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STATE/FEDERAL COURT RELATIONS

INTRODUCTION

In the second edition of "Federal Jurisdiction in Australia" published in 1978, Sir Zelman Cowen and Professor Zines expressed the view that:-

> "The Australian record exposes very clearly the inconveniences of a two-tier jurisdiction and it should not be beyond the wit of man to re-fashion the Judicature Chapter of the Constitution and the legislation enacted thereunder so as to provide for the orderly administration of justice within the frame-work of a single integrated Court system (which may include functionally spe ialised tribunals)." (p. 139).

The inconveniences referred to by the authors have, if anything, assumed greater prominence in the two years that have passed since publication. For the moment, two illustrations will suffice. In 1979, a Mr. Fletcher commenced an action in the District Court in New South Wales in which he sought damages for alleged breach of the consumer protection provisions in Division 2 of Pt. V of the Trade Practices Act, 1974, (C'th) as well as for breach of warranties implied by State law. The jurisdiction of the District Court being limited to $20,000, the claim could not have been of any great magnitude. The learned District Court Judge held that a State Court had no jurisdiction in respect of so much of the claim as founded on the Commonwealth

legislation, the Federal Court having exclusive jurisdiction. Although he reserved the question of costs, in the absence of settlement, no doubt Mr. Fletcher in due course paid the cost of his alleged failure to accurately identify the tribunal from which he should seek his remedy. (Fletcher v. Seddon Atkinson (Aust.) Pty. Limited (1979) 1 N.S.W.L.R. 169).

In Zalai v. Col Crawford (Retail) Pty. Limited 32 A.L.R. 187, again the amount in question was relatively trifling and the only reason why the action was commenced in the Supreme Court was because the plaintiff was apprehensive that in the District Court he would be met by the decision in Fletcher which was directly in point. As anticipated by the plaintiff, objection was taken to the Court's jurisdiction but that objection was held to be misconceived. Rather than the Federal Court having exclusive jurisdiction in matters of this kind, it was said the true position was the other way and the State Courts had exclusive jurisdiction. The unsuccessful defendant was ordered to pay the costs and, once again, legal costs were incurred in litigating an issue which went nowhere in determining the merits of the dispute.

Even more recently in Arturi v. Zupps Motors Pty. Limited & Anor (unreported Fed. Ct. of A. 19th December, 1980), Brennan, J. came to the same conclusion in holding that the Federal Court had no jurisdiction in actions of this nature. The unfortunate plaintiff who had been the purchaser of a motor car and whose claim must again have been for a small amount, sought to avoid the usual consequence of suffering an order for costs by pointing out that he had acted in

reliance upon the decision in Fletcher. His Honour was obliged to hold that this circumstance provided no ground for refusing the successful party an indemnity for its costs.

I submit that the capsule history of this trilogy of actions suggests that in referring to "inconveniences" the authors were pitching their criticism rather too low. In any event, the other matter puts the proposition beyond argument

In the United Kingdom the Parliament passed the Judicature Act, 1873 to avoid a multiplicity of proceedings. In its judgment in United States Surgical Corporation v. Hospital Products International Pty. Limited (1981 A.T.P.R. par. 40197) the High Court of Australia made it clear that Australia has recently taken a great leap backward by ensuring that there will be claims by litigants which will have to be heard in part in State Courts and in part in Federal Courts. I will of course deal with this matter in detail later in the paper.

The Courts are no longer immune from examination and criticism. Neither should they be. If they fail in fulfilling the minimal demands of the public for provision of a forum where in the one Court, in the one proceeding, relatively expeditiously and inexpensively disputes are determined on their merits stripped of unnecessary technicalities, the rule of law will be imperilled and the public esteem for the administration of justice decrease.

Whilst they may excite the technical skills of lawyers, disputes as to jurisdiction are of no benefit to the public, to the contrary are highly detrimental.

Whilst it is perfectly true that it should be well within the ambit of professional competence to evolve a system of administration of justice which avoids or at least alleviates the difficulties with which the present system is pregnant and some of which have already manifested themselves there is no great room for optimism that this achievement will come within any reasonable period of time. In the Introduction to the Second Edition of their book, the authors recognise that the hope expressed in the First Edition that the problems they dealt with would be relegated to the shelves of legal history has remained unfulfilled, and recognise that the "major problems of federal jurisdiction remain and are likely to remain with us for many years to come". In similar vein, Gibbs, C.J. pointed at that:-

> "It is unfortunate that in some respects the boundary line between the jurisdiction of federal courts on the one hand and State Supreme Courts on the other remains ill defined, because no legal proceedings are more futile and unproductive than disputes as to jurisdiction. It may not be too much to hope that it will not be beyond the capacity of the Commonwealth and States acting in conjunction, with the view of advancing the public interest rather than in any attempt at self-aggrandisement, eventually to integrate both Federal and State Courts into one harmonious system." (swearing in 12th February, 1981).

