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Federal Jurisdiction in Australian Courts: Policies and Prospects

Brian R. Opeskin*

I. INTRODUCTION

Like the United States Constitution on which it was modelled, the Australian Constitution defines a certain class of legal disputes as matters of federal jurisdiction. Enumerated in Sections 75 and 76 of the Australian Constitution, these matters are the subject of “the judicial power of the Commonwealth” and include amongst other things questions of constitutional interpretation, questions arising under federal law, and diversity suits. It is somewhat curious that the drafters of the Australian Constitution chose to single out this class of matters for special treatment because the factors that motivated their disparate treatment in the United States were generally absent in Australia. At the time of Australia’s federation in 1901, each state had a well-established court system, and there was little reason to fear partiality or parochialism in the way these courts might dispense justice in matters affecting

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1. These matters are defined in sections 75 and 76 of the Australian Constitution as follows:

75. In all matters—

(i.) Arising under any treaty:

(ii.) Affecting consuls or other representatives of other countries:

(iii.) In which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party:

(iv.) Between States, or between residents of different States, or between a State and a resident of another State:

(v.) In which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth: the High Court shall have original jurisdiction.

76. The Parliament may make laws conferring original jurisdiction on the High Court in any matter—

(i.) Arising under this Constitution or involving its interpretation:

(ii.) Arising under any laws made by the Parliament:

(iii.) Of Admiralty and maritime jurisdiction:

(iv.) Relating to the same subject-matter claimed under the laws of different States.

AUSTL. CONST. ch. III, §§ 75-76.
the newly formed Commonwealth. Notwithstanding these differences, the constitutional drafters followed the American precedent, a decision that profoundly effected the development of the Australian judicial system.

The Australian Constitution clearly contemplates that federal courts may adjudicate matters of federal jurisdiction. First, the Constitution itself confers original jurisdiction on the High Court, which is a federal court, in some matters of federal jurisdiction. Second, the Constitution grants the Commonwealth Parliament the power to create additional federal courts and to define the jurisdiction of those courts with respect to any matters within federal jurisdiction. These powers would have enabled the Parliament to establish an extensive system of federal courts exercising jurisdiction in all matters of federal jurisdiction. However, unlike the United States, the Parliament did not undertake this course in Australia. With the exception of the High Court, which Parliament established soon after federation, there are only three federal courts in Australia. In their current incarnation, they are of comparatively recent origin. Far from exercising jurisdiction over the full range of matters enumerated in sections 75 and 76 of the Constitution, these federal courts have had jurisdiction conferred on them in a restricted and rather specialized range of federal matters.

Federal courts were not the only courts that the constitutional drafters contemplated as exercising federal jurisdiction. In a marked departure from the template of the United States Constitution, the drafters of the Australian Constitution expressly allowed Parliament to invest any state court with federal jurisdiction. This power, which has strikingly but inaccurately been called the "autochthonous expedient," was thought to be a sensible alternative to the


3. The Constitution confers jurisdiction on the High Court in § 75 matters, and Parliament may confer additional jurisdiction on the High Court in § 76 matters. Austl. Const. §§ 75-76.

4. Id. § 71.

5. Id. § 77(i).

6. The federal courts are the Family Court of Australia established in 1975, the Federal Court of Australia established in 1976 and the Industrial Relations Court of Australia established in 1994. The Federal Bankruptcy Court established in 1928 previously exercised the bankruptcy jurisdiction which is currently exercised by the Federal Court. The labor law jurisdiction of the Industrial Relations Court was previously exercised by the Federal Court, and before that by the Commonwealth Industrial Court. The latter was established in 1956 and renamed the Australian Industrial Court in 1973.


8. The Queen v. Kirby, Ex parte Boilermakers' Society of Australia, 94 C.L.R. 254, 268 (1956). The exercise of federal jurisdiction by state courts is not unique to Australia. In the United States, state courts are assumed to have concurrent jurisdiction in the adjudication and enforcement of federal law unless jurisdiction is expressly or impliedly made exclusive to the federal courts. Charles Dowd Box Co. v. Courtney, 368 U.S. 502 (1962); Claflin v. Houseman,
financial and administrative costs of establishing a separate system of federal courts to adjudicate the new class of federal matters established by the Constitution. The federal legislature exercised this power in 1903 and conferred jurisdiction on “the several Courts of the States” in virtually all matters of federal jurisdiction. Even today state courts deal with a significant proportion of federal matters in both civil and criminal cases.

The provision in the Australian Constitution authorizing the exercise of federal jurisdiction by either federal or state courts, as Parliament might choose, gives rise to the central questions addressed in this paper. In Australia the relationship between state and federal courts has often been a sensitive one. In part this sensitive relationship is due to differences in the terms and conditions of judicial office but is also due to differences in the nature of the day-to-day work of those courts. Rightly or wrongly, there is a perception that the trial work of some federal courts is more varied and stimulating than that of the state courts. Because the nature of the work undertaken by state and federal courts is in part a function of the distribution of federal jurisdiction between them, judges often have been concerned with the way in which Parliament exercises its power to confer federal jurisdiction on state and federal courts. In particular, state court judges have frequently expressed concern about the erosion of the jurisdiction and status of state courts at the hands of the federal legislature.

The potential for the Commonwealth Parliament to affect the jurisdictional balance between federal and state courts has grown tremendously in recent years. The reason for this is that, although the heads of federal jurisdiction are fixed by the terms of the Constitution, the range of matters falling within those heads has continued to expand. One such head of federal jurisdiction is section 76(ii) which makes any matter arising under federal law a matter of federal jurisdiction. In Australia, the role of the federal legislature in regulating commercial and private life has steadily increased throughout this century. In the United States, the expansive interpretation of the Commerce Clause has shifted the balance of legislative power toward central government. As in the United States, Australian courts have interpreted the various heads of federal legislative power in a manner that has permitted an ever-expanding role for federal legislative action.

9. Judiciary Act of 1903, pt. VI § 39(2). Only a narrow class of matters was preserved for the exclusive jurisdiction of the High Court, the only federal court then in existence. See id. § 38.
12. Section 51 of the Australian Constitution grants federal legislative power over thirty-nine
governed areas such as corporations, business conduct, bankruptcy, and family relations, but today complex federal statutes govern these areas.\textsuperscript{13}

The rise of federal legislation has had a corresponding effect both on the scope of federal jurisdiction and on the ability of the federal legislature to determine the distribution of jurisdiction between state and federal courts regarding matters of federal jurisdiction. Of course, the expansion of federal jurisdiction need not necessarily be reflected in an enhanced role for federal courts because new areas of federal jurisdiction may be invested exclusively in state courts. Nevertheless, the potential shift in the balance between state and federal courts has heightened the importance of Parliament’s role in achieving an appropriate equilibrium between the state and federal spheres of the judicial branch of government.

Against this background, this paper examines the principles and policies that underlie the federal government’s allocation of federal jurisdiction between the state or federal court systems. Examined in Part II, the first issue is why Parliament confers jurisdiction on federal courts at all, when Parliament can invest state courts with federal jurisdiction. If Parliament confers jurisdiction on federal courts, a second question arises, namely, whether that federal jurisdiction should be exclusive or concurrent with state court jurisdiction. Examined in Part III, the second issue arises because the Constitution grants Parliament the power to define the extent to which the jurisdiction of any federal court is exclusive of that which belongs to or is invested in state courts.\textsuperscript{14} Part IV examines three important developments which have affected the relationship between the jurisdiction of state and federal courts: (1) the development of the doctrine of accrued federal jurisdiction; (2) the referral of legislative power from the states to the Commonwealth; and, most significantly, (3) the nationwide scheme for cross-vesting the jurisdiction of superior courts. This Paper’s principal focus will be on federal-state court issues that have arisen since the establishment of the new federal courts in the mid-1970s. Examples will be drawn from various fields of federal law, such as trade practices, intellectual property, family law, bankruptcy and admiralty.\textsuperscript{15}


\textsuperscript{14} \textit{Austl. Const.} § 77(ii).

II. WHY CONFER FEDERAL JURISDICTION ON FEDERAL COURTS?

Under the Australian Constitution, the federal Parliament has a fundamental role in defining the federal jurisdiction of federal and state courts. This power extends to the regulation of both original and appellate jurisdiction, and is limited only by constitutional provisions specifying a minimum role for the High Court as the country’s supreme judicial tribunal. In particular, federal legislative power extends to the following matters: (a) conferring original jurisdiction on the High Court in section 76 matters (jurisdiction in section 75 matters is assured by the Constitution itself); (b) defining the original jurisdiction of federal courts, other than the High Court, in section 75 and section 76 matters; (c) investing state courts with jurisdiction in section 75 and section 76 matters; (d) defining the extent to which the jurisdiction of any federal court is exclusive of that of the state courts; (e) prescribing exceptions and regulations to the appellate jurisdiction of the High Court; and (f) defining the appellate jurisdiction of federal courts other than the High Court.

In light of these legislative powers, the principle question considered in this Part is why Parliament might choose to confer federal jurisdiction on federal courts rather than invest such jurisdiction in state courts. Not everyone has accepted the need to confer jurisdiction on federal courts. Writing shortly before the birth of the Commonwealth of Australia, two noted commentators on the Constitution predicted that:

it is probable that for some time there will be no necessity for the creation of any inferior federal courts, but that all the cases in which the original jurisdiction of the Commonwealth is invoked can be dealt with either by the High Court itself or by Courts of the States.

More recently the former Chief Justice of Australia, Sir Harry Gibbs, remarking about the rise of the Federal Court wrote, “[i]t is difficult to discover any valid reason in principle, or any practical necessity, for bringing into existence the new Federal Court and conferring upon it its present jurisdiction.” In his Honor’s opinion, it would have been better to pass this jurisdiction over to state courts.

16. Sections 73 and 75 of the Constitution confer original and appellate jurisdiction on the High Court in certain defined matters.
17. The power in section 77(i) to make laws “[d]efining the jurisdiction of any federal court other than the High Court” includes power to define both the appellate and the original jurisdiction of those courts. AUSTL. CONST., § 77(i); see Ah Yick v. Lehmert, 2 C.L.R. 593, 603-04 (1905); COHEN & ZINES, supra note 2, at 130-38.
18. QUICK & GARRAN, supra note 2, at 726.
The federal Parliament has not adopted the minimalist role for federal courts envisaged by Sir Harry Gibbs, nor has it conferred jurisdiction in all federal matters on federal courts. The issue of the appropriate balance between federal and state court jurisdiction was widely ventilated in the 1960s and 1970s in relation to numerous proposals for the creation of a superior federal court. In essence the debate centered around whether the new court should be a large court with jurisdiction over all matters of federal jurisdiction as in the United States, or a small court with a more selective jurisdictional basis. Ultimately, the small court model was chosen. This pattern is evident today in all federal courts created by Parliament. The Family Court and the Industrial Relations Court exercise jurisdiction in the specific fields of family law and labor law, respectively. Notwithstanding its jurisdiction is conferred on it by more than a hundred acts of Parliament, the Federal Court exercises jurisdiction in only eight principal areas of federal law, namely trade practices, consumer protection, intellectual property, taxation, administrative review, corporations, admiralty, and bankruptcy.

What principles and policies have motivated Parliament to confer jurisdiction on federal courts? Until the 1970s, Parliament did not proceed on any set principles, and relevant federal legislation reflected ad hoc decisions made without any real thought being given to the problem. However, when legislation establishing the Federal Court was introduced into the House of Representatives in 1976, the Attorney General, Mr. Ellicott, attempted to answer this question by stating that “[t]he government believes that only where there are special policy or perhaps historical reasons for doing so should original federal jurisdiction be vested in a federal court.” The Attorney General went on to name industrial law, bankruptcy, trade practices, and judicial review of federal administrative action as appropriate subject areas for the jurisdiction of a federal court. The Attorney General did not explain the special policy or historical reasons behind the choice of areas. Others who have held that office have expressed similar views though they often restated rather than elucidated the basis for conferring jurisdiction on federal courts. In view of these general statements, it is appropriate to examine in greater detail the reasons for establishing the Federal Court.

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24. Id.
detail the historical reasons or special policies that underlie and inform the conferral of original and appellate jurisdiction on federal courts.

A. High Court's Special Role

Whatever the policies underlying the conferral of jurisdiction on other federal courts, clearly the High Court of Australia is in a special position. The Constitution itself envisaged a federal supreme court under the name of the High Court of Australia,26 and conferred on it certain original and appellate jurisdiction.27 The constitutional provisions relating to the High Court's original jurisdiction are clearly modelled on Article III of the United States Constitution, but the provisions relating to the Court's appellate jurisdiction differ fundamentally from analogous provisions in the United States Constitution. The High Court of Australia operates as a general court of appeal from the state supreme courts in both federal and non-federal matters, and thus the Court has an important unifying effect on the common law throughout Australia.28

The role of Parliament in relation to the High Court generally has been limited to conferring jurisdiction on the High Court in section 76 matters and prescribing exceptions and regulations in respect of its appellate jurisdiction in accordance with section 73. In earlier times, the High Court bore a considerable burden of original and appellate jurisdiction under an assortment of federal statutes. In the view of some judges, much of this work impeded the central role of the Court as interpreter of the Constitution and the final court of general appeal.29 Since 1976, however, Parliament has done much to reform the High Court's jurisdiction and to relieve the Court of its excessive workload.30 The Attorney General, Mr. Ellicott, stated the guiding light for these reforms when introducing the first of these changes:

The High Court occupies a position of special importance under our constitutional framework. Not only is it the final interpreter of the Constitution, but it has a significant role as the court of appeal from State supreme courts and other federal courts. In this role, it has achieved

26. The High Court was formally established by Part II of the Judiciary Act of 1903. See Part II of the High Court of Australia Act 1979.
27. AUSTL. CONST. §§ 73, 75.
28. In this respect the High Court is similar to the Supreme Court of Canada which acts as a general court of appeal from the Canadian provinces. CAN. CONST. pt. VII, § 101.
recognition throughout the common law world as one of the great common law courts. It is vital to the working of the High Court that it should be left free to concentrate on constitutional issues and on the fundamental issues of law that come before it in the exercise of its appellate jurisdiction.\textsuperscript{31}

