upon federation the Commonwealth Parliament did not establish a separate network of Australian courts. Rather, it reposed federal jurisdiction in state courts. This worked well enough. However, by the 1960s the increased responsibilities of the Commonwealth government meant that there was a growing need for a federal judiciary below the High Court level. The move for a centralized federal curia bore fruit in 1977,\(^5\) when the Federal Court of Australia opened its doors. The breadth of jurisdiction reposed in this court has made it one of Australia’s most significant tribunals. Its judgments have reshaped Australia’s legal landscape.

The Paper continues with a short examination of the Family Court of Australia, which for two decades has endeavored to settle the legal issues arising from marital breakdown. It concludes with a brief discussion of possible future directions in what has become the vast and complex arena of Australian federal law.

II. GENESIS OF A NATION

A. Uniformity Born of a Planned Beginning

There are many striking similarities among the three countries represented at this conference. The United States, Canada, and Australia all are nations created through conquest and that have substantial size and natural wealth. All are federations dominated by English-speaking populations, sharing some cultural roots and legal traditions. Canada and Australia are part of the British Commonwealth, with relatively small, highly urbanized populations clustered around the habitable edges of their respective land masses. They share a

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similar, sometimes ambivalent relationship of dependence with the superpower that is the United States of America.

To understand the provenance of any legal system, however, it often is the unique aspects of a country's history that are decisive. Of the three countries, Australia stands apart for the homogeneity of its laws and legal institutions and for the central focus of its governments in the federal capital of Canberra. While there are regional differences in culture and outlook, these are subtle in comparison with the variety that exists among the Canadian provinces or American states. Indeed, in some respects, Australia is more a unitarian system than a confederation of different states and territories.

Australia's internal homogeneity owes much to its beginning as a series of penal colonies established to service the needs of its mother country, England. The first penal colony was established at Sydney in 1788. The earliest settlements were unambiguously English. Britain provided Australia's first involuntary settlers and her later free settlers. England was looked to as a source of law and authority. Unlike either America or Canada, Australia was settled in an ordered fashion, by people with more or less the same ethnic and cultural background.

The homogeneity of Australia's earliest settlers was reflected in the colonies' firm sense of their identity as Anglo-Saxon communities. This was manifest in the distrust shown to peoples of other cultures, whether aboriginal or Asian. Control of the racial composition of the colonies was high on the agenda of the earliest legislatures. One of the first initiatives of the new Federal Parliament in 1901 was to give a legislative basis to the government's White Australia Policy.

Fundamental to the uniformity of Australia's early legal regime was the settlers' characterization of the country as a terra nullius, or a land without settled laws. This meant that Britain's common law and legislative heritage could be adopted without any attempt to accommodate or even recognize the laws and customs of the indigenous peoples. Unlike the situation in Canada, there was no other major colonizing power present in the country to compromise the supremacy of the British laws.


8. See Immigration Restriction Act 1901 (Cth). This Act was the 17th law passed by the Australian Parliament in its first year.

9. In fact, Australia had been inhabited for centuries before white settlement by peoples with very developed systems of laws and customs. However, the propriety of the assumption that the country had been terra nullius as a matter of international law was not questioned by the courts until 1992. See infra section IV.D.
Australia’s penal beginnings probably slowed the grant of legislative powers to the colonies and delayed the establishment of a system of civil courts. However, it meant that when a degree of independence was granted to the fledgling colony, there was a centralized albeit occasionally corrupt system for maintaining law and order onto which a judicial scheme could be engrafted.

B. The Reception of English Law

As a colony of Britain, the common law and the rules of equity, at least to a certain extent, were deemed to have been received in Australia from time of settlement. 10 Where appropriate to the new colony, some English statutory law also was received by implication, although precisely which laws and at what dates was sometimes unclear. 11

To clarify the jurisprudential situation for Australia’s early courts, English common law and statutory law were formally extended to the Eastern Australian colonies on July 25, 1828, the date specified in the Australian Courts Act 1828, 12 passed in respect of what was then the colony of New South Wales. The colonies of Tasmania, Victoria, Queensland, and at federation, the Australian Capital Territory were carved out of New South Wales and were deemed to have adopted the English laws at the same date. 13 When the colonies of Western Australia and South Australia were founded in 1829 and 1836 respectively, English laws were formally introduced there as well. 14

The reception acts did not completely dispose of the issue of the status for the colonies of “imported” British statute law. There remained the question of when the colonial legislatures could amend such statutes. A distinction was made between general English statutes that might apply to the colonies and the “paramount” legislation that was created by the British Parliament for the specific purpose of the colonies. The former could be amended by local legislatures while the latter could not. 15 Once again, the uncertainty of the situation in Australia was addressed through the passage by the United Kingdom Parliament of various principle pieces of enabling legislation: the Australian Courts Act 1828, the Australian Constitutions Act 1850, the Colonial Laws Validity Act 1865, and the Commonwealth of Australia Constitution Act 1900. These left the paramount legislation concentrated in

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10. See CRAWFORD, supra note 1, at 5-6.
11. See id. at 16.
13. See Imperial Acts Application Act 1969 (NSW) § 5; Constitution Act 1975 (Vict.) § 3; Supreme Court Act 1868 (Qld.) § 20.
15. See CRAWFORD, supra note 1, at 16 (discussing Colonial Laws Validity Act 1865 § 2 (UK)).
three areas: appeals to the Privy Council, admiralty and prize law, and certain areas of evidence and foreign law.\textsuperscript{16}

The fact that English statutes applied across the range of Australian colonies helped to ensure a common jurisprudential base for the local courts and Parliaments. Uniformity of law between the colonies was further encouraged by the court hierarchy itself and the central role played by the Privy Council in the review of statutory and judgemade law.

The express nature of the Australian colonies' adoption of English law stands in contrast to the more irregular and ad hoc extension of British laws and judicial systems to the colonies in North America between 1607 and 1753.\textsuperscript{17} The other significant factor for Australia during the crucial period of first settlement, however, was the state of the English law and the prevailing legal philosophies. By the early 19th century, English laws had evolved into a relatively uniform corpus of material. More importantly, William Blackstone's theories were in their ascendancy. As Johnson points out, the notion of parliamentary sovereignty was never challenged in Australia as it was in Canada and the United States.\textsuperscript{18} Under the Westminster system of government, uniformity also was encouraged by the central role of the monarch.\textsuperscript{19}

C. The Colonial Court System

Between 1788 and 1823, Australia's courts were essentially military-styled tribunals. In the colonies of New South Wales and Tasmania there were criminal courts with a procedure akin to a court martial and civil courts established under the prerogative.\textsuperscript{20} In 1823 Supreme Courts were established in both of these colonies, and lower courts were created in keeping with the English hierarchy of judicial establishments. When the new colonies were founded the same scheme of courts was introduced or adopted in due course. As Crawford notes, Victoria is the only state that in any way entrenches or guarantees the existence of its judicial system in its state constitution.\textsuperscript{21} Even here, it is doubtful that the measures taken to guarantee the independence and

\textsuperscript{16} Id. As Crawford notes, the process for Australia of abolishing appeals to the Privy Council from the State Supreme Courts and from the High Court, was long and complicated. For further details, see infra section 4.4.

\textsuperscript{17} See Johnson, supra note 6, at 49; Herbert A. Johnson, English Statutes in Colonial New York, 58 New York Hist. 277 (1977).

\textsuperscript{18} Johnson, supra note 6.

\textsuperscript{19} Id.

\textsuperscript{20} See CRAWFORD, supra note 1, at 24; see also Enid M. Campbell, The Royal Prerogative to Create Colonial Courts: A Study of the Constitutional Foundations of the Judicial System in New South Wales, 1788-1823, 4 Sydney L. Rev. 343 (1964).

\textsuperscript{21} See CRAWFORD, supra note 1, at 24-26. The constitutions of Tasmania and New South Wales are silent on the matter of the judiciary, while those of Queensland, South Australia and Western Australia deal only with the tenure of Supreme Court judges.
jurisdiction of the Supreme Court would be binding on a state legislature bent on abolishing the court.\textsuperscript{22} It is interesting to note that jury trials in either criminal or civil matters were not introduced into New South Wales until the 1840s, owing in part to its status as a penal colony. South Australia and Western Australia, which were first settled by free settlers soon established trial by jury.

Before federation in 1901 there was no uniform system for appealing decisions of local supreme courts. Appeals could be made in most colonies to a Local Court of Appeals constituted by the Governor-in-Council. In addition, appeals from the supreme courts could be made by leave or as of right to the Privy Council. Neither avenue of appeal proved satisfactory. Local appeal mechanisms lacked quality, and the Privy Council was rendered inaccessible to most litigants by the cost and delays involved. The lack of a central, indigenous, appellate court is said to be one of the factors that encouraged the move toward federation. It is no coincidence that the framers of the federal constitution assured a right of appeal from the state supreme courts to the High Court.\textsuperscript{23} Since the abolition of rights to appeal to the Privy Council,\textsuperscript{24} the High Court has been the only refuge of appeal from decisions of the state supreme courts.

\textsuperscript{22} See CRAWFORD, supra note 1, at 24. State constitutions in Australia differ from their federal counterpart in that they can be amended without a referendum. Victoria’s constitution has been amended so as to prescribe the manner and form of any change to § 85 (the provision dealing with the status and jurisdiction of the Supreme Court). However, Crawford points out that “manner and form” amendments may only be binding on future Parliaments where they relate to the constitution, powers or procedures of the Parliament.

\textsuperscript{23} See AUSTL. CONST. § 73.

\textsuperscript{24} Australia Act 1986 (Cth), § 9; Australia Act 1986 (UK), § 9. For further details see infra section IV.D.
III. THE AUSTRALIAN CONSTITUTION AND ITS DIVISION OF POWERS

A. The Making of the Constitution

The Australian Constitution is a creature not of an Australian Parliament but of the British Imperial Parliament. Nevertheless, for the most part, the document itself was drafted in Australia by delegates from the various colonies who met at four conventions between 1890 and 1898.²⁵

It is significant that the drafters of the Australian Constitution had the constitutions of Canada and the United States as examples or models from which to work. Both of these constitutions grappled in different ways with the challenge of defining the relationship between an overriding federal body and the constituent states of the federation. Broadly speaking, the United States Constitution purported to defer to the states by setting out a rather modest list of federal powers. Any residual powers were left impliedly in the hands of the states.²⁶ By way of contrast, Canada chose to spell out the legislative powers of its Federal Parliament in a much more exhaustive fashion.²⁷ For the benefit of the provinces, a similarly extensive list was included of the powers vested exclusively in their parliaments.²⁸ The result distinguished very clearly between the Provincial and federal spheres of influence. The predominance of the federal government was evident, however, in Part V of the British North America Act, now the Canadian Constitution Act. This gave the Governor-General power to appoint and recall Lieutenant-Governors and to disallow Provincial legislation.