Another commentator in the field takes the view that jurisdictional difficulties are inherent in the Federal system of government. Mr. W.J. Wagner in "The Federal States and Their Judiciary" said at p. 132:-

> "Complexity and friction, more or less acute, between the authorities of the two systems is the price which must be paid for the advantages of federalism. Some friction cannot be avoided, because nothing is clear cut, in the life of the states. There will always be borderline cases which will present conflicting claims of jurisdiction."

If nothing is done the problems which present themselves are likely to be ever increasing in complexity and in number. The pressure for the transfer of jurisdiction from the State Courts to Federal Courts appears to be gaining momentum. Just recently the Chairman of the Australian Law Reform Commission has suggested that appeals in criminal cases determined by State Courts exercising federal jurisdiction should lie not to State Courts of Criminal Appeal as at present but to the Full Court of the Federal Court of Australia (54 A.L.J. 732 at p.741). As will appear, there is room for argument as to when federal jurisdiction is being exercised so that even such a relatively clear cut proposal if accepted may breed jurisdictional argument.

It has been suggested that it is contrary to the interests of the proper administration of justice that the present topic should remain the subject of discussion. The view has been advanced that the subject has been well and truly ventilated in various papers recently published, and that no advantage will be gained in further discussing a topic which might well engender some heat and perhaps ill-feeling between the proponents of different approaches. With great respect to those who take a contrary view, it seems to me idle to believe that the problem will just go away. So long as matters are discussed in a co-operative effort to solve admitted problems, no damage will be occasioned to the administration of justice or to the respect in which the Courts are held.

In this context it may not be without some interest to note that the American Law Institute produced six Tentative Drafts of its in depth examination, "Study of the Division of Jurisdiction Between State and Federal Courts", and each of these drafts was the subject of exhaustive discussion at various meetings of professional bodies. Discussion of this nature, I suggest, can only advantage all of us whose interest lies in ensuring an efficient system of administration of justice. It behoves us as members of the profession who have day to day experience of the problems under discussion to expose them and to make such suggestions as are considered appropriate for improving the machinery of justice. Matters of procedural reform are usually of interest only to lawyers and if we, as a professional body, do not prompt necessary changes and reforms, they are unlikely to come about. If it is recognised that there is a problem, what better place can there be for consideration of both the problem and the solution than at a meeting on a national basis of members of the profession?

The paper seeks to point to some of the problems which have arisen by reason of theconcurrent existence of State and Federal Courts and examine what remedies are available for resolution of some or all of these difficulties. It is not intended to repeat the reasons which have been advanced at various times by learned commentators opposed to the establishment of Federal Courts. The paper accepts that such Courts have been brought into existence and are here to stay. At the same time, it is necessary to look briefly at history to seek assistance in determining on the best course to be followed in the future.

HISTORY

Even before Federation there had been discussion concerning the need for a Court of Appeal from the Supreme Courts of the various colonies. As long ago as 1849 a Committee of the Privy Council was commissioned by Earl Grey, which recommended the setting up of a legislative body to be known as the General Assembly of Australia which, in turn, should have authority to provide for a general Supreme Court to be a Court of original jurisdiction or a Court of Appeal from any of the inferior Courts of the Separate provinces (Quick & Garran, The Annotated Constitution of The Australian Commonwealth p.85).

When the time came, the Founding Fathers were faced, not only with the task of establishing such a Court of Appeal, but also with grappling with the problem of determining who was to exercise the power of judicial review on constitutional grounds of legislation of the new Federal Parliament and the State legislatures and also exercise jurisdiction arising from the laws to be enacted by the newly created Federal Parliament. There was a number of models from which a choice of a Court of Appeal could be made (cf. Laskin, C.J. "The Role and Functions of Final Appellate Courts; The Supreme Court of Canada" (1975) 53 Can. Bar Rev. 496).

Although in a large measure the provisions of the United States Constitution served as a pattern, they determined on some significant departures in relation to the judicature. The High Court was created as a general appellate Court. Sitting at the apex of the Australian judicial structure (subject to appeals to Privy Council in certain cases), it was

in a position to ensure uniformity of decision in all matters both Federal and those exclusively regulated by the States. Again, Section 71 of the Constitution provided that the judicial power of the Commonwealth should be vested in the High Court, in such other Federal Courts as the Parliament created and "in such other Courts as it invests with federal jurisdiction". The express recognition in the Constitution (see also Section 77(iii)) that federal jurisdiction might be conferred upon State Courts was something that was peculiar to the Australian model.