Because of these reforms, the High Court now has a more circumscribed original and appellate jurisdiction within the limits set by the Constitution itself. Parliament has conferred original jurisdiction on the Court in matters arising under the Constitution or involving its interpretation, within the meaning of section 76(i), as befits its role as Australia’s supreme judicial tribunal.\textsuperscript{32} It has also conferred jurisdiction on the High Court in a few selected matters arising under federal law, within the meaning of section 76(ii).\textsuperscript{33} But apart from these matters, jurisdiction is not otherwise vested in the Court in section 76 matters.\textsuperscript{34} Likewise, the Court’s appellate jurisdiction has been greatly restricted in recent years by the requirement that an appellant in nearly all cases obtain special leave to appeal.\textsuperscript{35} The statutory grounds on which special leave may be granted reinforce the Court’s role as the apex of the judicial hierarchy in Australia. A party may generally obtain special leave only if a case raises a question of law of public importance, requires the resolution of differences of opinion between different courts, or is otherwise in the interests of justice.\textsuperscript{36}

Clearly, the decisions to vest original jurisdiction in the High Court and to prescribe conditions on the exercise of its appellate jurisdiction, have been influenced by considerations differing from those relevant to the conferral of

\textsuperscript{31} C. OF AUSTL., P. DEBATES, H. OF R., 2944 (June 3, 1976).
\textsuperscript{32} Judiciary Act of 1903, § 30(a).
\textsuperscript{33} Sitting as the Court of Disputed Returns, the High Court has original jurisdiction regarding federal electoral law, Commonwealth Electoral Act of 1918, Referendum (Constitution Alteration) Act of 1906. The Court also has original jurisdiction in “trials of indictable offences” against federal law, Judiciary Act of 1903 § 30(e).
\textsuperscript{34} As to the High Court’s admiralty and maritime jurisdiction under section 76(iii), see AUSTL. L. REFORM COMM’N, CIV. ADMIRALTY JURISDICTION, REP. 33 (1986). As to the Court’s jurisdiction under section 76(iv), see Leslie Katz, The History of the Inclusion in the Commonwealth Constitution of Section 76(iv), 2 PUB. L. REV. 228 (1991).
\textsuperscript{35} Special leave is not required in an appeal from a single justice of the High Court (Judiciary Act 1903 § 34), or in an appeal from the Full Court of the Family Court where that Court gives a certificate stating that an important question of law or public interest is involved (Family Law Act 1975 § 95).
\textsuperscript{36} Judiciary Act of 1903 § 35A. The requirement that an appellant obtain special leave to appeal to the High Court has been held to conform with section 73 of the Constitution, which provides a right of appeal from a state supreme court to the High Court. The special leave requirement conforms to section 73 because that right is subject to exceptions and regulations prescribed by Parliament. See Smith Kline & French Lab. (Austl.) Ltd. v. Commonwealth, 173 C.L.R. 194 (1991).
jurisdiction on other federal courts. Central amongst these has been the need to preserve the High Court as the "keystone of the federal arch."37

B. Uniformity

A second factor to have exerted a powerful influence on the distribution of federal jurisdiction between state and federal courts is the desire for uniformity. In essence the argument is that a federal court with national operation can attain uniformity in the interpretation and development of federal law which state courts interpreting the same laws cannot achieve. In relation to the United States Constitution, Alexander Hamilton expressed the matter with great clarity in the following terms:

If there are such things as political axioms, the propriety of the judicial power of a government being coextensive with its legislative, may be ranked among the number. The mere necessity of uniformity in the interpretation of the national laws, decides the question. Thirteen independent courts of final jurisdiction over the same causes, arising upon the same laws, is a hydra in government, from which nothing but contradiction and confusion can proceed.38

Similarly, another American commentator stated that "it hardly seems open to doubt that a full system of independent federal courts plays a valuable part in furthering the rapid, widespread, yet uniform and accurate, interpretation of federal law."39

In Australia, this argument has been most forcefully put in relation to jurisdiction in trade practices matters. Australia has had legislation dealing with restrictive trade practices almost since the time of federation.40 Although many of the earlier acts were considered ineffectual because of narrow coverage, high cost, and cumbersome procedures, the enactment of the Trade Practices Act of 197441 heralded a new era in the regulation of business conduct in the marketplace. Broadly speaking, the Act deals with two types of issues: Part IV addresses restrictive trade practices matters,42 and

38. THE FEDERALIST No. 80, at 364-65 (Alexander Hamilton) (Hallowell, Glazier, Musters, Smith eds., 1842).
42. Id. §§ 45-51 (dealing with arrangements substantially lessening competition, misuses of
Part V concerns consumer protection measures. In deciding which courts should exercise this new jurisdiction, the federal Parliament clearly could have allowed state courts to exercise the jurisdiction, or conferred that jurisdiction on a federal court. In addition, Parliament had power to determine whether that jurisdiction was to be exclusive or concurrent. In the result, Parliament conferred exclusive jurisdiction on the Australian Industrial Court to hear and determine any action, prosecution, or other proceeding under the Act. That jurisdiction was later transferred to the Federal Court upon its establishment.

The Minister for Manufacturing Industry, Mr. Enderby, explained the choice of a federal court when introducing the legislation into the House of Representatives. He remarked that confining jurisdiction initially to the Australian Industrial Court would “assist the early development of a cohesive body of case law which might not be possible if, in the early stages of the operation of the legislation, courts of lower status—presided over by magistrates, for example—were to have jurisdiction.” In a similar vein, Sir Nigel Bowen once stated that the conferral of trade practices jurisdiction on a federal court was especially important because, in a new field of law, cases would frequently raise new issues for determination. In his view, to have one court dealing with these matters would produce a more consistent body of legal doctrine.

It is apparent from these passages that the development of a uniform and cohesive body of jurisprudence in a new area of federal law was an important

market power, price discrimination, and mergers and acquisitions).

43. Id. §§ 51A-75A. Part V prohibits misleading or deceptive conduct, bait advertising, and pyramid selling. It also implies certain conditions and warranties into contracts for the sale of goods or services.


45. However, state courts had jurisdiction over one important consumer protection matter. Part V, Division 2 of the Trade Practices Act of 1974 implies into all consumer contracts certain non-excludable conditions and warranties. Trade Practices Act of 1974, §§ 66-74. Where there is a breach of these conditions and warranties, the proper action for the consumer to institute is an action for breach of contract rather than one for breach of the Trade Practices Act itself. State courts have jurisdiction over such common law claims and prior to 1987, that jurisdiction was exclusive of that of the Federal Court. See Arturi v. Zupps Motors Pty. Ltd., 33 A.L.R. 243 (1980); Zalai v. Col. Crawford (Retail) Pty. Ltd., 2 N.S.W.L.R. 438 (1980).


47. C. OF AUSTL., P. DEBATES, H. OF R., 234 (July 16, 1974).

role for the Industrial Court. Undoubtedly uniformity in the interpretation of federal laws and other matters of federal jurisdiction is desirable. However, it is by no means obvious that the only satisfactory way to achieve this goal is by conferring original jurisdiction on a federal court.

One reason for this is the role of precedent and judicial comity in achieving uniformity of interpretation. Consider, for example, a situation in which state courts are invested with federal jurisdiction over a matter arising under federal law. Although the courts of one state are not bound by a decision of another state court that interprets federal law, undoubtedly great weight will be accorded to a decision of another state court. This situation arose in \( R. \ v. \) Parsons\(^{50} \) where the Full Court of the Victorian Supreme Court had to consider the weight to be attached to a decision of the Queensland Court of Criminal Appeal on the interpretation of the federal Customs Act 1901.\(^{51} \) Notwithstanding their misgivings about the correctness of the Queensland decision, a majority of the Victorian Court followed the Queensland interpretation in holding that the federal offense of importing prohibited drugs did not require proof of \textit{mens rea}.\(^{52} \) The majority went on to approve the words of Chief Justice Street of the New South Wales Supreme Court, in a like case, in which his Honor stated:

Despite the forebodings of the prophets of doom to the effect that the existing State court system is less than appropriate to furnish the forum for construing Commonwealth legislation, the suggestion being that inconsistent views between the States will lead to inconsistencies in the administration of the law, I have no difficulty whatever in perceiving that the doctrine of precedent is fully adequate to cope with these risks. As a matter of precedent this Court is not, of course, bound by the decision of the Full Court of Victoria. But I have not the slightest doubt that, where a Commonwealth statute has been construed by the ultimate appellate court within any State or Territory, that construction should, as a matter of ordinary practice, be accepted and applied by the courts of other States and Territories so long as it is permitted to stand unchanged either by the court

\(^{49} \) Some have argued, however, that there are advantages in varying approaches to complex legal problems and that a variety of informed opinion may assist in the evolution and adaptation of legal rules. See Campbell, supra note 10, at 11. On the other hand, different but co-existing state interpretations of federal law make individual rights and obligations vary with the forum and may compromise the objectives of the rule of law. See Brian R. Opeskin, \textit{The Price of Forum Shopping: A Reply to Professor Juenger}, 16 SYD. L. REV. 14, 15-17 (1994).

\(^{50} \) [1983] 2 V.R. 499.

\(^{51} \) R. \ v. \ Gardiner, 27 A.L.R. 140 (1979).

\(^{52} \) Justice Starke, dissenting, acknowledged the Queensland decision to be a highly persuasive authority. However, his Honor stated that where a court is convinced that the decision of another state court is erroneous and likely to cause serious injustice, the court is entitled to decide the matter for itself. \textit{Parsons}, at 508 (Starke, J., dissenting).
of origin or by the High Court. The risk of differing interpretations amongst the States is thus negated and, in practical terms, a uniform application of Commonwealth laws throughout Australia is assured.53

When one compares the principle of comity operating between state courts of coordinate authority, it is apparent that if the relevant jurisdiction were to be conferred instead on a federal court, judges of that court would be in no different position vis-a-vis each other. A single judge of a federal court is not bound to follow a decision of another judge of the same court, although clearly great deference would be given to an earlier decision. From the viewpoint of achieving uniformity, there would thus seem to be little basis for preferring federal courts over state courts in the exercise of original federal jurisdiction.

A second reason for caution in accepting the argument of uniformity as a ground for conferring jurisdiction on federal courts arises from the role of appeals. In 1979 Sir Walter Campbell, later Chief Justice of Queensland, argued that it is the function of the High Court to ensure uniformity in the law and that the appellate jurisdiction of the High Court has ensured, and will continue to ensure, the uniformity of judge-made law in Australia in appropriate circumstances.54 His Honor thus saw no reason based on uniformity for creating the new Federal Court or for conferring extensive jurisdiction on it. Since then the Judiciary Act of 1903 has been amended to require the High Court to consider whether a decision of the Court is necessary to resolve differences of opinion between different courts when granting special leave to appeal.55 This emphasizes the role of the High Court as a court of general appeal at the apex of the court hierarchy in pronouncing the law for the whole of Australia, and thus distinguishes Australia from the United States, as earlier described by Hamilton.56

The federal Parliament has from time to time recognized the importance of appellate jurisdiction in achieving a uniform interpretation of federal law.

53. [1981] R. v. Abbredris, 1 N.S.W.L.R. 530, 542. There would appear to be a similar relationship between decisions of state and federal courts in situations of concurrent jurisdiction. In R. v. Yates, 102 A.L.R. 673, 679-80 (1991), the New South Wales Court of Criminal Appeal followed a decision of the full Federal Court on the interpretation of a provision of the federal Crimes Act of 1914. Notwithstanding the New South Wales Court’s misgivings about the earlier decision, it was not convinced that the decision was “plainly wrong,” and to reconsider the point would merely “highlight further the evils of waste and delay that the present distribution amongst courts in Australia of the power to exercise federal jurisdiction occasionally causes.” The High Court refused special leave to appeal stating that intermediate appellate courts should generally accept and apply the decisions of courts of coordinate authority on the interpretation of Commonwealth law. 13 No. 16 LEG. REP. C3 (1992). See also Australian Sec. Comm’n v. Marlborough Gold Mines Ltd., 177 C.L.R. 485, 492 (1993).


56. Supra note 38 and accompanying text.
Uniformity may be achieved not only by conferring original jurisdiction on federal courts, but also by giving federal courts exclusive jurisdiction to hear appeals from decisions of state courts in matters of federal jurisdiction. This approach was adopted during the 1980s with respect to intellectual property matters, which serves as a useful example of the way in which jurisdiction has been shared between state and federal courts in the Australian federation.\textsuperscript{57}

The law relating to intellectual property in Australia is governed principally by federal legislation enacted pursuant to Parliament's power to make laws with respect to "Copyrights, patents of inventions and designs, and trade marks"\textsuperscript{58} and by relevant principles of common law and equity. Prior to 1976, much of the jurisdiction under relevant federal intellectual property legislation was conferred on the High Court in its original jurisdiction. In 1976 jurisdiction in relation to trade marks, patents, and designs was expressly conferred on the supreme court of each state and territory\textsuperscript{59} and the High Court's jurisdiction was abolished. The consequence of these changes was that no federal court could exercise original jurisdiction over intellectual property matters, unless such matters were associated with matters otherwise within the court's jurisdiction.\textsuperscript{60}

Although most proceedings under the federal intellectual property laws were brought within the state court systems, an attempt was made to preserve uniformity in the interpretation of these laws through the provisions relating to appeals. The legislation provided that appeals under the various Acts could be taken to the federal court, or to the High Court with leave, but that otherwise no other appeals could be instituted.\textsuperscript{61} These provisions ensured that state appeals courts could not act as the final arbiters of the meaning of the federal legislation and that all appeals were determined in a federal court. With some simplification, the situation was thus that substantive first instance


\textsuperscript{58} AUSTL. CONST. § 51(xviii).

\textsuperscript{59} These were defined to be "prescribed courts" under the relevant Acts. See Trade Marks Act of 1955, §§ 6, 112(1B); Patents Act of 1952, §§ 6, 146(1B); Schedule, Patents Act of 1990, § 155; Designs Act of 1906 §§ 4(1), 40G(1B). In relation to copyright, the same result was probably achieved by the general conferral of federal jurisdiction upon state courts by section 39(2) of the Judiciary Act of 1903. But cf. P.H. LANE, LANE'S COMMENTARY ON THE AUSTRALIAN CONSTITUTION 458-59 (1986).

\textsuperscript{60} See infra part IV.A.