The drafters of the Australian Constitution took something from the American and Canadian models. Like Canada, they opted for a rather extensive listing of the legislative powers to be vested in the federal Parliament. However, they declined to give a similar constitutional basis to the states' law-making authority. In this regard the drafters were clearly more attracted to the American notion of leaving the residual, unspecified powers to the states.

Ironically, the two constitutions that sought to limit federal influence in this way are the ones where the states' power has waned most dramatically. The Canadian Provinces, on the other hand, have maintained and even

²⁵. CRAWFORD, supra note 1, at 25.
²⁷. The Canadian Constitution was enacted into law by the British Parliament in 1867. See Constitution Act 1867 (UK) § 91. This statute was formerly titled the British North America Act.
²⁸. CAN. CONST. § 92.
enhanced their standing at the expense of their federal government. In the United States and Australia, the judiciary's interpretation of the respective constitutions seems to be far removed from what the framers of those constitutions intended for both countries.

Section 51 of the Australian Constitution sets out for the federal Parliament thirty-nine heads of legislative power. These cover the areas thought essential for the operation of Australia as a nation: direct and indirect taxation, borrowing money on the public credit of the Commonwealth, defense, immigration and emigration, naturalization and aliens, external affairs, and matters going to ensure a uniform commercial system. In addition, the framers included areas where consistency among the states was thought to be desirable. The federal Parliament was therefore given power to legislate in respect of marriage and divorce, aged and invalid pensions; trade and commerce between the states; conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one state; post, telegraph and telephone and other like services; and trading corporations formed within the limits of the Commonwealth.

The Convention debates make it clear that it was the intention of the framers of the Australian Constitution to preserve and protect from federal intervention the domestic affairs of the states. The first of Sir Henry Parkes' four resolutions in 1891 was:

That the powers and privileges and territorial rights of the several existing colonies shall remain intact, except in respect of such surrenders as may be agreed upon as necessary and incidental to the power and authority of the National Federal Government.

B. The High Court as Interpreter of the Constitution

29. AUSTL. CONST. § 51(ii).
30. Id. § 51(iv).
31. Id. § 51(vi).
32. Id. § 51(xxvii).
33. Id. § 51(xix).
34. AUSTL. CONST. § 51(xxix).
35. Id. § 51(iii) (currency); Id. § 51(iv) (weights and measures); Id. § 51(vi) (bills of exchange).
36. Id. §§ 51(xxi) and (xxii).
37. Id. § 51(xxiii). This power was supplemented in 1946 by a power to legislate in respect of other types of pensions. See id. § 51(xxiiiA).
38. Id. § 51(i).
39. AUSTL. CONST. § 51(xxv).
40. Id. § 51(v).
41. Id. § 51(xx). The power also extends to foreign corporations.
42. AUSTL. CONST. DEBATES 23 (Sydney 1891).
The two chief architects of the Constitution—Griffith and Barton—were among the first appointments to the new High Court in 1901. In the early years of the new nation, their interpretation of the document they had created left in no doubt their belief in the inviolability of state sovereignty. In interpreting the Constitution, it is also no coincidence that the early High Court took some interest in parallel developments in the constitutional jurisprudence of the United States. As Professor Zines points out, however, the doctrine of state autonomy developed by the High Court was one that the judges implied from their notion of how a federation should operate. It was not one that was immediately apparent from the text of the Constitution. For example, while the first head of power in section 51 stipulates that the Federal Parliament’s power to legislate is limited to matters regarding trade and commerce between the states, at least nine of the remaining thirty-eight powers could allow for the regulation of aspects of intrastate trade. When the High Court turned its attention more to the text of the Constitution, it was almost inevitable that judicial respect for the integrity and autonomy of state powers would decline.

The turning point in Australia was the decision of the High Court in Amalgamated Society of Engineers v. Adelaide Steamship Co. Ltd. In that case, the High Court adopted a much more legalistic, almost literal approach to the Constitution than had been apparent in earlier cases. It deliberately eschewed implied doctrines on the basis that such notions belong more properly to the political arena than to statutory interpretation. The powers conferred on the Federal Parliament were to be interpreted on their face, allowing for historical developments that might not have been envisaged by the founding fathers.

Because the Australian Constitution confers no express legislative powers on the States, the High Court has not been forced to engage in any sort of balancing exercise in determining the extent of federal and state jurisdiction. Inevitably, curial interpretation of section 51 has seen a gradual growth in the range of matters regulated by federal legislation. For Commonwealth legislation to be valid, the federal Parliament need only rely on one head of power. If one placitum of section 51 is relevant, it is not pertinent that the

43. See, e.g., Attorney-General v. Brewery Employee Union, 6 C.L.R. 469, 503 (1908) (per Griffith C.J.); Peterswald v. Bartley, 1 C.L.R. 497, 507 (1904) (per Griffith C.J., Barton and O’Connor JJ.). Both cases are discussed by Crawford, supra note 26, at 114-15.
45. See, e.g., Austl. Const. § 51(iii) (bounties on production or export of goods); id. § 51(xiv) (insurance); id. § 51(xv) (weights and measures); id. § 51(xvi) (bills of exchange); id. § 51(xvii) (bankruptcy and insolvency); id. § 51(xviii) (copyrights and patents); id. § 51(xx) (corporations formed within the limits of the Commonwealth); id. § 51(XXXV) (conciliation and arbitration). On this point, see also Crawford supra note 26, at 116.
46. 28 C.L.R. 129 (1920).
legislation is riding roughshod over a state Parliament that had purported to regulate the matter in question.

The extent to which the High Court has expanded the scope of the Commonwealth's powers is evident in the use made of the corporations power in section 51(xx). This placitum has been relied on as the basis for controlling matters as diverse as restrictive trade practices including secondary boycotts and legislation aimed at the protection of the environment.

The most striking example of the manner in which the High Court has given a broad reading of federal heads of power has been its interpretation of the External Affairs power. Under section 51(xxix) of the Australian Constitution, the Australian government is empowered to legislate with respect to "external affairs." Over the last dozen years, the High Court has held that where the Australian government signs an international treaty, the Australian Parliament may pass laws to give affect to the treaty. In the Koowarta case of 1982, the High Court held by majority that the Parliament could enact laws prohibiting racial discrimination throughout the nation in order to give affect to international conventions that outlawed this form of discrimination. In the following year, the Court again by majority handed down its decision in the Tasmanian Dams case. Federal legislation that prohibited the building of a dam in the State of Tasmania on environmental grounds was upheld as a valid exercise of the external affairs power. This was because the Australian government was a signatory to conventions relating to the environment. Prior to these decisions, racial discrimination and environmental matters fell squarely within state responsibilities. These High Court precedents have been regarded as controversial and they have given rise to much academic literature. In a series of subsequent decisions, however, the High Court has continued to adhere to this broad reading of the external affairs power.


50. Id.; see also Racial Discrimination Act 1975 (Cth); International Convention on the Elimination of all Forms of Racial Discrimination. This Convention was adopted by the General Assembly of the United Nations in 1965. Australia ratified this Convention in 1975.


52. Id. The Convention for the Protection of the World Cultural and Natural Heritage was adopted by UNESCO in 1972 and was ratified by Australia in 1974.


54. See Polyukhovich v. Commonwealth, 172 C.L.R. 501 (1991); Horta v. Commonwealth,
reliance on this power, the Australian Parliament has enacted wide-reaching labor legislation as well as laws prohibiting direct and indirect discrimination on the grounds of sex and disability.

In the same way, the aliens power (section 51(xix)) has been upheld as a basis for legislation mandating the detention of certain illegal migrants and allowing for the deportation of long-term permanent residents. In both of these cases, it is doubtful that the High Court would have upheld similar legislation affecting citizens of Australia.

In practical terms, the other factor determining the distribution of power between the state and federal governments in Australia has been the fiscal arrangements set out in the Constitution. The collection and distribution of revenue is the preserve of the Commonwealth government. The states have attempted on various occasions to avoid the prohibition on the levying of state taxes. However, they are constitutionally dependent on the federal government for their financial survival.

The end result of the courts’ interpretation of section 51 of the Constitution is a Federal Parliament endowed with extensive legislative powers. If the framers of the Constitution intended the states to be the primary repositories of legislative powers affecting everyday life in Australia, the reverse is now the case: it is the Commonwealth that calls the tune.

IV. THE HIGH COURT OF AUSTRALIA

A. The Establishment of the High Court of Australia

The High Court of Australia sits at the apex of the Australian judicial system. It is therefore appropriate to begin commentary on the Australian...
federal court structure by detailing the powers and jurisdiction of this court. The High Court is, of course, the final arbiter on all aspects of the Australian Constitution. It also is the final court of appeal from the lower federal courts. Unlike the Supreme Court of the United States, the Australian High Court is the final court of appeal from the state courts as well. Accordingly, like the Supreme Court of Canada, it can unify the common law of Australia.

The relevant provisions of the Australian Constitution detail some aspects of the operations of the High Court, but in other areas the constitution is either silent or leave it to the Commonwealth Parliament to fill in the gaps. Section 71 of the Australian Constitution provides that the judicial power of the Commonwealth of Australia shall be vested in a federal supreme court that is to be known as the High Court of Australia. While the Constitution outlines the Court's appellate jurisdiction and most aspects of its original jurisdiction, it does not actually create the Court. Instead, section 71 provides that Parliament may establish the court and that it shall be comprised of a chief justice and at least two other justices. In 1903, after some debate, the Commonwealth Parliament passed legislation creating the court, which was constituted by a chief justice and two justices. In 1905, two further justices were appointed. In 1912 the court reached its present size of a chief justice and six other justices.