In a paper urging the creation of a Superior Federal Court, delivered at the Thirteenth Legal Convention, coincidentally also held in Hobart, Messrs. Byers, Q.C. and Toose, Q.C. contended that the original understanding was that the High Court and the State Courts should carry the initial and comparatively light burden arising from federal legislation but with the passage of time and the increase in the work, a complete structure of Federal Courts should be created (36 A.L.J. 308 at p.309). This view was not accepted by Sir Garfield Barwick in an article "The Australian Judicial System The Proposed New Federal Superior Court" 1 F.L.Rev. 1 at p.2.

Ir is emphatically repelled in a speech by the then Member for Wentworth (Mr. R.J. Ellicott, Q.C.) in the House of Representatives on 24th July, 1974 (Cth. Parl. Debs., H.R. p.598), where in referring to S.77(iii) of the Constitution he said:-

> "This provision was inserted in the Commonwealth Constitution; it is not found in the American Constitution. I took the trouble to find out what was in the minds of our founding fathers when they put in that provision. It is evidenced by a telegram which Simon sent to Sir Samuel Griffith on 1st April, 1897. It was said of this proposal to vest federal jurisdiction in State Courts that the object was 'to avoid needless creation of federal courts in all the States and the consequent degradation of State Courts and avoid the difficulties of litigation which exists in America'. They regarded the power to establish Federal Courts, more by way of reserve if any State should close its courts or obstruct the determination of federal matters. The use of State Courts was therefore seen by the founding fathers as a means of maintaining a simple court system within the Federation with the High Court as the supreme court of Australia. The founding fathers obviously saw the creation of Federal Courts as unnecessary except in the last resort."

The investiture of State Courts with federal jurisdiction earned itself the description of the "autochthonous expedient" in Reg. v. Kirby, ex parte Boilermakers Society of Australia (1956) 94 C.L.R. 254 at p.268. It is appropriate to point out that, notwithstanding the commonly held view that this was a native Australian arrangement, the same position obtains in the United States (Felton v. Mulligan (1971) 124 C.L.R. 367, Windeyer, J. at p.393).

It would appear that in the United States, also, the notion that State Courts were to have concurrent jurisdiction with Federal Courts had powerful adherents (The Federalist No. 82 Alexander Hamilton). The compromise between the views of those who wanted a fully-fledged system of Federal Courts and those who wished to retain concurrent State jurisdiction produced the compromise by Maddison in Article III of the Constitution, which permitted but did not require Congressional creation of lower Federal Courts (Adjudication of Federal Causes of Action in State Court 75 Michigan Law Review 311; Mr. Justice Clark, Federal Courts in the United States - Their Work and Administration 41 A.L.J. 251).

In the context of the possible solutions I propose to examine later, it is necessary to appreciate that some of the matters which moved Congress to establish a Federal Court system were that the Supreme Court of the United States was not a general Court of Appeal and accordingly, was limited in its efforts to ensure uniformity in U.S. law, that State Judges generally were elected and not appointed and were frequently regarded as being of a variable quality, that there was no confidence in the State Courts fairly giving effect to federal legislation and, most importantly, that it was thought that a federal system of Courts would provide a measure of unity to a country still suffering from the consequences of the Civil War. It can thus be readily perceived that the reasons which moved the United States to develop judicial machinery in the manner in which it had were and are absent in Australia and also that even today, as shown by the Study of the American Law Institute, a number of these reasons, such as those relating to State Court Judges, persists.

Although the Federal Parliament did, by the provisions of the Judiciary Act, 1903, invest State Courts with federal jurisdiction in an endeavour to limit appeals to the Privy Council, it did so in a somewhat circuitous fashion. First, S.39(1) of the Act took away the jurisdiction of State Courts in matters in which the High Court had jurisdiction by making that jurisdiction exclusive of that of State Courts. Then by S.39(2) (and subject to Sections 38 and 38A), State Courts were invested with federal jurisdiction both in that class of matter and also in matters in which the High Court might have original jurisdiction conferred on it but in which such jurisdiction was not conferred. In the result, a State Court could find itself exercising federal jurisdiction even in some instances where quite independently of invested federal jurisdiction it

might have had jurisdiction (Federal Jurisdiction in Aust. 2 Ed. p.224 et seq). The occasional problems which arose from the fact that a State Court was exercising such invested federal jurisdiction gave a taste of the problems that were yet to come. These future problems were not unforeseen at the time of creation of the new Federal Court (cf. Barwick, C.J. "The State of the Australian Judicature" (1977) 51 A.L.J. 480 @ 485 et seq.

In the early days there were only two exceptions to the system of exercising the judicial power of the Commonwealth through the High Court and the State Courts. One was the creation in 1904 of the Commonwealth Court of Conciliation and Arbitration. The setting up of this Court which until 1956 occupied a unique position in that it was invested with both judicial and administrative functions was a response to particular needs, and falls outside the main stream of discussion.

The Federal Court of Bankruptcy was established in 1930 largely due to the fact that it was felt that the Supreme Courts of New South Wales and Victoria were unable to cope with the amount of bankruptcy work generated by the Depression. The work in bankruptcy was retained by the Supreme Courts of the other States and the Court of Insolvency in South Australia.