\textsuperscript{61} Trade Marks Act of 1955, § 114; Patents Act of 1952, § 148; Patents Act of 1990, § 158; Designs Act of 1906, § 40I; Copyright Act of 1968, §§ 131B, 248L.
decisions in intellectual property cases were made exclusively in state courts and appeals were determined exclusively in federal courts.

These provisions were amended in 1987 to confer concurrent original jurisdiction on the federal court to hear and determine matters arising under the federal intellectual property Acts, but the provisions relating to the exclusive appellate jurisdiction of federal courts have remained unchanged. In the present context, the jurisdictional arrangements regarding intellectual property matters demonstrate that uniformity in the interpretation of federal law can be achieved by conferring appellate jurisdiction on federal courts, notwithstanding that original jurisdiction in those matters is exercised by the state courts.

C. Specialty

A compelling argument for conferring federal jurisdiction on federal courts is that it enables judges to develop specialist expertise regarding the particular subject areas entrusted to them. This factor has been an important determinant of the Australian federal judicial system where all federal courts established by Parliament, other than the High Court, have been specialized tribunals. In this respect the United States model of a full and separate system of federal courts has never been followed.

The specialization of Australian federal courts is readily apparent in relation to the Family Court, which exercises jurisdiction in matrimonial causes, and in relation to the new Industrial Relations Court, which exercises jurisdiction in labor law. The Federal Court also has specialized functions, although they are not as immediately apparent because jurisdiction is conferred on the Court by more than one hundred Acts of the federal Parliament. Indeed, Sir Nigel Bowen once reflected that he had misgivings about accepting his appointment as the first Chief Justice of the Federal Court because it looked as if the Court would have a "rag-bag" of jurisdiction. Notwith-


64. FED. CT. OF AUSTL., supra note 21, at 96-98.

65. Bowen, supra note 48, at 190.
standing the melange of sources, the vast majority of the Court's original jurisdiction concerns only eight areas of federal law: trade practices, consumer protection, intellectual property, taxation, administrative review, corporations, admiralty, and bankruptcy.

Whatever the area of federal law in question, the argument of specialization is premised on the notion that, if jurisdiction were conferred instead on state courts, the judges of those courts would have insufficient contact with the subject matter of the proceedings to deal with the matter properly and expeditiously. This point has been made, for example, in relation to federal administrative law. Since the earliest years of federation, review of the actions of Commonwealth officers has been removed for the most part from the jurisdiction of state courts. This has enabled federal courts (first the High Court and now the Federal Court) to develop a knowledge and understanding of Commonwealth governmental processes. This may not have been possible in state courts because the judges would have had only occasional contact with these matters. It has also been argued in some areas of federal law, such as patents, that the detailed and technical nature of the evidence and case law may make it appropriate for jurisdiction to be exercised by a specialized federal tribunal rather than by a state court of general jurisdiction.

Reinforcing the specialization and expertise of federal judges in certain areas of federal law is the fact that many judges hold commissions on related tribunals and bodies. Several judges of the Federal Court hold commissions on the Administrative Appeals Tribunal, the Trade Practices Tribunal, and the Copyright Tribunal, as well as holding appointments to bodies such as the Copyright Law Review Committee and the Admiralty Rules Committee. In some instances the legislation establishing a tribunal actually requires one or more of its members to be a judge of a federal court. Two important features of these tribunals are that they are nonjudicial in character and that judges appointed to them are appointed in a personal capacity, in accordance with the persona designata doctrine. Clearly judges who exercise non-
judicial functions over subject matter related to their judicial functions must bring to bear on the latter a unique breadth of experience that enhances the quality of their work as federal judges. By contrast, state court judges are not generally afforded the same opportunity to acquire additional expertise through appointment to nonjudicial federal bodies.

It must be acknowledged that specialization is not always considered a benefit of conferring jurisdiction on federal courts. First, the specialized and limited nature of some federal work, such as family law, has had a deleterious effect on the quality of judicial appointments because the work does not always attract lawyers of the highest calibre. Secondly, specialization may remove judges from experience of local matters and distance them from the community. Thirdly, the proliferation of specialized jurisdiction enhances the risk of jurisdictional conflict and uncertainty. However, notwithstanding these views, the advantages of specialization of labor have generally been as powerful a force in curial life as they have been in other spheres. The recent establishment of the Industrial Relations Court is a clear demonstration that arguments of specialization still have currency in Australian political thought.

D. Philosophy

One of the more interesting and disputed questions concerning the allocation of federal jurisdiction is whether fundamental principles of federalism require a federal-state division of power in the judicial branch of government, as in the legislative and executive branches. For reasons of accountability, it has been argued that federal judges should interpret federal laws. In the words of former Prime Minister Gough Whitlam, "Judges who are called on to interpret and apply statutes should be appointed by governments responsible to the parliaments which passed those statutes. On this basic principle alone . . . federal laws should primarily be applied and interpreted by judges appointed by the federal government." Echoing this sentiment, another writer has observed that "if the federal as well as state governments are to be viable and able to maintain a proper balance between

74. CRAWFORD, supra note 30, at 302.
75. See COMM. OF REV. INTO AUSTRALIAN INDUST. RELATIONS LAW AND SYS., supra note 63.
76. E.G. Whitlam, commenting on Byers & Toose, supra note 22, at 327.
the two legal systems . . . each of them should have at its disposal every branch of the three governmental powers.”77

On the other hand, as eminent an authority as Sir Owen Dixon78 claimed that “neither from the point of view of juristic principle nor from that of the practical and efficient administration of justice can the division of the Courts into state and federal be regarded as sound.”79 In his view, courts should be established as an independent organ accountable neither to the Commonwealth nor to any individual state. If established by the Constitution, courts of justice would have responsibility for administering the entire body of law, independently of the political arms of government, and free of the “extraordinary conception” of federal jurisdiction.80 The essence of this view is that the courts are not akin to other arms of government. A judge has a duty to apply to a case all the relevant law of the land whether its source be state or federal. Thus the supremacy of the law makes it unnecessary to establish independent state and federal judiciaries. Moreover, as the argument goes, the ability of judges to apply that law without interference from other branches of government is central to the idea of judicial independence.81

In light of this difference of opinion, it is interesting to note the views of Sir Kenneth Wheare, a well-known commentator on federalism, in reviewing the constitutions of Australia, Canada, Switzerland, and the United States nearly fifty years ago.

If the federal principle were to be strictly applied one would expect a dual system to be established in a federation, one set of courts to apply and

78. Sir Owen Dixon was a justice of the High Court from 1929-1952 and Chief Justice from 1952-1964.
79. Sir Owen Dixon, The Law and the Constitution, 51 Law Q. Rev. 590, 606 (1935). In criticizing Australia’s adherence to the United States constitutional model, Dixon claimed that “[t]he framers of our own Federal Commonwealth Constitution (who were for the most part lawyers) found the American instrument of government an incomparable model. They could not escape from its fascination. Its contemplation damped the smoldering fires of their originality.” Id. at 597.
81. The idea that only judges appointed by the Commonwealth should administer the laws of the Commonwealth has been rejected by some because they argue that it subverts the principle of judicial independence, by which judges are not directly accountable to the executive that appointed them. See Gibbs, supra note 19, at 677-78. Similarly, in relation to Canada, the Privy Council has stated that the role of the central government in appointing judges of provincial superior courts promotes judicial independence and impartiality. See Constitution Act 1867 § 96, (1975); Toronto Corp. v. York Corp., [1938] A.C. 415, 426; O. Martineau & Sons Ltd. v. City of Montreal, [1932] A.C. 113, 120-21. I am grateful to Leslie Katz for this point.
interpret the law of the general government, and another to apply and interpret the law of each state. In fact the United States alone of the four federations we are discussing comes near to applying this principle.\(^8\)

After examining the position in each federation, Wheare concluded that there was no uniformity among federations in the organization of their courts. He noted, however, that whenever a federation entrusted regional courts to apply and interpret federal laws, there was some safeguard for federal government, such as the right of a litigant to appeal to a federal court, or the power of the federal legislature to establish a parallel system of courts if the need arose.\(^3\)

The contrast between these different conceptions of federalism, as it relates to the judicial branch, might be thought of as a sterile argument of principle, devoid of relevance to the everyday working of the courts. However, the issue has aroused great interest in Australia in connection with the extended debates concerning the restructuring of the judicial system.\(^4\) As a measure of that interest it is worthwhile recounting the work of a government committee established to report on changes to the Australian judicature. In 1985 a Constitutional Commission was established for the purpose of considering ways in which the Australian Constitution might be changed to provide a suitable framework for the development of Australia as a federation and to recognize an appropriate division of responsibilities between the state and federal spheres of government. The Commission established an Advisory Committee to consider, \textit{inter alia}, whether separate state and federal court systems should be retained. The Advisory Committee divided on this question, a majority advocating the retention of separate state and federal courts.\(^5\) Importantly for present purposes, two members of the majority took the principled position advocating a single executive and a parliament able to accept political responsibility for the courts and their administration. In their view, the adoption of an integrated court system, which was neither federal nor state, would produce the inevitable practical result of dividing responsibility for the courts between the Commonwealth, state and territory governments. Recognizing the consequent difficulties that divided responsibility would entail, the Constitutional Commission supported the Advisory

\(^3\) Id. at 71.
\(^5\) Id. at 37-43. Concerned with the declining status of the state courts, the minority members opined that a unified system would be the best and most efficient system in the long run. They were also of the view that while it is necessary for government to have responsibility for the courts, it is not an essential attribute of federalism for each government to have its own courts.
Committee's general conclusions and recommended against the establishment of an integrated court system. 86

The relationship between the judicial branch of government and other branches is clearly an important aspect of the argument for the establishment of independent federal courts to administer federal laws. If the federal legislature enacts new legislation, the legislature and the executive should take responsibility for administering those laws by providing adequate resources for their interpretation and enforcement. However, their ability to take responsibility is circumscribed when federal jurisdiction is vested in state courts. The reason for this is that, when Parliament confers federal jurisdiction on state courts, it must generally take those courts as it finds them; the constitution or structure of state courts cannot be changed.

A good illustration of the difficulties that this can create is provided by events of the 1920s and 1930s in relation to bankruptcy jurisdiction. As discussed below, 87 the Commonwealth first took over the field of bankruptcy law in 1924 and invested jurisdiction in bankruptcy matters in state courts. In providing for the administration of the new federal Act, the Commonwealth attempted to make Commonwealth public servants Registrars of the state supreme courts for the purpose of issuing bankruptcy notices. However, in Le Mesurier v. Connor, 88 the High Court invalidated this law because the addition of personnel to a state court amounted to an interference with the state court's constitution and structure. The next year, Parliament created a new Federal Court of Bankruptcy and cited the High Court's decision as a reason for establishing a federal court to deal with bankruptcy matters rather than entrusting such matters to state courts. 89

This example clearly shows that the effective administration of federal laws may not be possible through sole reliance on the "autochthonous expedient." 90 The creation of federal courts, and the conferral of federal

86. Const. Comm'n, Final Rep., vol. 1, § 6.16 (1988). Curiously, the Commission simultaneously rejected the view that a vital federal system requires each level of government to have its own court system. Id. § 6.27.
87. See infra part II.F.
88. 42 C.L.R. 481 (1929).
89. C. of Austl., P. Debates, H. of R., 2045 (May 22, 1930). However, in practice the Federal Court of Bankruptcy did not operate in Western Australia, and the Supreme Court of that state continued to exercise federal jurisdiction in bankruptcy matters. So far as that state was concerned, the constitutional difficulties presented by Le Mesurier v. Connor, 42 C.L.R. 481 (1929), were solved by amendment of the federal law to make Commonwealth officers available to state courts, without making them officers of those courts. See Crawford, supra note 30, at 54 n.102.
90. See also Russell v. Russell, 134 C.L.R. 495 (1976) (where a federal law that required state courts exercising family law jurisdiction to sit in camera was held invalid because it went to the structure of the court; however, a law prohibiting state court judges from wearing robes in family law matters was held to be merely procedural and hence valid).
jurisdiction on them, may be necessary to ensure that laws made by the federal legislative branch are properly administered. In this respect, the legislature and the executive are not only responsible for the provision of adequate financial support for the administration of federal laws. Their responsibility extends to the appointment and removal of judges, the constitution of courts and reform of judicial administration, and the making of rules of court. All of this confirms the importance of ensuring that the federal sphere of government comprises a legislative, executive, and judicial branch.

E. Efficacy

A further reason that has been advanced for conferring federal jurisdiction on federal courts rather than state courts is that “the national character of the jurisdiction and the convenience of a court not limited by State boundaries make it appropriate to vest jurisdiction in such a court.” Certainly federal courts enjoy the benefit of nationwide jurisdiction over defendants and ready enforcement of judgments throughout Australia. For example, the legislation establishing the Federal Court provides that “[t]he process of the Court runs, and the judgments of the Court have effect and may be executed, throughout Australia and the Territories.” At one time this may have constituted a significant advantage over state courts whose jurisdiction over absent defendants and whose powers to execute judgments were more circumscribed. However, the comparative advantage of conferring jurisdiction on federal courts rather than state courts has been largely neutralized by federal legislation. In 1992 the Commonwealth enacted the Service and Execution of Process Act of 1992 which established a nationwide scheme for the service of process and execution of judgments of state courts. A similar scheme has existed in some form since the earliest years of federation, but the present scheme goes much further than its predecessor in converting Australia into a single jurisdiction for the purpose of the service and execution of court process. In relation to service, the Act provides simply that an initiating process issued in one state may be served in another state. Unlike the United States and Canada, there is no need to establish any connection

92. Durack, supra note 20, at 779.
93. Federal Court of Australia Act of 1976 § 18; see also Judiciary Act of 1903 § 25 (powers of the High Court); Industrial Relations Act of 1988 § 374 (powers of the Industrial Relations Court).
94. Service and Execution of Process Act of 1901.
96. In the United States, see International Shoe Co. v. Washington, 326 U.S. 310 (1945), and
between the chosen forum and the subject-matter of the action to effect service.\textsuperscript{97} Nor is there any need to obtain the court's leave before serving process in another state. Regarding judgments, the Act provides a simple method of enforcement through a process of registration. A judgment rendered by one state court may be registered in another state's court, and the judgment then has the same force and effect as if had been given by the registering court.\textsuperscript{98} Moreover, substantive defenses to the enforcement of a sister state judgment, which may have been previously available under conflicts of law rules, do not apply.\textsuperscript{99}

In the light of these developments, unparalleled in Canada or the United States, there would appear to be only marginal advantage in conferring jurisdiction on federal courts rather than state courts by reason of the efficacy of the proceedings.