Section 72 of the Constitution provides for the appointment and security of tenure of judges of the High Court and of all other federal judges. They are appointed by the Governor-General on the advice of the Executive Council (that is, by Cabinet), and they can only be removed on grounds of misbehavior or incapacity. A removal vote must be passed by both houses of the Commonwealth Parliament. Originally section 72 required federal judges to be appointed for life. In 1977, however, this section was altered by a constitutional amendment allowing appointments to be made until a retirement age of seventy years. Parliament is given the capacity to specify a lower retirement age, but it has not done so in relation to the High Court and accordingly seventy is the present age of retirement for High Court justices.

Ever since 1849, there have been calls for the establishment of a single court of appeal for all of the Australian colonies. Indeed, the drafters of

see Crawford, supra note 1, at 178-98.

63. See Austl. Const. §§ 73-74.
64. See id. §§ 75-76.
65. Id. § 71.
68. An appellate court was first recommended in 1849 by a Privy Council Committee chaired by Earl Gray. In 1853, a Constitutional Committee of the New South Wales Legislative Council, which was chaired by Wentworth, also urged the creation of an appeal court. See John Quick & Robert R. Garran, The Annotated Constitution of the Australian Commonwealth, 85, 91 (1901).
the Constitution believed that an Australian court of appeal was an essential ingredient of the federation.\textsuperscript{69} As has been shown, the High Court carries out this task. Before detailing the appellate and original jurisdiction of the High Court, however, a few words must be written on its role as final arbiter on the Constitution.

\textit{B. Constitutional Adjudication}

One of the rather strange silences in the Constitution relates to the capacity of the High Court to engage in constitutional adjudication through the process of judicial review. Australia inherited its parliamentary system from Great Britain. In England, where there is no written constitution, the Parliament is supreme and the courts do not have the power to strike down legislation. Nowhere in the Australian Constitution is it expressly stated that the High Court possesses the power to invalidate federal or state statutes that are contrary to the Australian Constitution. For that matter, the Constitution does not state that the Court may invalidate state legislation that is contrary to a state constitution. James Thomson has made a study of the constitutional debates on this matter, and he concludes that the delegates undoubtedly assumed that the High Court would possess the power to invalidate unconstitutional legislation.\textsuperscript{70} He then examines the text of the Constitution and concludes that, although some provisions may imply judicial review by the High Court, none clearly grants this power to the Court.\textsuperscript{71}

Nevertheless, since its establishment, the High Court has struck down federal and State legislation that is unconstitutional. It is the arbiter of the Constitution, and just like the Supreme Courts of Canada and the United States, its decisions have shaped Australian political and social life.

Above,\textsuperscript{72} we saw how the High Court has given a broad interpretation to the heads of federal power that are set out in section 51 of the Constitution. In recent decisions, the High Court has begun to draw implications from the constitution. The Australian Constitution possesses neither an American Bill of Rights nor a Canadian Charter of Rights and Freedoms. However, the High Court has signaled it will draw implications from the Constitution to protect basic rights where appropriate.

\textsuperscript{69} BENNETT, supra note 66, at 5-11.


\textsuperscript{71} See Thomson, supra note 70, at 186-201. The author examines a number of provisions. First, there is an examination of covering clause 5 of the Commonwealth of Australia Constitution Act, this being the British statute which enacted the Australian Constitution. He then analyzes §§ 71, 73, 74, and 76(i) of the Constitution.

\textsuperscript{72} See supra section II.B.
For example, in the *Australian Capital Television* decision of 1992 the Court struck down federal legislation that prohibited radio and television advertising during election campaigns.\(^73\) In lieu thereof, the legislation established a scheme under which political parties were granted free access to radio and television. The amount of access depended in part upon the percentage of votes received by the parties at previous elections. In the view of the court, this scheme impermissibly encroached on freedom of expression that is a necessary ingredient of democratic representative government. Although the Constitution does not expressly guarantee this form of freedom of expression, the judges were prepared to imply this freedom from the Constitution when read against the background of Australian democratic government.\(^74\)

C. The Court’s Original Jurisdiction

Sections 75 and 76 of the Australian Constitution detail the Court’s original jurisdiction.\(^75\) Section 75 sets out five matters where the High Court possesses original jurisdiction. As they are specified in the Constitution, they cannot be abrogated by the Parliament. This form of original jurisdiction often is referred to as inherent jurisdiction. Two of these five matters are of little significance. They relate to matters “arising under any treaty,”\(^76\) or “affecting consuls” or other foreign representatives.\(^77\) The provision on treaties was borrowed from the United States Constitution.\(^78\) In Australia, however, treaties do not become part of domestic law until the federal or state parliaments have enacted enabling legislation. Neither treaty nor consular jurisdiction has been used by the Court.

The final three matters are of more immediate concern. Under section 75(iv) of the Constitution, the High Court possesses diversity jurisdiction. This constitutional provision enables the Court to hear disputes between two or more states, between a state and a resident of another state, and between residents of different states. Because suits between two states often raise significant legal issues including constitutional questions, this jurisdiction has been exclusively vested in the High Court.\(^79\) However, the High Court has

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74. AUSTR. CONST. §§ 7, 24, 61-64. A recent issue of the University of Sydney Law Review was devoted to a discussion of this case and of *Nationwide News*, 177 C.L.R. 1. See Constitutional Rights for Australia, 16 SYDNEY L. REV. 245-405 (1994).

75. The law on the original jurisdiction of the High Court is complex and detailed. The best account is given in ZELMAN COWEN & LESLIE ZINES, FEDERAL JURISDICTION IN AUSTRALIA (2d ed., 1978). See especially Chapter 1.

76. AUSTR. CONST. § 75(i).

77. Id. § 75(ii).

78. U.S. CONST. art II, § 2, cl. 1.

79. Judiciary Act 1903 (Cth) § 38(b).
made it clear that it does not wish to hear claims between residents of different states that could be initiated in state supreme courts. The High Court does not wish to hear matters relating to traffic accidents simply because the litigants reside in different states. Section 75(iii) grants the court original jurisdiction in cases in which the Commonwealth or one of its officers is a party. Therefore, whenever any federal agency sues or is sued, the matter may come to the High Court.

The final head of inherent jurisdiction is set out in section 75(v) of the Constitution. The Court is given a constitutionally enshrined right to review judicially decisions of officers of the Commonwealth. The framers of the Constitution were aware of Marbury v. Madison, which prohibited the United States Supreme Court from issuing prerogative writs against federal officials. Accordingly, the High Court was given the power to issue writs of prohibition, mandamus, or injunctions against officers of the Commonwealth of Australia. What is surprising is that the framers of the Constitution failed to include the writ of certiorari. To overcome this error of omission, the court has allowed the writ of prohibition to expand to cover much of the ground of certiorari. The term "officers of the Commonwealth" has been given a broad interpretation; even judges of lower federal courts are regarded as officers of the Commonwealth.

This power to judicially review the decisions of federal officials is shared with the Federal Court of Australia, which has more restricted powers of judicial review. This limb of inherent jurisdiction has enabled the Court to ensure that the Commonwealth Government and its officers act in accordance with the law, and over the years the power of judicial review has generated a significant number of cases dealing with administrative law and constitutional law.

Section 76 of the Australian Constitution enables the Parliament to confer original jurisdiction on the High Court often described as vested jurisdiction. The first two paragraphs of this section concern us here. Under these two paragraphs, the Parliament is empowered to vest in the High Court jurisdiction on matters relating to the Constitution or concerning the interpretation and

81. See Judiciary Act 1903 (Cth) §§ 38(c), 40.
82. 5 U.S. (1 Cranch) 137 (1801).
85. Administrative Decisions (Judicial Review) Act 1977 (Cth); Judiciary Act 1903 (Cth) § 39-B.
86. See M. Allars, INTRODUCTION TO AUSTRALIAN ADMINISTRATIVE LAW 99-100 (1990).
87. Sections 76(iii) and (iv) of the Australian Constitution give the Parliament power to invest in the High Court jurisdiction relating to admiralty matters and to issues concerning the same subject matter claimed under the laws of different states.
88. AUSTL. CONST. § 76(i).
operation of federal laws. In the past, the Parliament had conferred much jurisdiction upon the High Court. In 1976 and 1979, however, this jurisdictional load was considerably lightened. James Crawford has explained the Court’s vested jurisdiction in detail. The major portion of this jurisdiction involves the Constitution. The High Court has been vested with jurisdiction to deal with all constitutional matters. Constitutional issues may also be dealt with in state and federal courts, but litigants have the option of referring any constitutional issues to the High Court for resolution. This reduction in the Court’s original jurisdiction has left the Court more time to concentrate upon constitutional adjudication and the hearing of appeals from state and federal courts.

D. Appeals to and from the High Court

In 1986, Australia cut its remaining links with the United Kingdom when the Australian and English Parliaments enacted the Australia Acts. Until the passage of these statutes, the English Privy Council was able to decide questions of law brought to it by Australian litigants. Ever since 1833, the Judicial Committee of the English Privy Council (that is judges who in the main sat in the House of Lords) has been determining appeals from the colonial courts. Throughout most of this century, the English Privy Council has handed down decisions on Australian law. To understand the present position, it is necessary to summarize this chapter of Australia’s legal and constitutional history. It will be then possible to examine the role of the High Court as our final appellate tribunal.

The story begins with sections 73 and 74 of the Australian Constitution. Section 73 conferred on the High Court jurisdiction to hear appeals from the state supreme courts, but this provision did not take away the right of litigants to appeal from state supreme courts directly to the Privy Council in London. Section 74 then curtailed, but did not extinguish, appeals from judgments of the High Court to the Privy Council. The framers of the Australian Constitution did wish to prevent appeals to the Privy Council from the High Court in relation to all matters touching the Australian Constitution. In order to obtain legal validity, however, it was necessary for the Constitution to be

89. Id. § 76(ii).
90. Jurisdiction of Courts (Miscellaneous Amendments) Act 1979 (Ch).
91. See CRAWFORD, supra note 1, at 181-82.
92. Judiciary Act 1903 (Ch) § 30A.
93. Id. § 40.
94. Australia Act 1986 (Ch); Australia Act 1986 (UK).
95. Draft Constitution of Australia 1898, cl. 74.
enacted by the British Parliament. The British colonial Secretary, Joseph Chamberlain, wished to retain appeals to the Privy Council on constitutional questions, primarily to secure British investment interests in Australia. The compromise, reached in London, was embedded in section 74 of the Constitution. Appeals from the High Court to the Privy Council were prohibited in relation to constitutional issues concerning the limits of federal and state powers, unless the High Court granted a certificate of appeal. Constitutional questions that did not touch federal or state powers could be appealed to the Privy Council.