In 1956 the decision of the High Court in the Boilermakers' Case revealed that it was not in accordance with constitutional requirement that both administrative and judicial functions should be exercised by the one body. Accordingly, the Commonwealth Industrial Court was brought into existence to exercise so much of the functions of the former Commonwealth Court of Conciliation and Arbitration as

were deemed to be judicial. When the Commonwealth decided to enter by legislation the field of restrictive trade practices, health and other disparate fields, it determined to utilise the Commonwealth Industrial Court for the exercise of judicial functions arising from and consequent upon the working of the various Acts. It was a somewhat inapt vehicle for this function because its members were appointed having regard to their experience in the industrial field.

In the late 60's it became accepted that the burden on the High Court was becoming acute. A great deal of the work in the original jurisdiction e.g. taxation and industrial property appeals and, indeed, some of the appeals from the Supreme Courts of Territories were inappropriate to the Court to which was assigned the guardianship of the Constitution. The need to lighten the workload of the High Court gave impetus to the call for the creation of a Superior Federal Court and the suggestions as to its form and function were many and varied. Eventually the work was divested from the High Court partly by conferring additional jurisdiction on the State Supreme Courts and partly on the newly created Federal Court and by conferring on the Court power to remit actions to other Courts of its own motion. Save for this last aspect to which I will advert hereafter, it is unnecessary to trace this devolution in any detail. It sufficiently appears from the legislation which effected it. The nature of the jurisdiction conferred on the Federal Court may conveniently be considered when dealing with that Court in particular.

At about the same time the Family Law Act, 1975 established the Family Court of Australia. In so doing the Government of the day felt it necessary to depart from the

philosophy expounded by the then Attorney-General, Sir Garfield Barwick, on the occasion of the passing of the Matrimonial Causes Act, 1959, when he said (cf. 1 Fed. L.R. 1 at p.4):-

> 'Mr. Speaker, the Supreme Courts of the States are great Courts. They were devised as arbiters of these quarrels, to do right and justice between man and man in their particular differences. It seems to me that, rather than set up a Federal Divorce Court system, we should simply invest the Supreme Courts of the States with Federal jurisdiction to hear and to determine matrimonial causes under this Act. The Bill does this. The State Courts would thus hear divorce cases as they do now, but all would administer the same Federal law --- The Bill also provides that the High Court can give leave to appeal from a Supreme Court to itself ---. The High Court will thus be enabled to secure uniformity of interpretation of the Federal law, and uniformity of practice and procedure in matrimonial causes throughout Australia."

I have taken the liberty of quoting from this speech because one of the arguments against permitting concurrent jurisdiction to the States in matters of Federal legislation is the claim that uniformity of interpretation would thereby be lost. That most experienced practitioner, the then Attorney-General, apparently felt no difficulty in contemplating simultaneous retention of jurisdiction inthe State Courts and the maintenance of uniformity of interpretation.

With this background I may proceed to enumerate the problems presently experienced in relation to the exercise of federal jurisdiction and possible ways of alleviating them.

EXERCISE OF FEDERAL JURISDICTION

One of the threshold questions in any examination of the matters posed for consideration arises from the fact that it is not easy to determine when a Court is in fact

exercising federal jurisdiction. In Lorenzo v. Carey (1921) 29 C.L.R. 243, the Court said (p.252):-

> "The phrase 'Federal jurisdiction' as used in Ss. 71, 73 and 77 of the Constitution, means jurisdiction derived from the Federal Commonwealth. It does not denote a power to adjudicate in certain matters, though it may connote such a power; it denotes the power to act as the judicial agent of the Commonwealth, which must act through agents if it acts at all."

It has been said that the question whether a State Court was in fact exercising federal jurisdiction had arisen surprisingly infrequently in reported cases (Sawer; Essays on the Australian Constitution 1961 Ed. p.85). However, in recent times the question has troubled the High Court on a number of occasions. Most recently in Moorgate Tobacco Limited v. Phillip Morris Limited (1980) 54 A.L.J.R. 479, the High Court appeared to take an expansive view of the circumstances in which a State Court should be held to be exercising federal jurisdiction. The appellant and the respondent were in dispute as to the entitlement of the respondent to use certain trade names or trademarks in relation to its products. In conducting its case in the Supreme Court, the appellant claimed on the basis of alleged contractual rights, trust or fiduciary obligation and the tort of unfair competition, remedies against the respondent's continued use of those trade names. The statement of claim alleged that there had not been any valid assignment to the respondent of any claim to the proprietorship of a certain trade mark in Australia. However, this particular aspect of the matter did not become the subject of contest in the actual conduct of the case and no reliance was placed on it. Had the matter of the existence or non-existence of a right created by the Trade Marks Act been

the subject of actual dispute at the hearing, then indubitably the Supreme Court would have been exercising federal jurisdiction conferred on it by S.39(2) of the Judiciary Act. It was the contention of the appellant that whether or not such a question was tendered for consideration by the statement of claim, it was not the subject of the trial in the way it was conducted. Nonetheless, in the joint judgment of Stephen, Mason, Aickin and Wilson, J.J. their Honours said at p.484:-

> "If a federal matter is raised on the pleadings federal jurisdiction is exercised notwithstanding that the Court finds it unnecessary to decide the federal question because the case can be disposed of on other grounds."