\textbf{F. History}

Fortuity and historical circumstance are the final factors that have influenced the conferral of jurisdiction on state or federal courts. Bankruptcy jurisdiction indicates the impact of these factors. Under the Australian Constitution, the federal Parliament has power to make laws with respect to bankruptcy and insolvency.\textsuperscript{100} The first federal Act passed pursuant to this power provided for bankruptcy jurisdiction to be exercised by state courts and by such federal courts of bankruptcy as Parliament created.\textsuperscript{101} In the first years of the Act's operation, no federal court was created, and bankruptcy matters were dealt with exclusively by state courts in the exercise of federal jurisdiction. However, with the arrival of the Great Depression in the late 1920s, bankruptcy work escalated to the point where state court judges in the most populous states of New South Wales and Victoria could not deal adequately with the volume of work.\textsuperscript{102} Following representations from the state governments, the federal Parliament established the Federal Court of

\begin{itemize}
  \item 97. However, a proceeding commenced in an inappropriate court may be stayed on grounds recognizing the degree of connection between the proceeding and the forum. See Service and Execution of Process Act of 1992 § 20.
  \item 98. \textit{Id.} § 105.
  \item 100. \textit{Austl. Const.} § 51(xvii).
  \item 101. Bankruptcy Act of 1924 § 18.
  \item 102. C. of \textit{Austl.}, P. \textit{Debates}, H. of R., 2045-46 (May 22, 1930).
\end{itemize}
Bankruptcy in 1930. In practice this newly established federal court exercised jurisdiction only in New South Wales and Victoria where there had been serious court congestion; in other states, state courts continued to exercise bankruptcy jurisdiction.

When the Federal Court was created in 1976, the jurisdiction of the Federal Court of Bankruptcy was transferred to the Federal Court, and the old court was abolished. However, the pre-existing situation was preserved in so far as it was intended that the Federal Court exercise bankruptcy jurisdiction only in the two states of New South Wales and Victoria and in the Australian Capital Territory. In other states, bankruptcy jurisdiction was exercised by the appropriate state courts. Only in 1982 did the Federal Court begin to exercise its bankruptcy jurisdiction throughout the country.

As this brief example shows, history can be a powerful determinant of the distribution of federal jurisdiction between state and federal courts in some circumstances. It is difficult to explain why a federal court exercised bankruptcy jurisdiction in some states and why state courts exercised this jurisdiction in other states except by reference to the historical circumstances surrounding the establishment of the Federal Court of Bankruptcy.

III. FEDERAL JURISDICTION: EXCLUSIVE OR CONCURRENT?

We have previously noted that the federal Parliament is given power under the Australian Constitution both to confer jurisdiction on federal courts of its creation and to invest state courts with federal jurisdiction. The preceding Part examined why Parliament has sometimes chosen to confer jurisdiction on federal courts rather than place sole reliance on investing state courts with federal jurisdiction—the so-called "autochthonous expedient." Parliament is also given power by the Constitution to make laws "[d]efining the extent to which the jurisdiction of any federal court shall be exclusive of that which belongs to or is invested in the courts of the States." Accordingly, whenever Parliament does choose to confer jurisdiction on federal courts, a further question arises as to whether that jurisdiction should be exclusive. That inquiry is the subject of this Part.

Some of the arguments considered in Part II, which support the conferral of jurisdiction on federal courts, may also be adduced to support the conferral of exclusive jurisdiction on those courts. The arguments of uniformity of

106. CRAWFORD, supra note 30, at 152.
107. AUSTL. CONST. §§ 77(i), 77(iii).
108. AUSTL. CONST § 77(ii).
interpretation and judicial specialization, for example, tend to support exclusivity.\textsuperscript{109} However, other factors appear to have had a greater influence on whether the jurisdiction conferred on federal courts is made exclusive or concurrent. In particular, the potential for forum shopping between state and federal courts has exerted some pressure towards the exclusive jurisdiction of federal courts, while concerns over split jurisdictional problems, access to justice, and the declining status of state courts, have promoted the conferral of concurrent jurisdiction on state and federal courts. The problems discussed here did not originate with the creation of the new federal courts in the 1970s. Problems of exclusive and concurrent jurisdiction have existed since the High Court of Australia was established at the dawn of Australia’s federation. For example, it has always been possible for a diversity suit to be brought either in the High Court or in a state court,\textsuperscript{110} and from an early date certain types of matters were reserved to the High Court exclusively.\textsuperscript{111} Greater strains began to emerge with the conferral of jurisdiction on the Commonwealth Industrial Court under a diverse range of federal statutes in the late 1960s and early 1970s. It was not until the establishment of the Family Court in 1975 and the Federal Court in 1976, however, that many of these issues were thrown into sharp relief. Accordingly, it is in the context of the experience of the last twenty years that these issues are examined.

A. Forum Shopping

Although in the United States forum shopping has been described as a “national legal pastime”\textsuperscript{112} and has had the tacit approval of the highest court,\textsuperscript{113} in Australia the practice has been frequently criticized by judges, law reform bodies, and academics alike.\textsuperscript{114} Australian cases in which judges

\textsuperscript{109} See Rogers, supra note 48, at 285; Rogers, supra note 10, at 634.

\textsuperscript{110} The High Court has jurisdiction in diversity suits by virtue of section 75 of the Constitution, and the several courts of the states are invested with federal jurisdiction in diversity suits by virtue of section 39(2) of the Judiciary Act of 1903. Concurrent jurisdiction in these matters has not presented as much difficulty as might at first appear because, unlike in the United States, the term “residents of different States” has been interpreted to exclude corporations. See Rochford v. Dayes, 84 A.L.R. 405 (1989); Crouch v. Commissioner for Ry. (Queensl.), 159 C.L.R. 22 (1985); Australasian Temperance & Gen. Mut. Life Assurance Soc’y Ltd. v. Howe, 31 C.L.R. 290 (1922). Moreover, the High Court has power to remit a matter to another court for trial which the Court invariably does in diversity cases. See Judiciary Act of 1903 § 44.

\textsuperscript{111} Judiciary Act of 1903 § 38. The matters within the High Court’s exclusive jurisdiction are identified principally by reference to the identity of the parties to the action, e.g., suits between states, suits between the Commonwealth and a state, and applications for certain prerogative writs against a Commonwealth officer.


\textsuperscript{114} See generally Friedrich K. Juenger, What’s Wrong with Forum Shopping?, 16 SYD. L.
have expressed their displeasure have generally involved a choice between alternative state or territorial fora.\textsuperscript{115} However, the conferral of federal jurisdiction on state and federal courts concurrently raises a different possibility for forum shopping. If state and federal courts have exclusive subject-matter jurisdiction, a plaintiff generally has no option but to litigate in the one court competent to hear the dispute. But whenever state and federal courts have concurrent jurisdiction over the subject-matter of an action, a choice arises between the available fora. A former Commonwealth Attorney General, Senator Durack, recognized these problems when considering the possibility of extending the concurrent jurisdiction of state and federal courts.\textsuperscript{116} In his view, adopting this expedient on a wide scale was likely to introduce new problems of forum shopping in place of the old problems of jurisdictional uncertainty.\textsuperscript{117} A plaintiff would be able to choose whichever court gave the greatest tactical advantage.

To regard the possibility of forum-shopping as a reason to refrain from conferring concurrent jurisdiction on state and federal courts presupposes that there is something inherently harmful in allowing plaintiffs to choose between these courts. Not everyone would agree with this assumption. Some commentators have hailed the resultant competition between state and federal courts as a significant advantage of concurrent jurisdiction. One reason advanced for this view is that forum shopping may bring about beneficial institutional change in the administration of justice. For example, prior to the changes made in 1987 to jurisdiction in trade practices matters, it was said that:

If the State Supreme Courts were given concurrent jurisdiction under the Trade Practices Act, all courts would gain an incentive to strive towards highest levels of performance. Courts which failed to do so would simply find that plaintiffs would take their matters elsewhere, and the court in question would suffer a relative loss [of] status and influence.\textsuperscript{118}

\textsuperscript{115} In recent cases decided by the High Court, for example, actions have been commenced in Queensland rather than New South Wales to avoid limitations on the assessment of damages in motor accident cases. See Stevens v. Head, 176 C.L.R. 433 (1993); Actions have been commenced in New South Wales rather than South Australia to avoid shorter limitation periods in actions for personal injury. See McKain v. R.W. Miller & Co., 174 C.L.R. 1 (1991); finally plaintiffs have brought actions in Victoria rather than the Northern Territory to avoid bars on recovery of economic loss in motor accident cases. See Breavington v. Godleman, 169 C.L.R. 41 (1988).

\textsuperscript{116} Durack, supra note 20, at 782.

\textsuperscript{117} As to the latter, see discussion infra part III.B.

\textsuperscript{118} Rogers, supra note 10, at 648 (quoting G. de Q. Walker, Submission to the Trade Practices Consultative Comm.).
Resuming this argument elsewhere, the commentator stated that conferring concurrent jurisdiction on state and federal courts would help to establish a competitive judicial market. In such an environment judges would have an incentive to administer trade practices cases in the most efficient manner possible to attract more cases to their court in an inherently interesting area of law.

As interesting as this argument is, it would appear to be flawed in two respects. First, the argument assumes that the advantages accruing to a plaintiff in choosing one court system will invariably translate into communal benefits in the way the system of justice is administered. However, there may be many rigidities in a market system that prevent the predicted institutional change. Second, in so far as the argument focuses on one systemic effect of competition between the courts, it takes no account of other costs of competition. One such cost is the harm to an individual defendant, who is unable to determine the legal consequences of his or her actions until such time as the plaintiff chooses a forum. Furthermore, by permitting a plaintiff to select either forum, with the consequential impact on the rights and obligations of both parties, a country’s compliance with the rule of law may be jeopardized.

Assuming then that the practice of forum shopping is properly to be discouraged, there is reason to favor the conferral of exclusive jurisdiction on federal courts over the conferral of concurrent jurisdiction with the states. The extent of that preference must depend, however, on the degree to which differences between the courts’ proceedings provide plaintiffs with a real incentive to engage in forum shopping. From a formal point of view, there are few strong incentives for plaintiffs to engage in federal-state forum shopping in the Australian judicial system. There are several reasons for this. First, most matters of federal jurisdiction that arise in state or federal courts are matters arising under the Constitution or under laws made by the federal Parliament. Consequently, the relevant federal law itself provides the rule of decision except in relation to procedural issues that arise in the course and conduct of litigation.

Second, all courts exercising federal jurisdiction are required by statute to apply the laws of the state or territory in which they sit except to the extent

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120. See Opeskin, supra note 49.
121. Austl. Const. §§ 76(i) - (ii).
122. P.E. Nygh, Conflict of Laws in Australia 255 (5th ed. 1991); Pryles & Hanks, supra note 99, at 192. Of course, procedural issues may have a significant bearing on the outcome of a case from a litigant’s point of view. The description of such matters as procedural is no reflection on their practical importance.
that the Constitution or federal law requires otherwise.\textsuperscript{123} This provision, closely modelled on an early Act of the United States Congress,\textsuperscript{124} is intended to ensure the harmonious relationship between the systems of state and federal law administered within each state.\textsuperscript{125} The effect of the provision is that a court exercising federal jurisdiction in a particular state will generally apply the one body of law to a matter before it, irrespective of whether the court is a state or federal court. The incentive to engage in forum shopping between state and federal courts within any given state is therefore minimized. On the other hand, the provision facilitates forum shopping between a court exercising federal jurisdiction in one state and a court exercising federal jurisdiction in another state.\textsuperscript{126} The section thus shows a clear preference for uniformity in all judicial proceedings commenced within a state over uniformity in the administration of all federal law.\textsuperscript{127} This preference may result in the disparate treatment from state to state of individuals whose rights and duties arise under federal law, but this lack of uniformity has been held not to infringe the Constitution, at least in a criminal context.\textsuperscript{128}

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{123} Judiciary Act of 1903 \S 79.
\item \textsuperscript{124} Judiciary Act of 1789 \S 34 (codified at 28 U.S.C. \S 1652 (1987)). The provision now states: "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."\textit{Id.}
\item \textsuperscript{125} \textit{See, e.g.}, Musgrave v. Commonwealth, 57 C.L.R. 514 (1937). In that case, a New South Wales resident commenced a libel action against a Queensland defendant in the High Court's diversity jurisdiction. The action was time barred in Queensland where the cause of action arose. However, Chief Justice Latham held that the action could be maintained in New South Wales because the High Court was obliged by \S 79 to apply the longer limitation period applicable in New South Wales, where the court sat. \textit{Id.}
\item \textsuperscript{126} For example, a litigant may choose freely between commencing a federal court action in any registry of the court with the consequence that, subject to the matter being transferred to another registry, the law of the chosen state will be applied. These factors have led some commentators to recommend amendment of section 79 of the Judiciary Act of 1903 to avoid the prospect of forum shopping. \textit{See} Enid Campbell, Federal \textit{Contract Law}, 44 \textit{Austl. L. J.} 580, 582 (1970); P.H.L., \textit{Recent Cases—Notes and Comments}, 41 \textit{Austl. L. J.} 210, 212 (1967).
\item \textsuperscript{127} The Australian Law Reform Commission challenged this approach in relation to the rules of evidence applied in federal courts. Until 1995, federal courts were required to apply different rules of evidence depending on the state or territory in which they exercised their jurisdiction. In recommending that a uniform law of evidence be adopted in all federal courts, the Commission commented that it was unsatisfactory for the outcome of a case under federal law to depend on the state in which the trial took place. Although the implementation of these recommendations might result in forum shopping between state and federal courts within a state, the Commission thought that this was unlikely to occur, at least in criminal matters. \textit{See Austl. L. Reform Comm., Evidence, Rep. No. 26, 108-18 (1985); Austl. L. Reform Comm., Evidence, Rep. No. 38, 10-13 (1987).} The federal Parliament recently enacted the Evidence Act of 1995, giving effect to the Commission's recommendations for a uniform evidence law for federal courts.
\item \textsuperscript{128} Leeth v. Australia, 174 C.L.R. 455 (1992), concerned the constitutional validity of a
\end{enumerate}
\end{footnotesize}
Third, certain federal laws discourage federal/state forum shopping. Foremost among these is the provision for the transfer of proceedings between federal courts and superior state courts under the crossvesting scheme introduced in 1987. The scheme is outlined further below, 129 but in essence it permits a court in which a proceeding has been commenced to transfer the proceeding to another participating court. 130 Given that a court may transfer a proceeding on the application of a party to the proceeding or on its own motion, 131 and that there is no appeal from a transfer decision, 132 the evident intent of the legislation is that there be an expeditious and final determination of the appropriate forum for litigation. 133 A further incentive for plaintiffs to commence proceedings in the state or federal system, as appropriate, is that they may be subject to an adverse costs ruling if they bring suit in an inappropriate forum. 134

Notwithstanding the absence of formal differences between litigating in state and federal courts, at the end of the day there are several less tangible disparities that may incline litigants to favor one court system over the other. It is often said, for example, that the Federal Court can offer parties a more speedy trial than state courts in certain matters due to its method of active case management. 135 There may also be some cost incentive to litigate small

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federal law requiring the minimum sentence of a federal offender to be set in like manner to a state offender tried in that state. Because each Australian state has markedly different laws with respect to the nonparole period, an offender against federal law may serve a different term of imprisonment according to the state in which he or she is tried and sentenced. Over a vigorous dissent, a majority of the High Court upheld the law, stating that the Constitution did not require Commonwealth laws to have a uniform operation on individuals throughout the Commonwealth. \( \text{Id. at } \) 467. The majority also remarked that the federal law in question served the important purpose of avoiding disharmony that would otherwise result if prisoners serving their sentences in the same prison were subject to different regimes regarding parole. \( \text{Id. at } \) 466, 472. As with section 79 of the Judiciary Act of 1903, the majority’s decision demonstrates a preference for intrastate uniformity at the expense of interstate diversity.