Section 74 gave the Australian Parliament a way out by allowing Parliament to limit appeals from the High Court to the Privy Council. In 1975, Parliament’s limitations on this right eliminated such appeals for all practical purposes. Passage of the Australia Acts in 1986 finally extinguished appeals from state courts to the Privy Council. For the last nine years, the High Court has been our final appellate body.

Section 73 of the Australian Constitution confers appellate jurisdiction on the High Court but gives the Parliament the power to regulate appeals. The law is technical and complex but, for purposes of this paper, can be stated briefly. First, appeals from single justices of the High Court to the full High Court are as of right. Second, appeals from the state supreme courts are by way of leave, which means that a litigant must seek leave from the High Court to appeal to that court. Third, appeals from the territorial courts also are by leave. Appeals from the Federal Court of Australia also are by leave. However, such appeals may be brought only from full benches and not from single federal court judges.

The High Court’s appellate jurisdiction has enabled it to develop a common law for Australia. More especially over the last twenty years, the Court has relied far less upon English common-law precedents. Instead, it has set itself the task of crafting its own common-law principles.

98. Australia Act 1986 (Cth) § 9; Australia Act 1986 (UK) § 9.
100. Given the recent changes in this area, the best and most up-to-date account is CRAWFORD, supra note 1, at 189-191.
101. Judiciary Act 1903 (Cth) § 34.
102. Id. § 35(2).
103. Id. § 35AA; see also Federal Court of Australia Act 1976 (Cth) § 24(2)(a).
104. Federal Court of Australia Act 1976 (Cth) § 33(2).
A recent example of this new approach can be seen in the 1992 decision in the *Mabo* case.\textsuperscript{105} Although this case did not come to the High Court by way of its appellate jurisdiction,\textsuperscript{106} it fits within this discussion of the High Court and the common law. Ever since its settlement, most orthodox legal jurists regarded Australia as vacant territory. According to the doctrine of *terra nullius*, the entire continent was owned by the English Crown upon accession to the British Empire. Native Australians were not regarded as owners of land. In the *Mabo* case the Court overthrew this old and outmoded doctrine, holding that where native Australians can show continuous links with land going back before white settlement, and where the government has not abrogated those links, then title to that land is vested in those native Australians.\textsuperscript{107} This decision created some controversy and much has been written about native land rights.\textsuperscript{108} *Mabo* shows that the Court is able to mould common-law doctrines to suit an Australian nation that is sailing toward the 21st century.

V. LABOR COURTS AND LABOR DISPUTES

A. *The Commonwealth Court of Conciliation and Arbitration*

A year after the Australian Parliament established the High Court, it created the Commonwealth Court of Conciliation and Arbitration.\textsuperscript{109} The purpose of this court was to settle interstate labor disputes through conciliation and, where this failed, through final and binding compulsory interest arbitration. Often outsiders are surprised to learn that the second-oldest Australian federal court was solely engaged in resolving disputes between labor and capital. The reason for this is that since the turn of the century, Australians have perceived that legal intervention in labor disputes has been able to secure, for the vast bulk of the work force, fair and reasonable terms and conditions of employment. It is only since the mid-1980s when large areas of the Australian economy were deregulated that the benefits of this form of legal intervention have been questioned.\textsuperscript{110}

The move to establish the first labor court can be traced back to the early 1890s when protracted labor disputes occurred in Australia’s shipping and sheep grazing industries.\textsuperscript{111} As these disputes crisscrossed the borders of the

\textsuperscript{105} Mabo v. Queensland (No. 2), 175 C.L.R. 1 (1992).
\textsuperscript{106} The matter actually commenced in the original jurisdiction of the Court.
\textsuperscript{107} Mabo, 175 C.L.R. 1.
\textsuperscript{109} Commonwealth Conciliation and Arbitration Act 1904 (Cth).
\textsuperscript{111} The best account of this period is given by the authors of a collection of essays in
Australian colonies, no single colonial government was able to settle them. By 1894, the trade unions had been defeated and the workers resumed employment on terms specified by the employers. A group of liberal reformers asserted that industrial peace could be established if labor courts were given powers to settle labor disputes by conciliation, and where this failed, by final and binding interest arbitration. By 1916, four states (New South Wales, Queensland, South Australia, and Western Australia) had created labor courts with powers of compulsory arbitration, with the two remaining states establishing wages board mechanisms.

During the 1890s, the benefits of labor arbitration were being discussed at the same time the founders of the nation were drafting the Australian Constitution. Not surprisingly, therefore, those attending the 1898 Convention decided to give the Australian government power to establish a national labor court that could settle labor disputes that crossed state boundaries. Section 51(xxxv) of the Australian Constitution empowers Parliament to establish machinery necessary to conciliate and arbitrate upon interstate labor disputes.

During 1903 and 1904, protracted debates occurred in the Commonwealth Parliament over the powers of a federal labor court. As a result, the Commonwealth Court of Conciliation and Arbitration was created in 1904. The Australian Constitution did not require that the processes of conciliation and arbitration be exercised by a court. It was believed, however, that only a court staffed by a senior judge would have the necessary status and authority to carry out such tasks, particularly in the face of concerted employer opposition. Accordingly, a high-ranking judge was appointed as president of the court. The president was to be drawn from the ranks of the High Court justices and was to be appointed to the Labor Court for a renewable term of

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113. The states of Victoria and Tasmania set up tripartite bodies called wages boards having the power to specify terms and conditions of labor throughout the industries within their jurisdiction.
114. Section 51(xxxv) provides that the Parliament may legislate with respect to “Conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one state.” AUSTL. CONST. § 51 (xxxv).
seven years. In other words, the president would continue as a justice of the High Court with life tenure but would simultaneously hold a fixed term appointment as president of the labor court.

The court was given wide-ranging powers. It could prevent and settle interstate labor disputes either by determining that an agreement that had been reached after conciliation should be certified as enforceable in the public interest or by arbitrating a settlement of terms and conditions of employment and embodying them in an enforceable award of the court. Powers also were given to the court to enforce its decisions and to fine recalcitrant trade unions and employers.

From 1907 to 1921, Henry Bournes Higgins served as the second President of the labor court. During his tenure, he did more than any other person has to establish compulsory arbitration as the accepted method of determining fair and just terms and conditions of employment. In 1907, for example, he established a basic or minimum wage that was sufficient for working men to sustain a wife and children in frugal comfort. During this time, the pronouncements of the federal Labor Court became national bench marks and were adopted by the state courts and tribunals. Henry Bournes Higgins regarded compulsory arbitration as a social and economic success. At the end of his fourteen year reign as President of the Labor Court, he compiled his writings into a little book which he styled his "New Province for Law and Order." By the close of the First World War, compulsory labor arbitration had become a fact of Australian life.

B. The Boilermakers' Doctrine and the Separation of Judicial Power

In 1918 a challenge was made to the powers of the court. This legal attack eventually was to have long-term consequences, not solely for the Labor Court, but for the entire federal judiciary. The Waterside Workers' Federation of Australia, a union of longshoremen registered with the Labor Court, was fined for striking in contravention of court orders. In Alexander's case the High Court held that the president of the Labor Court could not exercise federal judicial power, and hence the fine imposed on the trade union was void. The High Court also found that the appointment of the president was contrary to section 72 of the Australian Constitution. It will be recalled that until a 1977 amendment, section 72 provided that federal judges were to have life tenure. The president was only appointed to the Labor Court for a seven-year term. Even though the president retained his life tenure as

118. The first President was Justice O'Connor.
120. See, e.g., K.J. Hancock, The First Half Century of Australian Wage Policy, J. INDUS. REL. 1, 129 (1979).
122. I am grateful to the late Sir Richard Eggleston, counsel for the trade union in this case. In several warm and delightful conversations, he explained the background to the Boilermakers' decisions.
a judge of the High Court, the appointment as the president was not for life.
In 1926, the Parliament amended the act by making life-time appointments to
the Labor Court.123

It is not the purpose of this paper to trace the jurisprudence of the federal
Labor Court in its first half century of dispute settling,124 other than to make
the point that its decisions on general wage increases had a significant impact
on Australian life. In the view of former Prime Minister Bob Hawke (who
undertook graduate work in this area), by the mid-1950s the court had begun
to take on the trappings of an economic legislature.125 The growth in post-
World War II Australia led to a virtually full-employment economy. Added
to this prosperity was the rather high inflation of the early 1950s. Given these
circumstances, the increased role of the court in dividing these economic gains
was hardly surprising.

In this climate, it was perhaps inevitable that a High Court challenge
would be mounted against the powers of the Labor Court. In 1956, the
Boilermakers’ case came before the courts.126 The Boilermakers’ Society of
Australia, a registered trade union, challenged the legality of a fine by the
court. The argument was that the Australian Constitution required a
separation of judicial and general legislative powers and, therefore, the Labor
Court was unconstitutional because it impermissibly commingled judicial
functions with administrative powers. The court’s activities in certifying
agreements and arbitrating awards were administrative acts, whereas the
enforcement of its orders amounted to the exercise of judicial power. In the
Boilermakers’ case, the High Court127 and the Privy Council128 accepted
this argument. It was held that federal courts could only exercise federal
judicial powers and that it was impermissible to bestow nonjudicial functions
on these bodies. Even at the time of these judgments, many prominent
lawyers criticized the rigid separation of administrative and judicial powers
that would henceforth be imposed on federal courts.129

The Boilermakers’ doctrine, as it has become known, has ensured the
continued growth of case law that characterizes and delimits the boundaries of
federal judicial power.130 Although the rigidities of this doctrine have been

124. See, e.g., K.J. Hancock, The First Half Century of Australian Wage Policy, J. INDUS.
REL. 1, 129 (1979).
125. R.J. Hawke, The Commonwealth Arbitration Court: Legal Tribunal or Economic
126. I am grateful to the late Sir Richard Eggleston, counsel for the trade union in this case.
In several warm and delightful conversations, he explained the background to the Boilermakers’
decisions.
129. See, e.g., G. Sawer, Separation of Powers in the Australian Federation, 35 AUSTL. L.J.
177 (1961).
130. For discussion of this case law, see LESLIE ZINES, THE HIGH COURT AND THE

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lessened in recent years, at the federal level it still is impermissible to establish one agency to conciliate and arbitrate and also to make orders enforcing its decisions.