In the result then, so long as a matter of federal jurisdiction is the subject of allegation or reference somewhere in the pleadings, federal jurisdiction is thereby invoked and thereafter the matter will be one for the exercise of federal jurisdiction even though from start to finish nothing further may be said about the question. The Court left open the question whether a specific excision from the pleadings of the matter which invoked federal jurisdiction would be sufficient to bring about an abandonment of the invoked federal jurisdiction and allow the matter to be conducted as a matter of State jurisdiction.

Whether the jurisdiction exercised is federal jurisdiction or not, is of prime importance in determining available avenues of appeal since the prohibition of appeals to the Privy Council even from State Courts where they had been exercising federal jurisdiction. An insufficient appreciation of the fact that federal jurisdiction may have been exercised may have forbidding results.

An apt illustration has been recently presented by the Advice of the Privy Council in Cadbury Schweppes Pty. Limited v. Pub Squash Pty. Limited (1981) 32 A.L.R. 387. There again, in what was essentially an action for passing off and unfair competition, the pleadings tendered a question relating to the validity of a trade mark. As their Lordships pointed out, the federal question was not litigated at the trial and by consent, Powell, J. confined himself to the question of passing off. Nonetheless, applying the principles enunciated by the High Court in Moorgate, the matter involved the exercise of federal jurisdiction and the Judicial Committee had no jurisdiction to hear the appeal which occupied some days. As it happened, the Judicial Committee felt itself able to decide the merits of the appeal without passing on the submission that they had no jurisdiction. It is little short of frightening that such a question of jurisdiction should intrude itself in the very final stages of litigation and if the Judicial Committee had chosen to deal with the question of jurisdiction, an extraordinary amount of costs involved in arguing the merits might well have been thrown away.

One suggestion which is advanced from time to time by commentators in the field, is that appellate jurisdiction in all matters of federal jurisdiction should be vested in the Federal Court. Were this suggestion to be adopted the question of when federal jurisdiction is exercised would assume even greater practical everyday significance. It is fair to say that more often than not, the matter admits of no doubt one way or the other but there is still, as illustrated by the facts in Felton v. Mulligan (1971) 124 C.L.R. 367 and the two instances to which specific reference has been made, quite a substantial area for debate where none should exist.

HIGH COURT OF AUSTRALIA

The Constitution by S.75, conferred original jurisdiction upon the High Court in the matters therein enumerated. In addition, it conferred power on the Parliament to legislate to confer jurisdiction in the matters specified by S.76. However, neither Section made the jurisdiction of the High Court thus conferred, exclusive to any jurisdiction which the State Courts may have in those matters or in relation to those parties. Of course, pursuant to S.77(ii), the Parliament was given power to make laws defining the extent to which the jurisdiction of any Federal Court, including the High Court, should be exclusive. In the result, unless Parliament acted under S.77(ii), the jurisdiction of the High Court was concurrent with that of the State Courts. As has been seen, the Parliament did act by making the jurisdiction of the High Court exclusive in certain matters (Judiciary Act, Ss. 38 and 38A) but in relation to other matters, took the course set out in S.39 to which reference has already been made.

The jurisdiction conferred on the High Court by S.75 was in many ways burdensome. Actions between residents of different States arising out of motor car accidents or the custody of children, were not ones which were in any way suitable or apt for engaging the energies of the ultimate Court of Appeal. The Court sought to discourage litigants from invoking its diversity jurisdiction by threatening to withhold costs (Federal Jurisdiction in Australia 2nd Ed. p.75 et seq). The legal propriety of such a course was doubted by many and the Court did not actually implement its threats.

Whilst the jurisdiction could not be simply taken away, without a constitutional amendment and the invoking of jurisdiction by litigants could not be resisted, relief was sought by the amendment of S.44 of the Judiciary Act which conferred power upon the Court of its own motion to remit "to any Federal Court, Court of a State or Court of a territory that has jurisdiction with respect to a subject matter and the parties" any matter that is at any time pending in the High Court. Doubts have been expressed as to the constitutional validity of this provision, not only by the editors of Federal Jurisdiction in Australia (p.80 et seq) but also by Professor Lane in the Australian Federal System p.578. However, validity appears to have been assumed by the High Court in Johnston v. The Commonwealth of Australia 53 A.L.J.R. 350. The plaintiff, whose cause of action arose in South Australia instituted an action against the Commonwealth in the original jurisdiction of the High Court pursuant to the provisions of S.75(iii). Thereafter he applied to have the action remitted for hearing in the Supreme Court of New South Wales. The application was resisted by the defendant Commonwealth, on the basis that the Supreme Court of New South Wales had no jurisdiction in the action. However, the Court was of the opinion that the Supreme Court, having general jurisdiction with respect to actions of the kind in issue, that is actions against the Commonwealth, S.44 operated to vest federal jurisdiction in the Supreme Court to hear this action. It is in the highest degree unlikely that the High Court would declare the section invalid.