129. See infra part IV.C.
131. Id. § 5(7).
132. Id. § 13(a).
133. In Bankinvest A.G. v. Seabrook, 14 N.S.W.L.R. 711, 714, (1988), Chief Justice Street stated that a decision to transfer a proceeding called for:
   a ‘nuts and bolts’ management decision as to which court, in the pursuit of the interests of justice, is the more appropriate to hear and determine the substantive dispute. Consideration of textured principle and deep learning—in particular principles of international law such as forum non conveniens—have no place in a cross-vesting adjudication.
134. The Federal Court Rules provide that, if the court believes that the claim could more suitably have been brought in another court or tribunal, any costs to be paid will be reduced by one-third. See Federal Court Rules, O. 62, r. 36A(2).
claims in state courts.  

Rightly or wrongly, litigants may have greater confidence in the quality of decisions of the federal courts. Some commentators have predicted that factors such as these might lead to a drift toward litigants choosing federal courts over state courts in important litigation.

If that is so, and if forum shopping is to be discouraged, it is arguable that federal jurisdiction should not be conferred concurrently on state and federal courts.

B. Split Jurisdictional Problems

All who have addressed themselves to the question of a dual system of courts appear to have accepted as a prime requisite of any such system that litigants be given the opportunity to have determined in one court and in the one proceeding the matters in dispute between them.  

This view, expressed by a judge of the New South Wales Supreme Court, is a laudable sentiment commonly voiced by those concerned with federal-state court relations in Australia. At the heart of the comment is the conviction that disputes over jurisdiction within a federal system are futile and unproductive because they involve the expenditure of considerable public and private resources without reaching the merits of the parties’ dispute.

An inappropriate division of jurisdiction between state and federal courts may present a serious threat to the goal of having one court adjudicate all disputed issues between the parties. If a federal court is able to resolve only some of the relevant issues because of limitations on its jurisdiction, the parties may be forced to pursue the remainder of their claim in the state court system, with consequent expense and delay. Split jurisdictional problems such as these were a common feature of federal-state court relations during the 1980s, and they arose in a variety of circumstances. It is instructive, however, to

136. The Federal Court Rules provide that if the plaintiff is awarded judgment of less than $100,000 as a money sum or as damages, any costs will be reduced by one-third unless the court orders otherwise. See Federal Court Rules, O. 62, r. 36A(1).


138. Rogers, supra note 48, at 288.

139. See also Street, supra note 10, at 435, who commented that “[i]t cannot, I believe, be stated too often, too loudly or too clearly that the ideal court is one that can administer the whole of the law of the land in the course of the one case between the litigants who are in dispute.”

examine two situations that typified the difficulties experienced in that period, relating to commercial law and to family law.

The first example of split jurisdictional problems arises in the context of the consumer protection provisions of the trade practices legislation. As mentioned above, the Federal Court once exercised exclusive jurisdiction over proceedings arising under the Trade Practices Act.\textsuperscript{141} However, some claims under that Act bear a great similarity to common law claims subject to the plenary jurisdiction of the state courts. For example, an action may be brought under the Trade Practices Act for damages where a corporation has engaged in misleading or deceptive conduct in breach of section 52 of the Act. Such a claim is often similar to a common law claim in tort for passing off, and not infrequently a plaintiff will wish to plead both causes of action. In the 1980s the question arose whether the Federal Court, in exercising its exclusive statutory jurisdiction over section 52 matters, could also determine the allied common law claim. If the Federal Court had no jurisdiction over the common law claim and state courts had no jurisdiction over the federal claim, there was a real prospect that neither court system could deal with the whole of the parties’ dispute. Split jurisdictional problems such as these raised the specter of litigation on jurisdictional issues, multiple proceedings, and inadequate redress of the parties’ grievances.

The second example concerns jurisdiction in relation to the custody of children. Although this is a complex area of law, it is possible to give an overview of some of the difficulties that have arisen.\textsuperscript{142} The Australian Constitution grants power to Parliament to make laws with respect to “marriage” and “[d]ivorce and matrimonial causes; and in relation thereto, parental rights, and the custody and guardianship of infants.”\textsuperscript{143} Although some federal legislation had previously been enacted pursuant to these powers,\textsuperscript{144} in 1975 the Commonwealth passed the Family Law Act to

\textsuperscript{141} See supra part II.B.


\textsuperscript{143} Austl. Const. ch. I, pt. V, §§ 51(xxi) & (xvii), respectively. These are the principal, but not the only, Commonwealth powers with respect to family law. Thus, federal legislative power over “immigration and emigration” and “external affairs” has been held to validate various provisions of the Family Law Act 1975. See Re Vaughan, [1980] F.L.C. 90-888, at 75,606 (withholding the passport of a child under threat of being removed from Australia); In the Marriage of Blair, 90 F.L.R. 182, 194-95 (1988) (recognizing overseas custody orders).

\textsuperscript{144} Principally, these were the Matrimonial Causes Act 1959, which gave Australia its first unified law of divorce, and the Marriage Act 1961, which unified the law relating to marriage.
provide a new nationwide scheme with respect to divorce, child custody, maintenance and property settlement. The Act rested principally on the marriage power, which placed immediate constraints on its scope. In relation to child custody, for example, it was held early on that the Family Law Act applied only to the natural or adopted children of both parties to the marriage and that, accordingly, the Act could not regulate the custody of ex-nuptial children of the husband or wife, or the custody of a child of other parents, even though the child lived as a member of the family of the husband and wife (for example, a foster child). The need for a constitutional linkage between child custody and marriage thus presented considerable difficulty for the federal government in providing comprehensively for the custody of children, especially in light of the increasing variety of family arrangements and the government’s desire to extend the reach of federal family law as far as possible.

The limitations on the scope of the marriage power in the present context are important because they translated directly into jurisdictional difficulties for the courts. The Family Law Act created a new federal court, the Family Court, to exercise jurisdiction under the Act and conferred jurisdiction on the Court which was largely exclusive of that of the states. However, the federal jurisdiction conferred on the Family Court was necessarily confined to the types of jurisdiction enumerated in sections 75 and 76 of the Constitu-

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146. AUSTL. CONST. ch. I, pt. V, §§ 51(xxii) was not widely relied on because proceedings for ancillary relief, such as custody and guardianship, could only be brought in the context of divorce or nullity proceedings. The Family Law Act, however, sought to enable custody and other proceedings to be brought independently of proceedings for the dissolution or nullity of a marriage.


148. See Joint Select Comm. on The Family Law Act, Family Law in AUSTL., § 4.57 (1980) (recommending that the Family Law Act be amended to the fullest extent permitted by the Constitution to ensure that the Family Court has jurisdiction to deal with all matters affecting child custody, guardianship, and access).

149. Family Law Act 1975 §§ 39(1)(a) & 40, and Proclamations made thereunder. There are two important exceptions which relate, first, to the state of Western Australia, where a state family court was established, and, secondly, to state courts of summary jurisdiction, which were given jurisdiction in relation to certain limited proceedings under the Act.
In so far as section 76(ii) enabled jurisdiction to be conferred on federal courts with respect to matters "arising under any laws made by Parliament," constitutional restrictions on the power of Parliament to make laws with respect to the custody of children ensured that the jurisdiction of the Family Court was similarly constrained. The practical difficulties stemming from these jurisdictional limitations soon became widely known. If a family comprised both children of a marriage and ex-nuptial children, a dispute over custody would have to be determined in two different courts: the former in the Family Court and the latter in a state court. Worse still, in exceptional situations neither a state nor federal court was competent to determine the particular custody proceedings brought before it. Commenting on this discreditable situation in 1983, a governmental committee expressed its most serious concern and dismay regarding the effect which the present distribution of family law powers has had on the personal lives of ordinary members of the community. Persons who are unfortunate enough to experience difficulty in their matrimonial and family life have had those difficulties greatly exacerbated by the added delay, uncertainty and anxiety created by the protracted and prolonged constitutional litigation needed to clarify the boundaries of Commonwealth and State power.

Understandably, the split jurisdictional problems considered above have tended to bring the legal system into disrepute and have given rise to considerable pressure for reform. The worst of the problems have now been solved as a result of developments in the late 1980s, such as the growth of the doctrine of accrued jurisdiction, the cross-vesting of jurisdiction, and the referral of legislative power from the states to the Commonwealth, which are considered further below. Another solution has been to broaden the concurrent jurisdiction of state and federal courts independently of the cross-vesting legislation, since the broader the area of concurrence, the lesser the risk that jurisdiction over a particular dispute will be split between two court systems. To this extent, split jurisdictional problems between state and

150. AUSTL. CONST. ch. III, § 77(i).
151. See, e.g., Clarke v. McInnes, 1 N.S.W. L. R. 598 (1978) (rejecting for want of jurisdiction child custody applications by father and grandparents made to separate courts after death of the children's mother). For the judge's extracurial criticisms, see Michael M. Helsham, Correspondence, 52 AUSTL. L. J. 466 (1978).
153. See infra pt. IV.
154. See Rogers, supra note 48, at 288 (concurrent trade practices jurisdiction).
federal courts have been a significant catalyst in the expansion of concurrent jurisdiction of state courts in matters of federal jurisdiction.

C. Access To Justice

A third factor relevant to the allocation of exclusive or concurrent jurisdiction to state and federal courts is access to justice. In recent years state and federal governments have attempted to enhance access to justice for all Australians through the provision of a fairer, more efficient, and more effective legal system. Although the goal of such reforms is to improve the operation of the legal system across the board, if the state court system provides greater access to justice than the federal system, it is arguable those courts should be given concurrent jurisdiction in matters of federal jurisdiction.

The importance of access to justice as a determinant of state and federal court jurisdiction has long been apparent in the consumer protection provisions of the Trade Practices Act 1974, whose history provides a useful illustration of the issues. When first enacted, the Trade Practices Act conferred exclusive jurisdiction on a federal court in consumer protection matters. However, this was always regarded as a temporary measure to allow for the development of a coherent body of jurisprudence in a new area of law. Implicit in this view may have been an unexplained preference for conferring jurisdiction in consumer protection matters on state courts in the longer term. A possible reason for this attitude was suggested by a committee established in 1976 to review the operation and effect of the Trade Practices Act. After noting that the conferral of exclusive jurisdiction on the Australian Industrial Court was unnecessarily restrictive, the committee stated its view as follows:

At the present time, State courts exercise federal jurisdiction in a wide range of matters. The Committee believes such courts should be given jurisdiction also on matters arising under Commonwealth consumer laws. Such an extension would be of assistance to both State consumer agencies, and the public generally, to whom State courts are more familiar and accessible than the Australian Industrial Court.

The committee based its recommendation for concurrent jurisdiction on the idea of access to justice, insofar as state courts were thought to be more familiar and accessible to the public than the Industrial Court. Similarly, in 1979 another governmental committee recommended, in the course of

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157. Id. at § 9.35.
reviewing the effect of competition policy on small businesses in Australia, that jurisdiction under the consumer protection provisions of the Trade Practices Act be conferred on state courts. It had been suggested to the committee that small businesses would benefit by being able to have access to the simpler procedures of the various state courts, should they wish to use the provisions of the Act to protect their positions. The committee agreed with this submission and concluded that “any disadvantages which might arise out of the inconsistent decisions which could occur initially are far outweighed by the benefits to small businesses, consumers and other less powerful litigants who would thereby obtain ready access to the Courts.” In 1987 as a result of these recommendations, the federal Parliament conferred concurrent jurisdiction on state and territory courts in relation to consumer protection matters arising under Division 1 and 1A of Part V of the Trade Practices Act. When introducing the amending legislation into Parliament, the Attorney-General, Mr. Bowen, commented that the community’s best interests were not necessarily well served by the Federal Court’s exclusive jurisdiction in these matters because cases arising under these Divisions were often disputes of local character, better dealt with in a state court. Reviewing these developments, the issue of access to justice appears to have been a paramount consideration in the ultimate investiture of state courts with concurrent jurisdiction in consumer protection matters.

158. 1 TRADE PRACTICES CONSULTATIVE COMM., SMALL BUSINESS AND THE TRADE PRACTICES ACT (1979). The Committee made a similar recommendation in relation to restrictive trade practices under part IV of the Act.

159. Id. §§ 12.34 - 12.36.

160. Jurisdiction of Courts (Miscellaneous Amendments) Act 1987. In 1992 the Trade Practices Act 1974 was again amended to provide for concurrent state jurisdiction in matters arising under part IVA of the Act, which relates to unconscionable conduct. See Trade Practices Legislation Amendment Act 1992. It should be noted that since 1983, fair trading legislation has been introduced in all states and territories in terms that mirror part V, div. 1, Trade Practices Act 1974. The fair trading legislation allows certain consumer protection claims to be brought in state courts in circumstances where the protections of the Trade Practices Act 1974 may not be available, as where an individual, rather than a corporation, engages in the relevant conduct.