C. Labor Courts 1956-1994

Even before this decision was affirmed by the Privy Council the Australian government decided to divide the functions of the Labor Court between a Conciliation and Arbitration Commission and an Industrial Court. As is now well known, the new commission was given the administrative tasks of settling labor disputes by promulgating awards or by certifying agreements. On the other hand, the new Industrial Court was left with a narrow range of functions including the enforcement of awards and agreements and the general supervision of internal trade union affairs.

The Industrial Court began in 1956 with a bench of three judges. By the time of the establishment of the Federal Court in early 1977 the Industrial Court had a Chief Judge and eleven other justices and a growing non-labor jurisdiction. Although not prescribed in the enabling legislation, the judges of the Industrial Court were appointed in part because of their knowledge of labor law and industrial relations. Their minds, therefore, were, on the whole, less divorced from industrial relations matters than those of judges who had been appointed to less specialized courts. Furthermore, on many industrial matters that came before them, they were required to sit in full benches comprising two, then later three, judges. In our view, this gave the Industrial Court a much greater degree of collegiality than is the case with courts hearing matters at first instance by a single judge. Although this court


133. For background to the division of functions and the politics which went with this split, see B. d'ALPUGET, MEDIATOR: A BIOGRAPHY OF SIR RICHARD KIRBY 149-57 (1977).

134. Conciliation and Arbitration (Amendment) Act 1956 (Cth); see also Conciliation and Arbitration (Amendment) Act (No. 2) 1956 (Cth).

135. In 1956, the Commission's title was the Commonwealth Conciliation and Arbitration Commission while that of the court was the Commonwealth Industrial Court. In 1973, the word "Commonwealth" was replaced by the word "Australian" in both these titles.

136. Section 98 of the Conciliation and Arbitration Act 1904 (Cth) as it stood in 1956 provided that the Commonwealth Industrial Court should consist of a Chief Judge and two other judges. This provision was amended from time to time, increasing the number of judges to 11 by 1976.

137. Its most interesting area of non-industrial jurisdiction was that given to it by the Trade Practices Act 1974 (Cth).

138. Conciliation and Arbitration Act 1904 (Cth) § 104. For details of the intricate amendments to this section, see C.P. MILLS & G. SORRELL, FEDERAL INDUSTRIAL LAWS 286 (5th ed., 1975).
decided many cases on the scope of awards and on internal trade union affairs. Few landmark decisions remain of relevance to present labor law. As will be detailed below, in 1976 the Australian Parliament enacted legislation to establish the Federal Court of Australia. The legislators also decided to transfer the labor relations jurisdiction from the Industrial Court to the Federal Court of Australia. To this end, an industrial division of the federal court was established and was bestowed the labor relations jurisdiction. It was believed that a separate division of the court could continue the work of the Industrial Court and maintain the specialized nature of this jurisdiction. In practice, however, most of the federal court judges were appointed to the general and industrial divisions. By the mid-1980s, for all practical purposes, the federal court was operating as though the industrial division had been abolished. Although space does not permit an analysis of the labor relations decisions that were handed down by the Federal Court from 1977 to 1994, many of its decisions were innovative. For example, the court adopted an interventionist approach to trade union rules, vigorously asserting that trade unions should operate in accordance with democratic values and that their officials should be properly accountable to the members in relation to the expenditure of funds.

D. The Search for an Industrial Court

In 1983 the Australian government commissioned an inquiry into federal industrial relations law. In 1985, the committee argued for the creation of an Australian Labor Court. The committee sought to create a court and a commission that could operate as though it were a single agency, undoing the damage caused by the Boilermakers' doctrine. Under this plan, an Australian

139. But see Moore v. Doyle, 15 F.L.R. 59 (1969) (a major exception relating to the legal personality of trade unions that are simultaneously registered under federal and state industrial laws).
140. For strong criticism of the Industrial Court, see F. Hutley, What's Wrong with the Family Law Act, QUADRANT Jan.-Feb. 1987, at 73.
141. See infra section 6.
143. Id. § 13.
Industrial Relations Commission would be established together with an Australian Labor Court. The judges of the court would be concurrently appointed to the new Commission. It appears that it was hoped that these joint appointees would be able to use judicial or administrative powers, depending on whether they were sitting in the court or the Commission.

One area where the Boilermakers' doctrine caused special difficulties related to unfair dismissals. At that time, although members of the Conciliation and Arbitration Commission could hold that dismissals were unfair, they could not order the employer to reinstate or to compensate the employees, even if reinstatement was an appropriate method of settling an industrial dispute, because such orders amounted to the exercise of judicial power. In a series of subsequent cases, the High Court endeavored to sort out this mess, but it was not until two decisions were handed down in mid-1993 that it was possible for Commission members to order compensation or reinstatement to resolve industrial disputes.

In 1987, the Australian government endeavored to carry through this reform by creating an Australian Labor Court. Under the Industrial Relations Bill 1987, an Australian Labor Court was to be established and was to be given jurisdiction over federal industrial relations, including cases relating to trade union secondary boycott activities. The judges of this court were required to possess the normal qualifications for judicial office. However, the bill went further by providing that they also were required to possess "skills and experience in the field of industrial relations" that in the opinion of the Governor-General made them suitable persons to be appointed as judges. These proposed qualifications also represented a departure from established policy. Appointees to neither the old labor court nor the Industrial Court were required to meet qualifications other than being suitable judges. The selection of such appointments from the pool of qualified persons was left to the good sense of the government of the day. Judges of the Australian Labor Court also were able to hold joint appointments as presidential members of the Industrial Relations Commission and could be appointed concurrently as Federal Court judges. After employer opposition to other aspects of this bill, it was withdrawn by the government. When the Industrial Relations Act 1988 was enacted by Parliament the following year, it did not establish a

151. Industrial Relations Bill 1987 (Cth) cl. 47.
152. Id. at cl. 62-75.
153. Id. at cl. 90.
154. Id. at cl. 49(b).
155. Id. at cl. 51.
156. Industrial Relations Bill 1987 (Cth) cl. 52.
157. Industrial Relations Act 1988 (Cth). This statute repealed the existing industrial relations
new court. Labor relations jurisdiction remained with the Federal Court of Australia.

E. The Industrial Relations Court of Australia

In late 1993 the Australian Parliament enacted the Industrial Relations Reform Act,\(^\text{158}\) which ushered in the most far-reaching changes to Australian labor law since the establishment of compulsory arbitration at the turn of the century.\(^\text{159}\) Broadly speaking, this statute transformed federal labor law from a mechanism based upon the concepts of conciliation and arbitration to one in which enterprise bargaining is to become the primary means of settling terms and conditions of employment. The Industrial Relations Commission will underpin this bargaining with the promulgation of awards, which will safeguard minimum employment conditions.

As part of this package of reforms, the Parliament created the Industrial Relations Court of Australia.\(^\text{160}\) The labor relations jurisdiction that had been vested in the Federal Court has been transferred to the Industrial Relations Court\(^\text{161}\) which now possesses original jurisdiction in federal labor relations matters.\(^\text{162}\) The Industrial Relations Court also has appellate jurisdiction. First, with some significant exceptions,\(^\text{163}\) its full benches may hear appeals from single judges;\(^\text{164}\) and second, it may hear appeals from state and territorial courts on labor relations matters.\(^\text{165}\) The court also is empowered to answer questions asked of it by the Industrial Relations Commission.\(^\text{166}\) Appeals from decisions of the Full Industrial Relations Court to the High Court, with some exceptions,\(^\text{167}\) require leave to appeal from the High Court.\(^\text{168}\)

\(^{158}\) Industrial Relations Reform Act 1993 (Cth). This statute made extensive amendments to the Industrial Relations Act 1988 (Cth). Accordingly, references are, in the main, to the Industrial Relations Act.


\(^{160}\) For commentaries on this new court, see J.T. Ludeke, The Structural Features of the New System, 7 AUSTL. J. LAB. L. 132, 141-46 (1994); J.W. Shaw, The Industrial Relations Court of Australia, in EMPLOYMENT SECURITY (Ronald C. McCallum et al. eds., 1994).

\(^{161}\) Industrial Relations Reform Act 1993 (Cth) § 59.

\(^{162}\) Industrial Relations Act 1988 (Cth) § 412.

\(^{163}\) Id. § 421.

\(^{164}\) Id. § 420.

\(^{165}\) Id. § 422.

\(^{166}\) Id. §§ 46, 415(2).

\(^{167}\) Some matters, especially those dealing with inquiries into trade union ballots, are not appealable to the High Court. See Industrial Relations Act 1988 (Cth) § 432(3).

\(^{168}\) Id. § 432.
The Industrial Relations Court is constituted by a Chief Justice and nine other judges. The Governor-General, on advice from the federal cabinet, appoints the judges of the court in the same manner as other federal judges.\textsuperscript{169} The government did not resurrect its 1987 policy of requiring specialist judges to have experience in labor relations law. All of the present judges, save one,\textsuperscript{170} have been appointed from the ranks of the judges of the Federal Court of Australia, and these judges still hold their commissions as judges of the Federal Court.\textsuperscript{171}

The jurisdiction of the Industrial Relations Court is far broader than that possessed by the former Industrial Court because the last fifteen years have witnessed significant labor relations changes, especially at the federal level. Over the next half dozen years, the judges of this new court will face many challenges in the process of moulding labor relations law. One field that will take much of their time relates to the unfair dismissal of employees. As part of the 1993 reform package, the Parliament established an unfair dismissals regime that is available to a majority of the Australian workforce.\textsuperscript{172} The Industrial Relations Court has been given jurisdiction to reinstate and compensate unfairly dismissed workers.\textsuperscript{173} In order to prevent the court from being overwhelmed by claims, the statute empowers the government to appoint judicial registrars to hear most unfair termination matters.\textsuperscript{174} In a recent judgment, the High Court held that the appointment of judicial registrars to resolve matrimonial issues did not violate the concept of federal judicial power.\textsuperscript{175} Provided that the judicial registrars observe guidelines and that their decisions are automatically open to complete hearings by a court, these registrars will only be exercising delegated powers. The precious concept of judicial power will continue to reside in the courts. At the time of writing, four judicial registrars have been appointed to hear unfair dismissal claims. While judicial power remains with the courts, the use of these registrars is a sensible approach, especially for small claims.