The inescapable problem of an action commenced in the High Court and part of which was clearly within the original jurisdiction of the High Court but part of which was grounded by State law and which standing by itself was

disqualified from being dealt with in the original jurisdiction was decisively dealt with on a number of occasions. Most recently, Sir Harry Gibbs, in Moorgate Tobacco Limited v. Phillip Morris Limited said:-

> "It is well established that where the High Court is invested with jurisdiction to determine a matter of a particular kind, the Court is 'clothed with full authority essential for the complete adjudication of the matter' and not merely for the decision of the matter which attracted jurisdiction; R. v. Bevan; ex parte Elias and Gordon (1942) 66 C.L.R. 452 at p.465; and see pp. 480 to 481. Once the jurisdiction is attracted, the Court can deal with all questions necessary to be dealt with to enable the case to be finally disposed of, except such matters as are severable and distinct from that which attracted jurisdiction." (supra p.482).

Of course, there is a great deal of room for legitimate argument and difference of views as to whether a particular matter is severable or non-severable. Even in the limited number of cases where the High Court turned its attention to this question, there have been instances of different views being taken by the Justices. It will be convenient to speak of this when considering the jurisdiction of the Federal Court of Australia.

FEDERAL COURT OF AUSTRALIA

By virtue of S.19 of the Federal Court of Australia Act, 1976, the original jurisdiction of the Court is such as is vested in it by laws made by the Parliament in respect of matters arising under laws made by the Parliament. The consequent bestowal of jurisdiction upon the newly created Court, makes a varied collection. The jurisdiction formerly exercised in Victoria and New South Wales by the Federal Court of Bankruptcy, constitutes one facet of the Court's jurisdiction. The work of the former Industrial Court

pursuant to the provisions of the Conciliation and Arbitration Act, 1904, is now exercised by the Industrial Division of the Court. In addition to this specialized bankruptcy and industrial work, a wide range of Federal Statutes have conferred jurisdiction on the Court in restrictive trade practices and consumer protection, administrative law, copyright, broadcasting and television, health insurance and prices justification. It is fair to say that up to the present at any rate, the bulk of the Court's work has come from matters arising under the Trade Practices Act, 1974.

When the House of Representatives was considering the Federal Court of Australia Bill, the then Attorney-General stated that "the Government believed that only where there are special policy or perhaps historical reasons for doing so, should original federal jurisdiction be vested in a Federal Court" (Cth. Parl. Deb. H.R. 21st October, 1976 p. 2111). The present Attorney-General restated the policy in much the same terms but not confined to original jurisdiction when he said "The policy ... is that the Federal Court of Australia will have jurisdiction only in those matters where for historical or special policy reasons it is desirable that jurisdiction be exercised by a Federal Court" (Cth. Parl. Deb. Senate 28th September, 1978 p.1060). Even if this policy be adhered to the "special policy" reasons which may underlie the conferring of jurisdiction must be subjective in the extreme. The Petroleum Retail Marketing Sites Act, 1980 (No. 140 of 1980) which restricts the number of sites from which petroleum products may be sold and empowers the Court to make not only orders for the payment of penalties but also to enforce other measures for the implementation of the Act, defines the "Court" as the Federal Court of Australia.

only because the provisions of the Act may be invoked in ejectment proceedings, that S.26 of the cognate Petroleum Retail Marketing Franchise Act 1980 confers concurrent jurisdiction on the State Courts. What "special policy" reasons may underlie the conferring of jurisdiction on the Federal Court in such cases is not readily apparent to an outside observer.

Whilst Sir Garfield Barwick (in "The Australian Judicial System; The Proposed New Federal Superior Court" 1 Fed. L.R. 1 at p.3) was of the view in 1964 that something "special" was required that called for the jurisdiction of a federal rather than a State Court, he either intended to confine this statement to matters of original jurisdiction or changed his view when in his speech ("The State of the Australian Judicature" (1977) 51 A.L.J. 480 at 491) he advocated that all appellate work irrespective of whether the relevant law be federal or State, should be carried out by the Federal Court.