162. Issues of access and costs have again received attention in relation to trade practices matters. See AUSTRALIAN LAW REFORM COMM’N, COMPLIANCE WITH THE TRADE PRACTICES ACT 1974, Rep. No. 68, §§ 5.1—5.30 (1994). The commission noted that there are numerous barriers to private enforcement of the Act, especially for consumers and small businesses. Litigation in the Federal Court or in the Supreme Court of a state or territory is often expensive and complex. However, many lower courts could also grant relief in disputes under the Act, and these courts were less intimidating, faster in disposing of matters, more widely dispersed geographically, and less costly than superior courts. The commission recommended that where lower courts had been granted power to grant appropriate remedies, more should be done to promote the fact that consumer protection matters could be conducted in those courts. Where state governments had not granted such powers to lower courts, it recommended that jurisdiction
Although the above example relates to trade practices law, it is clear that access to justice may have a bearing on the allocation of jurisdiction in other areas of federal law. The Access to Justice Advisory Committee has recently reported that individuals face many barriers in accessing justice effectively, including physical accessibility, information on legal services, high legal and court costs, availability of legal aid, and delays in adjudicating disputes.\(^{163}\) It is difficult to make a comparative assessment of all these factors for state and federal courts, partly because of the diversity of practices in the various courts, and partly because of lack of comparable data.\(^{164}\) However, it is instructive to examine two such factors.

In respect of physical accessibility, federal courts appear to be generally less accessible than the various state courts. The Federal Court has only one registry in each state and territory,\(^{165}\) and although the Court is empowered to sit anywhere in Australia if it so chooses,\(^{166}\) sittings are seldom held outside the capital city where the registry is located. The Family Court, which has registries and conducts hearings in major country centers and in capital cities, is somewhat better placed, but geographic factors are still regarded as a major impediment to access to justice.\(^{167}\) By contrast, the state Supreme Courts usually maintain registries and conduct regular sittings in capital cities and large country towns throughout the state. Moreover, the extensive network of District Courts and Local Courts within each state court system provides a high degree of accessibility for litigants in relation to matters that fall within the jurisdiction of those courts.\(^{168}\) As an illustration of the importance of these issues, it is worth noting that geographic accessibility was a central issue in the Australian Law Reform Commission’s review of the

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\(^{163}\) ACCESS TO JUSTICE ADVISORY COMM., ACCESS TO JUSTICE: AN ACTION PLAN (1994).

\(^{164}\) The Access to Justice Advisory Committee has criticized the lack of uniformity in the collection of court statistics in civil cases. Id. §§ 17.49—17.68; see also P. Lane, Court Management Information, AUSTRALIAN INSTITUTE OF JUDICIAL ADMINISTRATION, DISCUSSION PAPER (1993).

\(^{165}\) Federal Court of Australia Act 1976 § 34 empowers the Governor-General to establish such registries as he or she thinks fit, with at least one registry in each state and territory.

\(^{166}\) Id. § 12.


\(^{168}\) Sir Garfield Barwick once remarked, in relation to the growth of district and county courts in the states, that “because the districts within which they operate are spread throughout the country, the law is brought close to the citizen, losing much of that sense of remoteness which courts sitting in the capital cities of the States tend to engender.” See Barwick, supra note 29, at 492.
allocation of admiralty jurisdiction between state and federal courts. In particular, the Commission rejected the possibility of conferring exclusive admiralty jurisdiction on the Federal Court because a considerable amount of admiralty work in Australia was based in coastal towns in which the Federal Court had no presence and was never likely to have a presence. The Commission recommended that in rem admiralty jurisdiction be conferred on the Federal Court and on the state Supreme Courts concurrently, and Parliament soon adopted the suggested reforms.

In a similar vein, the imposition of court fees presents a further barrier to justice which may differentiate state and federal courts. Most Australian courts impose fees on litigants for use of the court system and ancillary services, helping to defray the cost of administering the courts by seeking contribution from the direct users of the system. These fees have tended to escalate rapidly in recent years to the point where they form a very significant component of overall costs to litigants. Once again it is difficult to draw clear conclusions about the comparative accessibility of state and federal courts. However, a rough comparison of Federal Court fees with those of state and territory Supreme Courts suggests that the former are notably greater than the latter, with the possible exception of the Supreme Court of New South Wales.

The importance to be attached to access to justice issues in determining the allocation of jurisdiction between state and federal courts must clearly depend on the subject-matter in question. There is probably little point in conferring jurisdiction on lower state courts in admiralty matters. However, in matters that are likely to affect the daily lives of citizens, access to justice is a consideration to be weighed in determining whether the jurisdiction of federal courts should be exclusive of, or concurrent with, that of the states.

D. Court Status

The final argument meriting consideration is that the conferral of exclusive jurisdiction on federal courts will cause a deterioration in the reputation and status of the state Supreme Courts. There is little room for

169. AUSTRL. LAW REFORM COMM’N, supra note 34, §§ 217-43.
170. Id. § 231.
172. It has been estimated that between 1965 and 1985 the amount collected through court fees in the Supreme Court of New South Wales rose by almost 750%. See A. Barnard & G. Withers, Financing the Australian Courts, AUSTRALIAN INSTITUTE OF JUDICIAL ADMINISTRATION (1989).
174. See AUSTRL. LAW REFORM COMM’N, supra note 34, § 240-41; Admiralty Act 1988 § 11.
doubt that before the growth of federal jurisdiction in the 1970s, the state Supreme Courts were generally regarded by the community and the profession as courts of high standard. Yet, as social regulation by federal law has increased over the years, a wider range of matters has fallen within the scope of federal jurisdiction. To the extent that this jurisdiction has been vested in federal courts rather than state courts, there has been a corresponding decline in the role and function of state courts, leading some observers to fear that, if the jurisdiction of the federal courts continues to expand, state courts will become increasingly restricted in the scope of their jurisdiction. This does not mean that the volume of work done by those courts would necessarily decline but that “much of the variety might go, leading to a decline in the quality of appointees to State courts and a consequent, if gradual, loss of prestige.”\(^{175}\)

It is perhaps unsurprising that these views have been most commonly expressed by state court judges,\(^{176}\) but this is not to say that their concerns are unfounded.\(^{177}\) First, many people consider the trial work of the state Supreme Courts to be less varied and stimulating than that of the federal courts. Secondly, the terms and conditions of appointment to judicial office in the state courts are often less attractive than those applicable to federal courts. Thirdly, in circumstances where state court decisions are subject to appeal to a federal court, “[i]t is idle to contend that the creation of a court which sits on appeal from the decisions of state supreme courts does not affect the status, dignity and reputation of the latter courts.”\(^{178}\)

There is no doubt that the federal government has been sensitive to the need to maintain a viable and respected judicial system at the state level. In this respect, principles of federalism are manifest in the judicial branch, as in other branches, of government in Australia. It is noteworthy, for example, that when jurisdictional reforms were undertaken in 1976 to divest the High Court of much of its original jurisdiction and invest that jurisdiction in the state courts, the changes were hailed as an important boost to the status and authority of state courts.\(^{179}\) The expansion of the state courts’ concurrent federal jurisdiction, and a reduction of the federal courts’ exclusive jurisdiction, is clearly one answer to the concerns held for the status of state courts. But even these changes may not allay fears if litigants continue to be attracted to the forum of a federal court.

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175. CONSTIT. COMM’N, AUSTRL. JUD. SYS. ADVISORY COMM., supra note 84, § 3.53.
176. See supra note 10.
177. Contra Bowen, supra note 25, at 813.
178. Campbell, supra note 10, at 18.
IV. RECENT JURISDICTIONAL DEVELOPMENTS IN AUSTRALIA

The legal and practical difficulties that have arisen from the expansion of federal courts and federal jurisdiction since the 1970s have engendered a number of significant developments in the jurisdiction of state and federal courts in Australia. This Part examines three of these developments, namely, the evolution of the associated and accrued jurisdiction of federal courts, the reference of legislative power from the states to the Commonwealth in relation to child custody, and the establishment of a scheme for cross-vesting the jurisdiction of superior state and federal courts in Australia. The first of these developments owes much to the jurisprudence of United States courts in relation to pendent jurisdiction, but the latter two are uniquely Australian in character.

All three developments have had several material effects. First, they have all gone some way to alleviating the split jurisdictional problems experienced by litigants by enabling one court to adjudicate all matters in dispute between the parties. Secondly, the developments have altered the balance of jurisdiction between state and federal courts, though not all in the same way. In the case of accrued jurisdiction and the reference of state powers, there has been an expansion of the jurisdiction of the federal courts at the expense of the state courts, whereas the cross-vesting scheme, by enlarging the concurrent jurisdiction of state and federal courts, has had a more equivocal effect. And thirdly, there have been consequential effects on the status of state and federal courts.

A. Associated and Accrued Jurisdiction

In the last two decades there have been two related developments in the jurisdiction of federal courts which have had the effect of expanding their jurisdiction and ameliorating the split jurisdictional problems sometimes experienced in those courts. The first of these has its basis in federal statutes that confer jurisdiction on federal courts in matters "associated" with matters already within the courts’ jurisdiction. The second has its basis in judicial development of the doctrine of accrued jurisdiction along lines similar to the American doctrine of pendent jurisdiction.\(^\text{180}\)

In relation to the doctrine of associated jurisdiction, section 32(1) of the Federal Court of Australia Act 1976 provides that "To the extent that the Constitution permits, jurisdiction is conferred on the Court in respect of matters not otherwise within its jurisdiction that are associated with matters in

which the jurisdiction of the Court is invoked."181 Similar provision is made in respect of other federal courts.182 Some doubt was initially expressed as to the meaning of the prefatory phrase in the section, but the High Court has held that the phrase refers to all the legislative power of the Commonwealth regarding matters of federal jurisdiction.183 Accordingly, associated jurisdiction aims to bring within the sphere of an existing federal claim an associated matter that is still a federal matter within the meaning of sections 75 and 76 of the Constitution, but in respect of which jurisdiction has not otherwise been conferred on the federal court in question. Bearing in mind that federal courts other than the High Court have jurisdiction only in areas specifically conferred by Act of Parliament, the doctrine of associated jurisdiction extends the court's jurisdiction in individual cases to associated federal questions.

An example of the operation of associated jurisdiction is provided by Allied Mills Industries pty. Ltd. v. Trade Practices Commission.184 In that case the Trade Practices Commission brought proceedings in the Federal Court against Allied Mills for breach of section 45 of the Trade Practices Act.185 In the course of the proceedings, a former manager of Allied Mills gave the Commission a number of commercially sensitive documents which the company wished to keep confidential. The company brought a cross-claim in which it sought to restrain the Commission from using or disclosing the information contained in the documents on the grounds that the Commission was acting tortiously and in breach of a duty of confidence. The question thus arose whether the Federal Court had jurisdiction over the cross-claim, given that it was founded on common law and equitable causes of action that were not generally within the Court's jurisdiction. In the result, the Court held that it did have jurisdiction over the cross-claim because the cross-claim was associated with the principal matter and was itself a federal matter. The Trade Practices Commission was an emanation of "the Commonwealth," and the cross-claim was therefore a matter in which the Commonwealth was a party, within the meaning of section 75(iii) of the Constitution.

A more challenging question is whether a federal court can exercise jurisdiction in non-federal matters by means of the doctrine of accrued jurisdiction. The purpose of such a doctrine is to bring within the scope of an

185. Section 45 prohibits a corporation from making or giving effect to a contract, arrangement, or understanding substantially lessening competition.
existing federal claim another claim that is non-federal and over which a federal court would not otherwise have jurisdiction. The High Court took the first steps toward adopting such a doctrine in relation to its own jurisdiction in the 1940s,\textsuperscript{186} but it was not until the question arose in relation to the Federal Court in the 1980s that the doctrine of accrued jurisdiction came into full bloom. In each case the vehicle for attaching the non-federal claim to the federal claim is the constitutional notion of a “matter,” which, like the expressions “cases” and “controversies” in the United States Constitution, encompasses the whole matter or controversy between the parties.\textsuperscript{187} In a series of key cases,\textsuperscript{188} the High Court embraced a broad notion of accrued jurisdiction in relation to the Federal Court, albeit over vigorous dissent.

Several propositions may be distilled from the central cases as to the nature and operation of accrued jurisdiction in Australia. First, a federal court has jurisdiction to adjudicate an entire “matter,” including federal and non-federal claims, provided the latter claims are attached to and not severable from the former.\textsuperscript{189} Second, whether a non-federal claim is severable and distinct from a federal claim is largely “a matter of impression and of practical judgment,”\textsuperscript{190} to be determined by reference to what the parties have done, their pleadings, and the conduct of the proceedings. One useful guide, resembling the test adopted by the United States Supreme Court in United Mine Workers \textit{v.} Gibbs,\textsuperscript{191} is whether the federal and non-federal claims arise out of “common transactions and facts.”\textsuperscript{192} Third, the exercise of accrued jurisdiction is discretionary, although “there would need to be very good reasons why a court which could resolve the whole matter should refuse or fail to do so.”\textsuperscript{193} Fourth, the federal claim must be a “substantial aspect” of the controversy,\textsuperscript{194} and it must be bona fide, and not merely a colorable attempt to attract the jurisdiction of a federal court over a non-federal claim.\textsuperscript{195} Fifth, once a federal court is properly seized of a “matter,” it has

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\item \textsuperscript{186} See Carter v. Egg & Egg Pulp Mktg. Board, 66 C.L.R. 557 (1942); The King v. Bevan 66 C.L.R. 452 (1942).
\item \textsuperscript{188} Philip Morris, 148 C.L.R. 457; Fencott v. Muller, 152 C.L.R. 570 (1983); Stack v. Coast Securities (No. 9) Pty. Ltd., 154 C.L.R. 261 (1983).
\item \textsuperscript{189} Fencott, 152 C.L.R. at 606.
\item \textsuperscript{190} Id. at 608.
\item \textsuperscript{191} 383 U.S. 715, 725 (1966) (holding that the state and federal claims must derive from a common nucleus of operative fact).
\item \textsuperscript{192} Fencott, 152 C.L.R. at 607.
\item \textsuperscript{194} Fencott, 152 C.L.R. at 609-10.
\item \textsuperscript{195} Philip Morris, 148 C.L.R. at 499. For a review of earlier High Court authority on this
\end{itemize}
jurisdiction to determine the non-federal claim even if the federal claim is rejected. Similarly, the court may determine the non-federal claim notwithstanding that the court finds it unnecessary to decide the federal question because the case can be disposed of on other grounds. And sixth, the doctrine of accrued jurisdiction applies not only to claims made between plaintiff and defendant, but to claims against third parties. This "pendent party" jurisdiction permits a federal court to adjudicate a non-federal claim against a person who is not a party to the principal federal claim.