When we examined the original jurisdiction of the High Court,\textsuperscript{176} we saw that it could judicially review decisions of Commonwealth officers.\textsuperscript{177} We also observed that federal judges could be judicially reviewed via this mechanism. Many of the High Court's judicial review decisions have related

\textsuperscript{169} Id. § 362.
\textsuperscript{170} Judge Michael Moore was formerly a presidential member of the Australian Industrial Relations Commission.
\textsuperscript{171} Judges of the Industrial Relations Court may hold concurrent appointments on the Federal Court of Australia. Industrial Relations Act 1988 (Cth) §§ 162(6) and (8).
\textsuperscript{172} See id. §§ 170CA-170EE.
\textsuperscript{173} Id. § 170EE.
\textsuperscript{174} Id. §§ 375-381.
\textsuperscript{176} See supra section IV.D.
\textsuperscript{177} AUSTR. CONST. § 75(v).
to the powers and functions of the members of the Industrial Relations Commission. Until the establishment of the Industrial Relations Court, only the High Court could judicially review decisions of the Commission. For several years, the present Chief Justice has argued that such matters should not waste the time of the highest court in the land. Accordingly, under a complicated process, the Industrial Relations Court has been empowered to review decisions of Commission members. When an applicant seeks judicial review before the High Court, that court may remit the matter to the Industrial Relations Court, which may then engage in the process of judicial review.

Finally, it should be mentioned that the Industrial Relations Court is given special powers to hear claims brought by seven or more persons who have an interest in the outcome of the matter. This representative process may be useful for various groups of litigants. For example, a dozen employees who believe that their employer has failed to pay them their wages could take advantage of this process. The broad jurisdiction that has been reposed in the court will give its judges special responsibilities. They will be required not only to administer the law but also to consider the intricacies of Australian industrial relations practice, a job which straddles the political and economic processes in our nation.

VI. THE FEDERAL COURT AUSTRALIA

A. The Vesting of Federal Jurisdiction in State Courts

Apart from the High Court and the labor courts, the Australian Parliament only created one other federal court before 1975. This was the Federal Court of Bankruptcy, established in 1930. This court only operated in the states of New South Wales and Victoria, and its work has been subsumed by the Federal Court of Australia. Unlike the United States Congress, the Australian Parliament did not establish a separate system of federal courts to administer federal law. Instead, the government was able to utilize what has been described as the "autochthonous expedient," the government was able to use the indigenous solution of vesting state courts with federal jurisdiction. This vesting is exceedingly complex, and it has taxed the minds of academics and judges alike. Since the creation of the Federal Court of Australia in 1976, however, these vesting rules are of less consequence. Nevertheless, a brief description is warranted here.

179. See Judiciary Act 1903 (Cth) § 44; Industrial Relations Act 1988 (Cth) § 412.
182. For a detailed account, see Cowen & Zines, supra note 75, at 174-233 and for a briefer and more up to date description, see Crawford, supra note 1, at 38-43.
Under section 77(iii) of the Australian Constitution, the federal Parliament is empowered to vest in the courts of the states all the original jurisdiction bestowed upon the High Court of Australia by sections 75 and 76 of the Constitution. When giving this jurisdiction to the state courts, the Parliament may impose conditions upon its exercise. For example, the Parliament has provided that where state courts exercise federal jurisdiction, no appeal lay to the Privy Council. The High Court could grant leave to hear appeals despite state law to the contrary. In respect to courts of summary jurisdiction, magistrates were required to be designated to hear such cases by the Governor-General. It will be recalled that section 75 of the Australian Constitution gives the High Court inherent jurisdiction, specifying the heads of jurisdiction reposed in the High Court. On the other hand, section 76 of the Constitution enables the Parliament to vest areas of original jurisdiction in the High Court. Under section 76(ii), for example, the federal Parliament has vested in the High Court jurisdiction relating to the operation and interpretation of federal laws, such as those relating to intellectual property.

While section 77(iii) of the Constitution enables the Parliament to bestow this original jurisdiction on the state courts, the jurisdiction of those courts already encompassed some of the original jurisdiction. For example, under its diversity jurisdiction, the High Court may hear actions between residents of different states. However, the state supreme courts have always possessed the power to determine claims between residents in different states, provided all of the procedural requirements are satisfied. Section 77(ii) of the Constitution, however, gives the Australian Parliament the power to declare that federal jurisdiction that is reposed in federal courts shall be exclusive to those federal courts. In other words, the federal Parliament has the power to deprive the state courts of any of this original jurisdiction that they possessed in 1901 when the Constitution came into force.

When the Australian Parliament bestowed original jurisdiction on state supreme courts in 1903, it adopted a two-stage approach. In the first stage, the Parliament made all of the original jurisdiction in section 75 exclusive to the High Court. Parliament further provided that all of the section 76 jurisdiction that was reposed in the High Court was exclusive to that Court. This meant that the state courts retained none of the original jurisdiction in section 75, nor did they retain any of the jurisdiction which had been reposed in the High Court under section 76. In the second stage, the Parliament gave much of the original jurisdiction in sections 75 and 76 to the state courts. Some of the section 76 jurisdiction that had been reposed in

183. Judiciary Act 1903 (Cth) §§ 39(2)(a), (c) and (d).
184. See supra section IV.C.
185. AUSTL. CONST. § 75(iv).
186. Judiciary Act 1903 (Cth) § 39(1).
187. Id. § 39(2). See also § 38, which details which areas of original jurisdiction are exclusively vested in the High Court.
the state courts had never been given to the High Court. This left the courts with a nice jurisdictional conundrum: When a state court was exercising some of this non-exclusive jurisdiction, was it utilizing federal jurisdiction that was subject to conditions, or could its judges assert that they were exercising state jurisdiction free from these federal fetters? In the end, the High Court held that the federal jurisdiction was inconsistent with, and accordingly prevailed over, the residual state jurisdiction. 188

On the whole, the vesting of federal jurisdiction in state courts has worked well. It is still the case that much federal jurisdiction is exercised by state judges and magistrates. One such area relates to the illegal importation of drugs. Although this is a federal offence, 189 committals and criminal trials are heard by the state courts. This harmonious approach to federal jurisdiction has enabled federal and state judges to work together, and has made our court structure more unified than it might otherwise have been. To fill in the gap in this picture, it is necessary to turn our attention to the Federal Court of Australia.

B. The Evolution of the Federal Court

On February 7, 1977, the Federal Court of Australia opened its doors for business. 190 Its origins can be traced to the Thirteenth Legal Convention of the Law Council of Australia, which was held in Hobart in February 1963. 191 Byers Q.C. and Toose Q.C. delivered a paper proposing an Australian federal court. 192 Solicitor-General Sir Kenneth Bailey responded with an announcement that the federal Cabinet had given approval to the Attorney-General, Sir Garfield Barwick, to proceed with plans for just such a court.

In their paper, Byers and Toose argued that federal administration would be better served by removing the federal jurisdiction reposed in State supreme courts and giving it to a federal court. 193 They argued that such a move also would relieve the High Court of much of its routine original jurisdiction and that federal matters should be decided by federal courts, leaving state matters in the hands of state courts. 194 This proposal received some strong

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189. Customs Act 1901 (Cth) § 233B.
190. The Federal Court of Australia was established by the Federal Court of Australia Act 1976 (Cth).
191. For a brief account of the origins of the Federal Court, see CRAWFORD, supra note 1, at 150-51 and The Federal Court of Australia Comes Into Being, 51 AUSTL. L.J. 55 (1977).
193. Id.
194. Id.
opposition, for the removal of federal jurisdiction from state supreme courts was perceived by some as lowering the status of those courts.

When Sir Garfield Barwick announced his preferred option in June 1964, he shied away from the complete separation of the state and federal jurisdictions. His proposal was that the state courts should retain their existing federal jurisdiction. The proposed superior court was to become a repository for specialized federal jurisdiction, such as matters relating to taxation and intellectual property. The proposed court also was to be given some aspects of the High Court's original jurisdiction, and it was to have some appellate work. After a gap of three years, Attorney-General Bowen outlined the approach of the government to the establishment of a superior court in May 1967. A year and a half later, a bill was introduced into Parliament to establish a superior court. This bill adopted the essence of the Barwick proposals of 1964. While the bill sought to relieve the High Court of original jurisdiction, it did not divest the state supreme courts of any of their federal jurisdiction. Unfortunately, the bill lapsed, and the measure was not revived by the government.

When the Australian Labor Party came to power in 1972 under Prime Minister Gough Whitlam, it resurrected the plans for a superior court. This administration favored the Byers and Toose proposals of 1963. Whitlam and his cabinet regarded the High Court as the guarantor of the Constitution and the final court of appeal for Australia on substantial questions of law. The government wished to rid the High Court of the more mundane aspects of its original and appellate jurisdiction making a new federal court the primary repository for federal jurisdiction. In part, it was believed that divesting state supreme courts of federal jurisdiction, would enable the government to carry out procedural reforms to speed up and simplify federal litigation. In December 1973, the attorney-general introduced a bill for the establishment of a superior court into the Senate (the upper house of the Australian Parliament). This bill, together with two subsequent bills, was defeated.

195. See id. at 321-29.

196. Garfield Barwick, The Australian Judicial System: The Proposed New Federal Superior Court, 1 Fed. L. Rev. 1 (1964). The editors of the Federal Law Review stated that this paper had been written by Sir Garfield before April 23, 1964. On this date, it was announced that Sir Garfield was to be appointed as Chief Justice of the High Court of Australia. In the paper, Sir Garfield made it clear that he was writing in his capacity as a member of the government and not in any judicial capacity.