The method followed to confer appellate jurisdiction on the Federal Court by S.24 of the Act, was somewhat similar to that embodied in Section 19. The Court was given jurisdiction to hear appeals from single Judges of the Court, from judgments of the Supreme Courts of Territories and in such cases as are provided by any other Act," in appeals from the judgments of a court of a State, ... exercising federal jurisdiction." Thus, appellate jurisdiction has been conferred, for example, in taxation matters and matters of industrial property from judgments of State Supreme Courts.

Even before the passing of the Federal Court Act, it was foreseen that problems would necessarily arise from

the creation of this new body. Some of these were adverted to by the then Attorney-General in a speech which he gave at the Fourteenth Law Convention (41 A.L.J. 336). Other apprehensions as to the need to split proceedings by having part of a dispute dealt with in State Courts and part in the Federal Court, were articulated by Professor Lane in "The Commonwealth Superior Court" 43 A.L.J. 148 at 150. Since the creation of the Court, further reference has been made to problems which are likely to emerge in the exercise of jurisdiction (see The Relationship between the Federal Court and the Supreme Courts of the States by Sir Walter Campbell, J. 11 Uni. of Queensland Law Journal 3; Rogers, J. Federal/State Courts 54 A.L.J. 285; Gummow, Pendent Jurisdiction in Australia, 10 Fed.L.R. 211). The difficulties which were apprehended are by no means abstract exercises in imagination.

In an effort to meet the problems which were acknowledged and anticipated the draftsmen of the Federal Court Act included S. 32 which is in the following terms:-

> "(1) 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.
>
> (2) The jurisdiction conferred by sub-section (1) extends to jurisdiction to hear and determine an appeal from a judgment of a court so far as it relates to a matter that is associated with a matter in respect of which an appeal from that judgment, or another judgment of that court, is brought."

The validity and operation of this provision and the question whether the Federal Court enjoys the same pendent, ancillary or auxiliary jurisdiction as the High Court were all

explored in the recent decisions of the High Court in two matters heard together: Phillip Morris Inc. v. Adam P. Brown Male Fashions Pty. Ltd. ("The Marlboro Case") and United States Surgical Corporation v. Hospital Products International Pty. Limited ("Hospital Products Case").At the time of writing this paper they are only reported in 1981 A.T.P.R. par. 40-197).

In the Marlboro Case the plaintiffs were the owner and licensee respectively of the registered Australian Trade Mark "Marlboro". It was claimed that the defendant attached a label bearing that word to wearing apparel manufactured by it. The plaintiffs sought damages and injunctions to restrain the defendant's conduct claiming that it constituted both common law passing off and an infringement of the prohibitions contained in Ss. 53 and 53 of the Trade Practices Act and infringement of the Trade Mark provided for by federal legislation.

In the Hospital Products Case the plaintiffs sought damages and injunctions in respect of alleged breaches of Ss. 53 and 53 of the Trade Practices Act and also in respect of passing off, infringement of copyright, unfair competition, breach of confidence, conspiracy and possibly fraud as well as breach of contract. Whilst in the Marlboro Case the same set of facts allegedly gave rise to all causes of action, there were of necessity additional, and in some respects, different facts pleaded to give rise to the claim under the Act and passing off on the one hand and the other causes of action on the other. Both actions were commenced in the Federal Court and were removed into the High Court which was invited to determine the extent of the jurisdiction of the Federal Court to entertain them. It will be perceived that each

action was mounted in part on a basis which indubitably lay within the exclusive province of the Federal Court. Equally other bases of the actions were matters in which, putting aside any connection which they may have had with the matters of federal jurisdiction, the Federal Court could not have exercised jurisdiction. The question therefore became to what extent, if at all, the Parliament could and did confer jurisdiction on the Federal Court to hear and determine claims for relief based on non-federal law where such claims were joined with relief based on federal law which conferred jurisdiction on the Federal Court. The High Court, Aickin and Wilson, J.J. dissenting, held that the jurisdiction of the Federal Court was more extensive than the resolution of questions specifically designated as being within federal jurisdiction. The Court had what was described by some as an accrued jurisdiction, by others as an ancillary jurisdiction. The former Chief Justice and Murphy, J. were of the view that a matter will be outside accrued jurisdiction only if it is separate and disparate from the matter which attracts federal jurisdiction. However, it is to be noticed that Barwick, C.J. was not disposed to confine this accrued jurisdiction too closely when he said:-

> "The Federal jurisdiction will not extend to enable the Court to resolve the further matter being as I have said in substance a disperate and independent matter. But this does not involve any close confinement of the Federal jurisdiction by too narrow a view of what is relevantly the matter. The emphasis on the disparate and independent nature of what is not part of or within the matter should ensure that no narrow view is taken of the parameters of the matter."

His Honour took the view that all the manifold allegations in the Hospital Products Case constituted one matter. In the light of that conclusion, it is difficult

to determine how the boundaries are to be drawn. Why is an allegation of conspiracy not a disparate and independent matter to a breach of S.52 of the Act? Murphy, J. joined in the same conclusion.