The dependence of the doctrine of accrued jurisdiction on the constitutional conception of a "matter" suggests that the doctrine ought to be available equally in all federal courts. Yet accrued jurisdiction has fared less well in the Family Court than in the Federal Court. It might have been thought, for example, that the doctrine could have gone some way toward overcoming the jurisdictional difficulties of the Family Court in relation to the custody of ex-nuptial children and the interests of third parties, but this has not generally been the case. The leading High Court decision, Smith v. Smith, concerned the jurisdiction of the Family Court to approve a maintenance agreement between parties to a dissolved marriage. A difficulty arose because the agreement purported to exclude future claims under the Family Provision Act 1982 (N.S.W.), which enabled provision to be made out of a deceased person's estate for the maintenance, education, or advancement of a family member. The legislation specifically permitted the Supreme Court of New South Wales to approve a person's release of his or her right to make an application under the Act in relation to a deceased person, and the question arose whether the Family Court could approve the release in the course of approving the maintenance agreement. The High Court held that the Family Court had no accrued jurisdiction to exercise the power of approval conferred on the Supreme Court under the state family provision legislation because that matter was a distinct and severable claim from the approval of the maintenance agreement.

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198. See Michael R. Errington, The Implications of Smith v. Smith, 1 Austl. J. Fam. L. 255 (1986); L.J.W. Aitken, The Accrued and Associated Jurisdiction of the Family Court, 3 Austl. J. Fam. L. 101 (1989); Crawford, supra note 28, at 226–27. In one early case, a Family Court judge held that the Court had accrued jurisdiction to make orders with respect to the custody of a child of a marriage and two ex-nuptial children, but however desirable that outcome, it is doubtful whether the decision can be regarded as correct in the light of subsequent High Court authority. See Lye and Lye F.L.C. § 91-324 (1983).

agreement itself and required consideration of different factors. Moreover, if the Family Court had assumed an accrued jurisdiction to approve the release, it would not have been effective for the purposes of the Family Provision Act 1982 because that Act specifically required approval by order of the state’s Supreme Court. Certain statements in the judgments suggest an approach to accrued jurisdiction in family law matters that is rather more restrictive than that applied to the Federal Court, leading one commentator to remark that their disparate treatment probably rested more on the perceived quality of the judges than on any difference of constitutional principle.

Notwithstanding the limitations on the doctrine of accrued jurisdiction in the context of family law, the evolution of associated and accrued jurisdiction has had an important bearing on the role and status of state and federal courts. Justice Mason acknowledged this in *Philip Morris* when describing an apprehension that, if the Federal Court were to have jurisdiction over attached non-federal claims, "State courts will lose to the Federal Court a proportion of the important work which they have hitherto discharged..." State courts cannot, of course, accrete to themselves federal claims not otherwise within their jurisdiction. But the ability of federal courts to exercise jurisdiction over certain federal and non-federal claims not otherwise within their jurisdiction undoubtedly expands the range of matters capable of being brought in federal courts. This is especially noticeable when a non-federal claim is closely allied to a federal claim within the exclusive jurisdiction of a federal court, as was the case before 1987 with passing off actions and claims arising under section 52 of the Trade Practices Act. The Federal Court’s ability to deal with both claims by means of its accrued and vested jurisdiction effectively deprived the state courts of much of their common law jurisdiction over passing off claims.

Despite the benefits of associated and accrued jurisdiction in avoiding multiplicity of proceedings, the doctrines have been more an anodyne than a panacea for the jurisdictional ills of the federal courts. Even when the doctrines were at their zenith, split jurisdictional problems persisted in cases in which federal and non-federal claims arose in the course of one dispute, but were nonetheless regarded as severable. To take an illustration, in one case the purchasers of a caravan park commenced an action in the Federal Court against the vendors alleging misrepresentations in relation to the value of the business and contraventions of Part V of the Trade Practices Act 1974.

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200. *Id.* at 250-51.
201. *Id.*
203. 148 C.L.R. at 513.
204. See *supra* part III.C.
The vendors brought a third-party claim against their own solicitors for negligence and breach of contract on the ground that the solicitors failed to exercise due care in the sale. However, the Federal Court declined to exercise accrued jurisdiction over the third-party claim. Notwithstanding that the principal claim and the third-party claim involved some mutually relevant evidence and that it was desirable for the vendors to have all matters disposed of simultaneously, the two claims were held to be distinct and severable, and did not relevantly arise out of common transactions and facts.\(^{206}\) Accordingly, the principal claim had to be determined in the Federal Court and the other claim in a state court.

The persistence of such problems resulted in continuing pressure for jurisdictional reform in the federal judicial system. Indeed, many of the later reforms, such as the reference of state powers to the Commonwealth and the cross-vesting of jurisdiction of superior courts, have eclipsed the doctrines of associated and accrued jurisdiction in terms of practical importance. The cross-vesting scheme, for example, makes it largely unnecessary for superior courts to determine whether state or federal jurisdiction is being exercised in any particular case. Nonetheless, associated and accrued jurisdiction still play some part in understanding the jurisdictional landscape of Australian courts, both as a matter of history and as a matter of current practice. Accrued jurisdiction continues to have relevance for the High Court and the Industrial Relations Court, which are not part of the cross-vesting scheme, and associated jurisdiction continues to have relevance for the Federal Court and the Family Court, whose jurisdiction is not cross-vested in each other under the cross-vesting legislation.\(^{207}\)

**B. Reference of Legislative Powers**

Section 51(xxxvii) of the Australian Constitution empowers the federal legislature to make laws with respect to “Matters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States, but so that the law shall extend only to States by whose Parliaments the matter is referred, or which afterwards adopt the law.” The purpose of this provision was evidently to provide a means by which states might, by common agreement, bring about federal action without the need to amend the Constitution. It is thus one of several means by which state and federal


\(^{207}\) *See infra* part IV.C.
governments may cooperate to solve problems arising from limitations on federal legislative power.\(^{208}\)

Although the section has been subject to little judicial exegesis and academic commentary,\(^{209}\) several aspects of its operation are clear. First, a matter can be referred to the Commonwealth by a state in general terms. It had at one time been suggested that section 51(\textit{xxxvii}) only enabled federal Parliament to enact a law the terms of which had been completely determined by the referring state. However, the High Court has rejected as absurd the proposition that the only matters that can be referred are those requiring the conversion of state Bills into federal laws.\(^{210}\) Accordingly, where a matter has been referred in general terms, the Commonwealth has discretion as to the precise content of the legislation that it enacts in reliance on the reference. Secondly, legislative power over the referred matter does not become exclusive to the federal Parliament by virtue of the reference.\(^{211}\) Like most federal legislative powers granted by section 51 of the Constitution, legislative power over the referred matter may be exercised concurrently by the states,\(^{212}\) except to the extent that state law is inconsistent with federal law, in which case federal law prevails.\(^{213}\) Thirdly, a state need not refer a matter once and for all time.\(^{214}\) A reference may be conditional, for example, on a similar reference being made by other states or it may be terminable on the happening of a particular event.

Given the apparent flexibility of section 51(\textit{xxxvii}) and the notorious difficulty of securing constitutional change in Australia by means of referendum,\(^{215}\) the section might have been thought of as an attractive mechanism

\(^{208}\) See also § 51(\textit{xxxviii}) (empowering the federal Parliament to make certain laws at the request or with the concurrence of the state Parliaments directly concerned) \textit{Austral. Const.}, ch. I, pt. V, § 51(\textit{xxxviii}).


\(^{211}\) Graham v. Paterson, 81 C.L.R. 1 (1950).

\(^{212}\) However, some legislative powers enumerated in § 51 are by their very nature exclusive to the Commonwealth, such as the power over external affairs. See New South Wales v. Commonwealth, 135 C.L.R. 337, 373 (1975); H. Burmester, \textit{The Australian States and Participation in the Foreign Policy Process}, 9 \textit{Fed. L. Rev.} 257, 275-80 (1978).


\(^{214}\) \textit{Public Vehicles Licensing Appeal Tribunal}, 113 C.L.R. at 226.

\(^{215}\) \textit{Austral. Const} ch. VIII, § 128. permits amendment of the Constitution by referendum, but requires the proposed change to be approved by a majority of voters overall and by a majority of voters in a majority of states. Of more than 40 referendum proposals only eight have been carried, the last in 1977.
for securing desired change. In fact, until the comparatively recent reference of power over child custody, little effective use was made of the section. It has been documented, for example, that in the first 70 years of federation, only 23 state Acts were passed referring matters to the Commonwealth, eleven of which related to wartime powers, and that only four federal Acts were passed in reliance on state references.\textsuperscript{216} There are several reasons for this modest record. States have been understandably reluctant to cede additional powers to the Commonwealth in light of the history of steady federal encroachment into areas of traditional state concern. There are continuing constitutional uncertainties about the scope of the reference power and, in particular, about the ability of a state to revoke a reference and the effect on existing laws of such a revocation. Often it has been difficult to secure the simultaneous agreement of the states in circumstances in which a uniform approach has been desirable.\textsuperscript{217} In the words of one commentator, “it is hard to make six clocks strike all at once.”\textsuperscript{218}

Notwithstanding the historical reluctance of states to use section 51(\textsuperscript{xxxvii}), during the 1980s the section was employed for the important purpose of referring to the Commonwealth certain matters relating to child custody. A principal objective of the reference, which had its genesis in recommendations dating back to the 1970s,\textsuperscript{219} was to avoid the jurisdictional difficulties that the Family Court had faced in dealing with the custody of ex-nuptial children. The High Court had held on several occasions that the federal legislative power over “marriage” extended to making laws with respect to the custody of children of a marriage, but not to the custody of ex-nuptial children.\textsuperscript{220} This limitation on legislative power was mirrored in the jurisdiction of the Family Court, and this created particular difficulties for families that had some children of each kind: the custody and guardianship of different children had to be settled in different courts.

To solve these difficulties, between 1986 and 1990 five states referred to the Commonwealth the matters of (a) child maintenance and (b) the custody and guardianship of, and access to, children.\textsuperscript{221} The sixth state, Western

\textsuperscript{216} Johnson, \textit{supra} note 209, at 45.

\textsuperscript{217} For example, in the 1920s, a proposal to secure uniform laws for air navigation throughout Australia by means of the reference power failed by reason of lack of agreement amongst the states. Two states referred the matter to the Commonwealth as agreed, two others made a reference over air navigation in much more limited terms, and the remaining states did not refer the matter at all. As the result, the federal Air Navigation Act 1920 was never proclaimed. \textit{See id.} at 48-50.

\textsuperscript{218} K.H. Bailey, \textit{Fifty Years of the Australian Constitution}, 25 \textit{Austl. L. J.} 314, 335 (1951) (paraphrasing John Adam's aphorism).


\textsuperscript{220} \textit{See supra} part III.B.

\textsuperscript{221} Commonwealth Powers (Family Law - Children) Act 1986 (N.S.W.); Commonwealth

https://scholarcommons.sc.edu/sclr/vol46/iss5/7
Australia, gave no reference because the establishment of a state family court in that state circumvented the jurisdictional difficulties experienced elsewhere in Australia. The references made by the remaining states expressly exempted from their scope matters of child adoption and the custody and guardianship of children who are wards of the state. Moreover, conformably with High Court authority, the references were expressed to be terminable upon proclamation by the Governor of the state.

It goes without saying that the state references alone effected no change in the jurisdictional relationship of state and federal courts with respect to child custody. These changes were only brought about by Commonwealth legislation based on the newly acquired power. In 1987 the Commonwealth passed such a law, inserting a substantially new Part VII into the Family Law Act 1975. The practical significance of the reference was that the Commonwealth was no longer required to enact child custody laws that bore a nexus to the marriage relationship, as it was previously required to do when it relied on the "marriage" power. Accordingly, Part VII now refers to the custody and guardianship of, and access to, children in general, and not merely children of a marriage. Moreover, third party custody proceedings have been considerably relaxed and may now be instituted by any person who has an interest in the welfare of the child, whether or not a party to the marriage is a party to the proceedings. Jurisdiction with respect to these and other matters arising under Part VII is conferred on the Family Court, with the result that that Court is now able to determine a whole matter before it in relation to child custody, guardianship, access, and maintenance, without the need to distinguish between nuptial and ex-nuptial children.

The successful eradication of split jurisdictional problems in relation to child custody suggests that section 51(38) of the Constitution might be used to solve other jurisdictional difficulties that arise in the Australian federal system. Another aspect of family law jurisdiction that has generated some difficulty is that of de facto relationships. The Commonwealth has power to legislate with respect to marriage, but it is unlikely that this power extends to making laws with respect to individuals who live only in a marriage-like relationship. Accordingly, parties to a de facto relationship do not have the benefit of federal laws with respect to the alteration of property interests and


222. See supra note 208.

223. Family Law Amendment Act 1987. By § 60E(4), part VII is expressed to extend to a state only while there is in force state legislation referring to the Commonwealth some or all of the matters dealt with by that Part.

224. Family Law Act 1975 § 63C.

225. Id. § 63.
the provision of maintenance. In an attempt to remedy this situation, the Standing Committee of Attorneys-General at one stage proposed uniform state and federal legislation on de facto relationships to replace the varying state laws on the subject. However, the option now being pursued is a reference of power from the states to the Commonwealth in relation to maintenance, and alteration of property interests, of de facto partners. Not all states are in favor of a reference of power, but the Queensland Law Reform Commission has recommended this course, and the Queensland cabinet has approved a reference of power in principle. When the reference is complete, the Commonwealth will be able to give people in de facto relationships the same access as married people to the laws and procedures available under the Family Law Act 1975, at least in those states willing to refer the matter.