199. Commonwealth Superior Court Bill 1968 (Cth).


202. See Superior Court of Australia Bill 1973 (Cth); C. OF AUSTL., P. DEBATES, S., Senator
The conservative political parties opposed the measures, and it appears that concerns were again expressed that the state supreme courts would decline in importance if they no longer possessed significant amounts of federal jurisdiction.204

By 1975 it was clear that something had to be done about the administration of federal laws. As the Australian government utilized more and more of its constitutional powers, pressures were placed on the courts. For example, the Australian Parliament had enacted mild antitrust legislation in 1965,205 but in 1974, a much stronger statute was passed.206 This Act dealt not only with antitrust matters but also with consumer protection.207 Yet, at the time these measures were enacted, the Industrial Court was the only federal court in which this new jurisdiction could be reposed. In August 1975, in a rather uncharacteristic outburst from the bench, Judge Gibbs and several of his brother High Court judges spoke against the failure to reform the High Court’s appellate jurisdiction.208

Ironically, a conservative government209 oversaw the passage of the legislation establishing the Federal Court of Australia.210 When the attorney-general introduced the Federal Court of Australia Bill211 in October 1976,212 it was clear that the government had opted largely for the Barwick model of 1964. The bill gave the Federal Court of Australia special federal jurisdiction, as well as some appellate work in federal matters and transferred the jurisdiction of the Industrial Court and the Federal Court of Bankruptcy to the Federal Court.213 The new court was to be given powers to hear appeals from the Territory Courts, thus relieving the High Court of this appellate

203. Superior Court of Australia Bill (No 1) 1974 (Cth); Superior Court of Australia Bill (No. 2) 1974 (Cth).
204. In a speech which was delivered at the Eighteenth Legal Convention of the Law Council of Australia which was held in Canberra in July 1975, Prime E.G. Minister Whitlam congratulated those supreme court judges who had opposed the superior court bills on their “unparalleled skill as lobbyists.” 49 AUSTL. L.J. 310, 310 (1975).
207. Id. part VI.
208. Moller v. Roy, 132 C.L.R. 622, 632-33 (per Gibbs, J.) (1975); see also id. at 638-39 (per Stephen, J.); id. at 639 (per Mason, J.); id. at 640 (per Jacobs, J.).
211. Federal Court of Australia Bill 1976 (Cth).
213. Separate amending statutes transferred this jurisdiction to the Federal Court. See Conciliation and Arbitration Amendment Act (No. 3) 1976 (Cth); and Bankruptcy Amendment Act 1976 (Cth).
jurisdiction. In effect, this approach amounted to little more than a rationalization of existing federal resources.\textsuperscript{214}

C. The Federal Court of Australia

The Federal Court of Australia began operations in February 1977. Under the Federal Court of Australia Act, judges of the court are appointed in the usual manner by the Governor-General.\textsuperscript{215} It is possible for judges to hold concurrent appointments in other federal or territory courts.\textsuperscript{216} A full court of the Federal Court must be constituted by at least three judges.\textsuperscript{217}

The Federal Court of Australia Act did not bestow any original jurisdiction on the court.\textsuperscript{218} Rather, it was decided that Parliament should, from time to time, invest the court with original or concurrent jurisdiction as it saw fit. When seeking to ascertain the court’s original jurisdiction, it is therefore necessary to search through the statute books to see what matters have been given to the court. Until 1994, the court exercised labor relations jurisdiction, but as we have seen,\textsuperscript{219} this area of law has been given to the Industrial Relations Court.

In February 1977, a Chief Justice and eighteen other judges were appointed to the court. All of these judges, except for Chief Justice Bowen and Judge Keely, were appointed from the ranks of the federal judiciary. During this brief span of years, the Federal Court has grown in size and is presently made up of a Chief Justice and forty-one judges spread across the continent. The Federal Court has become the most significant court in our nation, except for the High Court of Australia. Its judgments impact upon many aspects of the daily lives of Australians. Significantly, three of the seven High Court justices served periods of apprenticeship in the Federal Court.

The court’s major fields of original jurisdiction\textsuperscript{220} include bankruptcy,\textsuperscript{221} antitrust and consumer protection,\textsuperscript{222} intellectual property,\textsuperscript{223} the making of enforceable orders under antidiscrimination legislation,\textsuperscript{224} taxa-

\textsuperscript{214} For comment and analysis, see P.H. Lane, \textit{The New Federal Jurisdiction}, 54 AUSTL. L.J. 11 (1980).

\textsuperscript{215} Federal Court of Australia Act 1976 (Cth) § 6.

\textsuperscript{216} Id. § 6(5).

\textsuperscript{217} Id. § 14(2).

\textsuperscript{218} Id. § 19.

\textsuperscript{219} See supra section V.E.

\textsuperscript{220} See generally CRAWFORD, supra note 1, at 151-55.

\textsuperscript{221} Bankruptcy Act 1966 (Cth).

\textsuperscript{222} Trade Practices Act 1974 (Cth).

\textsuperscript{223} The Jurisdiction of Courts (Miscellaneous Amendments) Act 1987 (Cth) bestowed original jurisdiction on the Federal Court under various intellectual property statutes including the Patents Act 1952 (Cth) and the Trade Marks Act 1955 (Cth).

\textsuperscript{224} Racial Discrimination Act 1975 (Cth) §§ 25Z-25ZI; Sex Discrimination Act 1984 (Cth)
tion, admiralty, corporations law, the judicial review of government administrative decisions, and the supervision of various federal tribunals.

The Federal Court possesses significant appellate jurisdiction. Litigants may appeal to the Full Federal Court from decisions of single judges. Appeals from territorial supreme courts (other than the Supreme Court of the Northern Territory which has its own Full Court) are to the Federal Court. Before the establishment of the Federal Court, such appeals went directly to the High Court, and this is one area where that court's appellate jurisdiction has been lessened.

In our view, the major reason that the Federal Court has become such a significant part of the Australian legal framework is the Australian Parliament's increased use of its federal powers. As we showed in section 3 above, in recent years the Parliament has utilized various heads of constitutional power to increase the scope of federal law. In the field of consumer protection, for example, many cases relating to misleading and deceptive statements and conduct by sellers have been brought in the Federal Court. Another major area of legal growth has been administrative law. The Federal Court has a substantial administrative law work load in reviewing the decisions of federal officials. This has of course lessened the review work of the High Court which, it will be recalled, has original jurisdiction to review decisions of federal officers. An interesting aberration in this regard is the


225. Exclusive jurisdiction under the Income Tax Assessment Act 1936 (Cth) and other related taxation statutes, was bestowed on the Federal Court by the Jurisdiction of Courts (Miscellaneous Amendments) Act 1987 (Cth).


228. The two main sources of the court's power to review such decisions are the Administrative Decisions (Judicial Review) Act 1977 (Cth) and the Judiciary Act 1903 (Cth) § 39B. From September 1, 1994, however, its power to judicially review migration decisions was taken away from the mainstream. The Federal Court's role in these cases is now defined exclusively by Part 8 of the Migration Act 1958 (Cth). See MARY E. CROCK, IMMIGRATION CONTROL AND THE LAW IN AUSTRALIA, ch. 12 (Sydney: The Federation Press, forthcoming).

229. See, e.g., Administrative Appeals Tribunal Act 1975 (Cth) § 44; Immigration Act 1958 (Cth), § 475.

230. See CRAWFORD, supra note 1, at 155-57.

231. See Federal Court of Australia Act 1976 (Cth).


234. See supra section IV.C.
move in September 1994 to limit the role played by the Federal Court in the judicial review of migration actions. This may result in a substantial rise in the number of applications to review migration decisions made to the High Court.235

An additional reason that the Federal Court hears many matters is its associate and accrued jurisdiction. This issue is fully covered in another paper in this collection,236 and all that need be written here is a brief summary. Under section 32 of the Federal Court of Australia Act, the court can hear associated matters under federal law which are otherwise outside its jurisdiction.237 This associated jurisdiction is similar to the United States concept of pendent jurisdiction. The court also possesses accrued jurisdiction. This form of jurisdiction enables the Federal Court to hear a common-law claim concurrently with a matter within its jurisdiction, provided the common-law matter is an attached nonseverable claim. This issue first arose in Adamson v. West Perth Football Club Inc.238 in which Judge Northrop held that a common-law restraint-of-trade action could be joined to a similar claim under section 45 of the Trade Practices Act.239 Both the Federal Court240 and the High Court subsequently upheld this form of accrued jurisdiction.241 More recently, the Federal Court has affirmed that it has accrued jurisdiction to deal with a common-law claim, even if the matter within jurisdiction fails.242 Since July 1, 1988, cross-vesting legislation243 has minimized some of these technical jurisdictional problems. The net result of the court’s associated and accrued jurisdiction is that the court has more than fifteen years experience in hearing common-law claims which arise with matters within its jurisdiction.

235. See Crock, supra note 228, at ch. 12.
239. Id. at 211-24 (analyzing all previous High Court authorities). For comment and analysis, see W.M.C. Gummow, Pendent Jurisdiction in Australia — Section 32 of the Federal Court of Australia Act 1976, 10 Fed. L. REV. 211 (1979).
The rise of the Federal Court is one of the more interesting aspects of the history of the structure and growth of the Australian system of federal courts. Indeed, the federal court has so altered the legal landscape that it is difficult to imagine Australian law without it. To complete this discussion of these federal courts, we turn finally to the Family Court of Australia.

VII. THE FAMILY COURT OF AUSTRALIA

A. Australian Divorce Law

Before the Creation of the Family Court

The development of family law in Australia was influenced strongly by the beginnings of the colonies. For this reason, Australina family law's history is even more curious than that of the equivalent English laws from which it is derived.

In early 19th century Britain, authority for the annulment of a marriage or for the release of parties from the bonds of matrimony was vested primarily in the ecclesiastical courts. Full divorce was available to the very wealthy through the passage of a private act of Parliament. In the young Australian colonies, the ecclesiastical courts were never introduced and the Supreme Courts were given no matrimonial jurisdiction. There was one attempt to use the Parliamentary dissolution method, but this failed. Until the colonies took up the English reforms in 1857, divorce was not available in Australia.