C. Cross-vesting of Jurisdiction

The final jurisdictional development to be considered in this paper is the scheme for cross-vesting the jurisdiction of superior courts in Australia, which came into effect on July 1, 1988. As we have seen, the growth of federal jurisdiction and federal courts in the 1970s and 1980s gave rise to numerous practical and legal problems. Foremost amongst these were the split jurisdictional problems that arose from the exclusive jurisdiction of the Federal Court and the Family Court and the longer-term concerns about the declining status of state courts. Numerous reform proposals emerged from these circumstances, including recommendations for a unified court system for

226. On the existing state laws, see Dickey, supra note 142, at 194-205.
Australia. However, the proposal that was eventually pursued by the Standing Committee of Attorneys-General and adopted by state and federal Parliaments was for cross-vesting the jurisdiction of Australian superior courts. In 1987 the Commonwealth Parliament and each of the Parliaments of the states and the Northern Territory enacted legislation in agreed terms under the name of the Jurisdiction of Courts (Cross-vesting) Act 1987.230

The cross-vesting scheme is simple in concept, but effects a radical change in the Australian judicial system. The scheme comprises two main aspects which operate independently but are nonetheless related. First, the scheme cross-vests the subject-matter jurisdiction of participating courts, and, secondly, the scheme provides for the transfer of proceedings between those courts. The courts participating in the scheme are two federal courts (the Federal Court and the Family Court), the Supreme Court of each of the six states, and the Supreme Courts of the two Territories (the Northern Territory and the Australian Capital Territory). Importantly, the scheme excludes from its ambit the High Court, the Industrial Relations Court and, for the most part the various lower courts of the participating states,231 and applies only to civil proceedings.232 The two aspects of the scheme will be considered in turn.

With respect to the cross-vesting of jurisdiction, the pivotal provisions of the scheme are those vesting the subject-matter jurisdiction of participating courts in various other participating courts, subject to certain exceptions.233 To take the central example, the Commonwealth Act vests the jurisdiction of the Federal Court and the Family Court in each of the state Supreme Courts,234 and, reciprocally, the State Acts confer original and appellate jurisdiction in “state matters” on the Federal Court and the Family Court.235 Likewise, the jurisdiction of each state Supreme Court is cross-vested in the

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230. In this section, the federal legislation forming part of the cross-vesting scheme is referred to as the “Commonwealth Act,” and the state legislation forming part of the scheme is referred to as the “State Acts.”

231. In certain circumstances, a proceeding pending in a lower state court may be removed into the Supreme Court of that state to be dealt with under the cross-vesting scheme. See Commonwealth Act § 8; State Acts § 8.

232. Commonwealth Act § 3(1) definition of “proceeding”; and State Acts § 3(5).


235. See State Acts §§ 4(1) & 4(2). “State matter” is defined in § 3(1) to mean a matter in which the Supreme Court has jurisdiction otherwise than by reason of a Commonwealth law. Thus, if a Supreme Court is invested with federal jurisdiction in a particular matter, that jurisdiction is not cross-vested in a federal court.
other Supreme Courts, although the jurisdiction of the Federal Court and the Family Court is not cross-vested as between themselves. By cross-vesting the jurisdiction of state and federal courts in this manner, the various Australian governments hoped to bring about a situation in which "no action will fail in a court through lack of jurisdiction, and ... no court will have to determine the boundaries between Federal, State and Territory jurisdictions."238

It may immediately be asked whether such scheme is constitutionally permissible. There is clearly no difficulty in investing state courts with federal jurisdiction, but whether a federal court can exercise state jurisdiction is a more difficult question. The legislative scheme proceeds on the basis that federal courts can exercise judicial power from sources other than Chapter III of the Constitution, such as that conferred on them by a state. However, there is a respectable view to the contrary; the comprehensive language of sections 75 and 76 of the Constitution may be taken to specify exhaustively the scope of the original jurisdiction of federal courts. This view has been asserted on several occasions, but for present purposes it may be assumed that the scheme is valid.

The second aspect of the scheme relates to the transfer of proceedings between participating courts. As a result of the cross-vesting of jurisdiction, it is possible for a litigant to commence most proceedings in any of the participating courts without regard to the subject-matter of the action. However, it was always intended that federal and state courts stay within their traditional jurisdictional fields. To this end, the legislation provides for the transfer of proceedings between participating courts.241 The transfer provisions operate independently of the provisions with respect to the cross-}

237. There was no need to cross-vest the jurisdiction of the federal courts because the doctrine of associated jurisdiction ensured that split jurisdictional problems did not arise between these courts. See supra part IV.A.
239. AUSTL. CONST. ch. III, § 77(iii).
241. Commonwealth Act § 5, State Acts § 5. The legislation also contemplates a transfer to non-participating courts in certain trade practices matters. See Commonwealth Act § 10, State Acts § 10. These sections, together with the analogous provision in § 86A Trade Practices Act 1974, have been frequently utilized by the courts, as evidenced by the fact that nearly half the transfers in trade practices matters have been made to lower courts. See MOLONEY & McMASTER, supra note 229, app. 1, tbl. E.
vesting of jurisdiction with the result that a matter may be transferred between participating courts irrespective of whether cross-vested jurisdiction is being exercised. In addition to this general scheme, there are also several other schemes for the transfer of proceedings between courts in particular classes of matters. Such schemes exist in relation to corporations law, family law, admiralty proceedings, and trade practices, but the details of these ancillary schemes need not concern us here.242

So far as the general transfer scheme is concerned, section 5 of the Commonwealth Act and the State Acts place an obligation on a court to transfer a pending matter to another participating court, where it would be more appropriate for the other court to hear the matter, having regard to a number of factors. The factors to be considered include the existence of related proceedings in another court; whether the court would have had jurisdiction in the absence of the cross-vesting scheme; whether the interpretation of a Commonwealth law is in issue; and the interests of justice. To facilitate the transfer process, a court can transfer a proceeding of its own motion, and a decision in relation to transfer is not subject to appeal.243

One important exception to the transfer provisions arises in relation to a “special federal matter,” which is defined to include, inter alia, restrictive trade practices matters and matters arising from judicial review of federal administrative action.244 Where a special federal matter is pending in a state Supreme Court, the Court must transfer the matter to the Federal Court or other specified court, unless the Supreme Court makes an order to retain the matter.245 In making a retention order, the Supreme Court must be satisfied that there are special reasons for doing so unrelated to the convenience of the parties, and the Court must have regard to the general rule that special federal matters should be heard by the Federal Court.246 These provisions were introduced to recognize the special role of the Federal Court in matters in which it had exclusive original jurisdiction prior to the commencement of the cross-vesting scheme, and they have been described as fundamental to the operation of the cross-vesting scheme.247 The practical effect of the provi-

242. For a discussion of these schemes, see Moloney & McMaster, supra note 229, at 51-67.
244. Commonwealth Act § 3(1); State Acts § 3(1).
246. Commonwealth Act §§ 6(3) and 6(6). Additionally, the Court must give notice of the pending special federal matter to the Commonwealth Attorney-General, whose submissions must be taken into account in deciding whether or not the matter ought to be retained.
247. N.E.C. Info. Sys. Austl. Pty. Ltd. v. Lockhart, 108 A.L.R. 561, 570 (1992). Similarly, Chief Judge Rogers (Com. Div.) has stated that the underlying reasons for the enactment of § 6 were, firstly, the special expertise of the Federal Court with respect to such matters and, secondly, the desirability that matters of particular concern to the Commonwealth should be decided by the Federal Court. See Metroplaza Pty. Ltd. v. Girvan NSW Pty. Ltd. (in liq.), 24
sions with respect to special federal matters is that, notwithstanding that state Supreme Courts generally have cross-vested jurisdiction in relation to them, it is rare for a Supreme Court to determine such a matter.\textsuperscript{248}

To a very large extent, the transfer provisions are the linchpin of the cross-vesting scheme, for unless proceedings are transferred in such a way that each participating court keeps within its "proper" jurisdictional fields, there is potential for a dramatic redistribution of jurisdiction between state and federal courts in Australia. The Attorney-General, Mr. Lionel Bowen, recognized this fact when introducing the cross-vesting legislation into Parliament:

The successful operation of the cross-vesting scheme will depend very much upon courts approaching the legislation in accordance with its general purpose and intention as indicated in the preamble to the Commonwealth and State legislation. Courts will need to be ruthless in the exercise of their transferral powers to ensure that litigants do not engage in 'forum shopping' by commencing proceedings in inappropriate courts or resort to other tactical manoeuvres that would otherwise be available to them by reason of the fact that State courts would have all the jurisdiction of the Federal Courts and vice versa. The courts themselves would also be expected not to take advantage of the legislation to aggregate business to their own courts in matters that would not otherwise have been within their respective jurisdiction.\textsuperscript{249}

Having regard to the innovative, but complex, nature of the cross-vesting scheme, judges of the participating courts and others have attempted to keep its operation under close observation. Reviewing the scheme in 1992, four years after it came into effect, Moloney and McMaster concluded that the scheme has worked effectively and efficiently over the course of its short life, although it is not without problems.\textsuperscript{250} They went on to state that the scheme "has gone a considerable way to overcoming many of the jurisdictional problems which previously beset litigants in Australian courts. To this extent, it has met its fundamental aims, albeit that it has created a new set of constructional issues along the way."\textsuperscript{251}

\textsuperscript{248} In a review of the operation of the cross-vesting scheme in 1992, there were found to be only six reported cases pertaining to the transfer of special federal matters. See MOLONEY & MCSMART, \textit{supra} note 229, at 104 n.201.

\textsuperscript{249} C. OF AUSTL., P. DEBATES, H. OF R., 2557 (Oct. 22, 1986).

\textsuperscript{250} MOLONEY & MCSMART, \textit{supra} note 229, at 147.

\textsuperscript{251} Id.
V. CONCLUSION

Many Australian commentators have disparaged the very existence of federal jurisdiction and aspersed the “hypnotic fascination” of Australia’s constitutional drafters with the judicature provisions of the United States Constitution. Sir Owen Dixon once described the subtleties and refinements of the law of federal jurisdiction as forming “a special and peculiarly arid study,” while Cowen and Zines have described the field as “technical, complicated, difficult and not infrequently absurd.” Yet the law of federal jurisdiction involves fundamental questions of judicial power and offers insights into the allocation of authority within the system of federal government in Australia. This paper has addressed one aspect of the allocation of judicial authority by examining the way in which the federal legislature has distributed federal jurisdiction between state and federal courts within the Australian federation.

In 1901 it was predicted that the judicial power of the Commonwealth would, for the foreseeable future, be exercised entirely by the High Court and by state courts invested with federal jurisdiction. The latter measure—the so-called autochthonous expedient—may have been antithetical to pure principles of federalism, but it was readily seized on as a convenient means of dealing with the new class of matters marked out by Chapter III of the Constitution. The historical reliance on the investiture of state courts with federal jurisdiction no doubt maintained and enhanced the role and status of those courts, whose daily business involved the interpretation of federal laws enacted pursuant to the Constitution.

The authority of state courts in exercising the judicial power of the Commonwealth was basically left unchallenged until the 1970s. The increasing volume of federal legislation around this period, covering all aspects of commercial and private life, brought about a corresponding rise in the range of matters falling within federal jurisdiction and with it questions about the appropriate allocation of the new jurisdiction within the federation. Although specialized federal courts had earlier been created in relation to bankruptcy and labor law, the establishment of the Family Court in 1975 and the Federal Court in 1976 posed a new and direct challenge to the traditional position of state courts, insofar as they were invested with federal jurisdiction.

In exercise of the powers granted to it by the Constitution, the federal Parliament soon conferred jurisdiction on the new federal courts in a range of federal matters. In some matters the courts were empowered to exercise

252. Cowen & Zines, supra note 2, at xv; Dixon, supra note 79, at 597.
255. See supra note 16.
original jurisdiction, but in others they only exercised appellate jurisdiction, the matters having been heard at first instance in state courts. Likewise, the original jurisdiction of the new federal courts was sometimes made exclusive of, and sometimes concurrent with, that of the states.

Various principles and policies have underpinned the legislative choices relating to the conferment of jurisdiction on state and federal courts, but these policies have not always been clearly articulated or thoroughly explored. Foremost amongst these underlying policies has been the desire for uniformity, specialization and efficacy in the interpretation and enforcement of federal law. In general, these factors have pointed towards the conferment of federal jurisdiction on federal courts rather than state courts, but the preference for conferring jurisdiction on federal courts has not been without cost. There have been costs for individual litigants in terms of access to justice and split jurisdictional problems. And there have been costs for the judicial system as a whole in terms of heightened tensions between the state and federal spheres of the judicature. Most noticeable is the concern that the function and status of state courts will decline as the jurisdiction of the federal courts continues to expand.

Three recent developments in the jurisdiction of Australian courts have had an impact on the respective roles of state and federal courts in the federal system of government. The emergence of the doctrine of accrued jurisdiction, the reference of state power to the Commonwealth in respect of child custody, and the establishment of the cross-vesting scheme have all ameliorated the split jurisdictional problems faced by litigants. However, they have done little to arrest the declining role and status of state courts. The cross-vesting scheme has probably been neutral in its impact on the balance of jurisdiction between state and federal courts because, although the jurisdiction of all participating courts has been enlarged, the transfer provisions have ensured that each court stays within its traditional jurisdictional fields. By contrast, the development of accrued jurisdiction and the reference of power to the Commonwealth have enhanced the jurisdiction of federal courts at the expense of the jurisdiction of state courts.

It seems inevitable that the quantity and variety of federal law will continue to expand as Australia’s position in the world becomes increasingly internationalized and as legislative power within Australia becomes increasingly centralized. As a result, the range of matters falling within federal jurisdiction must necessarily expand, and with it, the power of the Commonwealth to determine an appropriate balance between the jurisdiction of state and federal courts, in matters of federal jurisdiction. In the past, the

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Commonwealth has been sensitive to the need to preserve a viable and respected system of state courts capable of exercising invested federal jurisdiction. However, it is difficult to resist the conclusion of the Australian Judicial System Advisory Committee that the more that federal jurisdiction is conferred on federal courts the more it is likely to seem appropriate to confer further jurisdiction on those courts. If that is so, fundamental questions about the appropriate role of state and federal courts in the Australian federal system are destined to remain.