The English Matrimonial Causes Act of 1857 abolished the jurisdiction of the ecclesiastical courts and conferred authority on a new Court of Divorce and Matrimonial Causes to grant divorce to a husband on grounds of adultery or to a wife on grounds of adultery and cruelty or other offense. The various Australian colonies all adopted matrimonial causes legislation that empowered their local supreme court to grant divorce by judicial decree. The grounds for obtaining such an order, however, did not replicate the English Act and were not uniform among the colonies.

The problems caused by the irregularity of the colonies' divorce laws were well recognized by the framers of the Constitution. After vigorous debate, it was felt that states' rights should yield to the desirability of one uniform system of matrimonial law across the nation. For this reason, section 51(xxii) of the Australian Constitution gave the federal

244. See Crawford, supra note 1, at 214-16 (addressing the history of divorce under English law).
245. See Campbell, supra note 20, at 363-66.
246. See Crawford, supra note 1, at 215.
248. See Quick & Garran, supra note 68, at 608.
Parliament power to legislate for marriage,\textsuperscript{249} divorce, parental rights, and the custody and guardianship of infants.\textsuperscript{250} Curiously, the new federal government did not move after 1901 to enact uniform family laws. The old fault-based system continued with all its regional peculiarities until 1961.\textsuperscript{251}

In 1961 the federal Matrimonial Causes Act 1959\textsuperscript{252} came into force, displacing the state laws but conferring federal jurisdiction on the state supreme courts. These courts continued to exercise their state-based jurisdiction in cases involving ex-nuptial children and de facto couples, two areas not covered by the federal Constitution. The 1959 act provided for divorce on fourteen grounds, most requiring the parties to demonstrate an element of fault. The one important advance was the inclusion of separation (for five and later three years) as such a ground.

Abandonment of fault as a basis for divorce did not occur until 1975, when the Australian Parliament passed the Family Law Act.\textsuperscript{253} This legislation was visionary and revolutionary in the context of the preceding history of family law in Australia. It is one of the more memorable changes made by the Whitlam Labor government elected in 1972. The Act was the brainchild of Senator Lionel Murphy, then attorney general, and later judge of the High Court.

The Family Law Act 1975 established a single ground for the dissolution of marriage: irretrievable breakdown of marriage, evidenced by one year's separation. Fault in either party to a marriage was no longer relevant. The Act established the Family Court to exercise the jurisdiction of the Act. The federal matrimonial jurisdiction of the state supreme courts was phased out everywhere but the Northern Territory.\textsuperscript{254}

In 1987 the supreme courts' jurisdiction over ex-nuptial children and de facto marriages also was transferred to the Family Court. This was done after four of the states referred their powers to deal with these residual family law matters to the Commonwealth Parliament.\textsuperscript{255}

\textsuperscript{249} AUSTL. CONST. § 51(xxi).

\textsuperscript{250} Id. § 51(xxii).

\textsuperscript{251} For critiques of the fault-based system, see, e.g., H.A. FINLAY & R.J. BAILEY-HARRIS, FAMILY LAW IN AUSTRALIA 14-16 (4th ed., 1989) and S. PARKER, ET AL., AUSTRALIAN FAMILY LAW IN CONTEXT, ch. 3 (1994).

\textsuperscript{252} Matrimonial Causes Act 1959 (Cth).

\textsuperscript{253} Family Law Act 1975 (Cth).

\textsuperscript{254} See CRAWFORD, supra note 1, at 216-17.

\textsuperscript{255} See, e.g., Commonwealth Powers (Family Law - Children) Act 1986 (N.S.W.); see also CRAWFORD, supra note 1, at 222-23; FINLAY & BAILEY-HARRIS, supra note 251, at ch. 6. Queensland referred its powers later. Western Australia has a Family Court that applies both state and federal law.
B. The Family Court of Australia

The Family Court of Australia is the largest superior court in Australia. In September 1994, there were four judicial registrars and fifty-three judges of whom the Chief Justice held a cross-appointment with the Federal Court. As in other areas, the powers of the court have increased as the years have passed as the result of judicial decisions and direct cooperative arrangements between the Commonwealth and the states.256

The Family Court Act 1975 does not confine its sphere of operation to matters relating solely to divorce or separation proceedings. The 1975 Act was passed in reliance on the divorce and the marriage powers in sections 51(xxi) and (xxii) of the Constitution. This gave the court jurisdiction over matters concerning maintenance and property of parties to a marriage and over the custody of the children of a marriage, even when these were not ancillary to divorce proceedings. The scheme of the Act was upheld by a bare majority of the High Court in Russell v. Russell.257 The success of the legislation in that case established for the federal Parliament the ability to pick and choose between heads of constitutional power to circumvent limitations inherent in one or the other.258 Between 1976 and 1987, other jurisdictional and constitutional difficulties for the court were resolved through amendments to the Act and through cooperative arrangements with the states.259

The Family Court has undergone some interesting procedural changes in recent years. The court often is described as a “helping” court was designed to be open, accessible, and nonintimidating to the parties. There is some evidence that its creators wished it to be nonadversarial in operation. However, the courts of review soon made it clear that the court should operate in the adjudicative manner familiar in other curial jurisdictions.260 The judges of the Family Court certainly adopted a more relaxed style than was common in other courts: judicial robes were not worn and counsel were not required to be gown. However, this experiment appears to have been a failure. In 1988, robing was restored in the belief that the formal dress would make litigants more respectful of the court and the orders it made.261

256. For a history of the Family Court, see PARKER, supra note 251, at ch. 7 and P. PARKINSON, TRADITION AND CHANGE IN AUSTRALIAN LAW 193 (1994).
257. 134 C.L.R. 495 (1976). The issue in that case related to the limiting phrase in § 51(xxii) of the Constitution which gave the Commonwealth power to legislate for “[d]ivorce and matrimonial causes; and in relation thereto, . . .” certain other matters. The argument was that to use the unqualified marriage power to get around the restrictions of § 51(xxii), Parliament would be rendering that plactum (and its restrictions) ineffective. Russell, 134 C.L.R. at 495.
258. For other examples establishing this ability, see supra section II.C.
259. See generally, CRAWFORD, supra note 1, at 222.
261. See Family Court of Australia (Additional Jurisdiction and Exercise of Powers) Act 1988 (Cth), § 30; CRAWFORD, supra note 1, at 221.
The work of the Family Court is concentrated in custody, maintenance, and property disputes. Few divorces are contested, so proceedings for principal relief take up little of the court’s time. Custody actions now be heard in Family Court whether they concern children of a marriage, ex nuptial children, or even children whose actual parents are not the applicants in the case. Recent changes in maintenance laws have resulted in a diversion in the roles played by the court respecting parties to a marriage and children. Children are covered by the Child Support Scheme introduced in 1989. This legislation relegates to the Family Court the role of reviewing assessments made by the Child Support Agency and certain other matters. The most difficult area of the Family Court’s jurisdiction, however, continues to be that involving property disputes. The complexity of the area is partly inherent and partly due to the lack of referral to the Commonwealth of power over family property matters. Nevertheless, at least some of the problems encountered in cases involving complex company directorships or insolvency have been addressed through jurisdictional cross-vesting.

VIII. The Future

The goal of this Paper has been to give an account of the development and present features of the Australian federal courts. In writing especially for a North American audience, it has been necessary to begin this description by detailing the origins of Australian white settlement and of the development of its legal institutions. In this preliminary portion of the Paper, we have also spent a little time discussing the Australian Constitution. This supreme document provides for the establishment of federal courts. It also delimits the legislative powers of the federal and State governments. As these delimitations govern the extent of federal law and hence the reach of the federal courts, we have examined the manner in which the High Court has interpreted the Constitution.

In the main body of the Paper, we have described the growth and structure of four federal courts. The High Court of Australia sits at the apex of the Australian judicial system and is the final court of appeal for Australia and the guardian of the Constitution. When describing its structure and growth, we have made the point that in recent years the High Court has shed much of its original jurisdiction and routine appellate work and has focussed upon being the final court of appeal on substantial questions of law and upon its role as arbiter of the Constitution. It is likely that in the immediate future

262. See Crawford, supra note 1, at 222.
265. See generally Crawford, supra note 1, at 224-26.
the High Court will continue down this path with the possible exception of cases involving the review of migration decisions.266

Labor courts also have been a feature of our federal court structure since the turn of the century. Their presence bespeaks much about Australia's preoccupations with industrial disputes and the respective roles of capital and labor in the nation. Over the last ninety years, there have been several labor court structures, with the greatest changes occurring in the mid-1950s, when the Boilermakers' doctrine caused a separation between federal courts and administrative tribunals. The present labor court is the Industrial Relations Court, which has had vested in it new jurisdiction consonant with the enactment of recent reforming labor legislation. Whether this court remains intact in the coming years or whether this jurisdiction is once again given to the Federal Court of Australia is very much a political question. In any event, it is clear that jurisdiction over labor relations will continue to occupy much of the time of the Australian federal court system.

Perhaps the most startling change to Australia's federal court structure occurred in 1977 when the Federal Court of Australia commenced operations. After a long period of gestation, this court has become the second most important curial body in the nation, surpassed only by the High Court. Its breadth of jurisdiction and the impact of its decisions have altered Australia's legal landscape. In the immediate future, legal life would be unthinkable without a significant federal presence in the form of the Federal Court of Australia. It may be that the court will be restructured in some way, but there is no doubt that federal judges will continue to undertake a substantial amount of legal decision-making, one rung below the High Court of Australia.

We concluded this study by writing a few words on the Family Court of Australia, which is our largest superior federal court. Given the federal and state cooperation in this area, it appears that this court will have a secure place in our federal court structure for many years to come. More than any other federal court, its decisions affect the lives of many Australian couples and their children.

Any study of the Australian system of federal courts of this length can only be preliminary in nature. Nevertheless, we hope that it will have given readers a foundation from which to view the jurisdictional issues that confront our network of federal and state courts.

266. By redefining and restricting access to the Federal Court in these cases, amendments to the Migration Act 1958 in September 1994 are expected to force a substantial number of disgruntled applicants to seek redress in the High Court. See CROCK, supra note 228, at ch. 12.