Mr. Justice Gibbs was of the opinion in the Marlboro Case that the case for the plaintiffs arose out of one set of circumstances which, whilst it gave them a right to relief on four distinct legal grounds: infringement of trademark; misleading or deceptive conduct; false representations and passing off, remained the one "matter". However, in the other action, to make out a case of breach of confidence; breach of contract; infringement of copyright; fraud or conspiracy, called for proof of further facts such as confidential relationship, possession of copyright, fraudulent intention, which were strangers to the matters that grounded the jurisdiction of the Federal Court. In general terms, by operation of S.32(1) of the Federal Court Act, His Honour considered that the Federal Court could properly be said to have jurisdiction in relation to matters associated with the subject clearly within the jurisdiction of the Federal Court, but recognised that the test of association called for was imprecise when the degree of relationship called for by the subsection is not defined. He offered the definition that given identity of parties "one matter is associated with another if the two matters arise out of substantially the same or closely connected facts" (my emphasis) His Honour recognised that "in many cases it will require an extensive examination of the facts before it can be decided whether the sub-section operates to confer jurisdiction in a particular case". His Honour detected a basis for some relief in the fact that the jurisdiction conferred by S.32(1) on the Federal Court is not exclusive. However, multiplicity of

litigation in different Courts may be avoided only if the cause of action which originally attracts federal jurisdiction is also one that is concurrent. In the particular instance before the Court that was not the case and accordingly, with great respect, His Honour's expression of relief was premature.

The second passage I have quoted from the judgment underlines the difficulty which I have been seeking to demonstrate exists in Federal/State Court relations. Time and time again, the situation will occur in which parties will be involved in the expenditure of time, money and energy in elucidating facts which when determined will have served no purpose in the determination of the rights of parties but will have served merely to show whether or not an appropriate forum had been chosen by one of the parties to the dispute. The very imprecision of the jurisdictional basis, as His Honour recognised, serves to illustrate the room for difference in view between judges at various stages as an action travels along the appellate ladder. After all, the Hospital Products Case elicited disparate conclusions as to what aspects of the action could properly be entertained in the Federal Court. There is no reason to believe that greater unanimity will prevail at the lower levels of the judicial structure. Tests such as "substantially" and "closely connected" are invitations to a hapless trial judge to fall into error and for appellate courts to differ amongst members. It would be idle to expect that the High Court will grant leave to appeal against a decision of the Full Court of the Federal Court that there is jurisdiction to entertain an "associated" matter or one which is within the "accrued" jurisdiction, yet when ultimately a matter may go to the High Court on an appeal as of right, it may be that that Court will be obliged to hold that the initial

determination as to jurisdiction was incorrect. Surely, this is not a prospect that one can treat with equanimity.

At this point it may be useful to mention a terrifying offspring of the United States two-tiered court structure. In American Fire and Casualty Co. v. Finn 341 U.S. 6, the Supreme Court felt obliged to hold that even a party who has invoked jurisdiction may subsequently challenge it if the result of a trial on the merits proves unfavourable. He may then try for a different result in the State Court. One's instinctive reaction is to say that the Courts will not allow a party to approbate and reprobate in this fashion. However, if the objection to jurisdiction rests on a constitutional foundation, it is at the very least doubtful that a Court may refuse to entertain the objection. Again, in the event of a successful challenge to the jurisdiction of the Federal Court at some appellate level, it could not be argued in any subsequent proceedings that there was either res judicata or issue estoppel between the parties (Spencer Bower and Turner, Res Judicata 2 Ed. 1969 pp. 92 et seq; "The Collateral Estoppel Effect of Prior State Court Findings in Cases within Exclusive Federal Jurisdiction" (1978) 91 Harv.L. Rev. 281). The trial on the merits would have to commence from the beginning.

To return to the decisions of the High Court, Mason, J. (with whom Stephen, J. agreed), held that the Federal Court had jurisdiction to decide "an attached non-severable claim". His Honour explained the concept this way:-

> "The classification of a claim as 'non-severable' does not necessarily mean that it is, or must be, united to the Federal claim by a single claim for relief, though this claim is a common illustration of a non-severable claim. The non-severable character of the attached claim may emerge from other aspects of the relationship between the Federal and attached claim. For example, it may appear that the resolution of the attached claim is essential to the determination of the Federal question. Likewise, it may appear that the attached claim and the Federal claim so depend on common transactions and facts, that they arise out of a common substratum of facts. In instances of this kind, a court which exercises Federal jurisdiction will have jurisdiction to determine the attached claim as an element inthe exercise of its Federal jurisdiction."

A complete paper would be required to do justice to the elaborate analysis called for by the decisions of the High Court and for present purposes I have sufficiently described the broad thrust of the majority judgments.

It may perhaps not be inappropriate to provide some examples of practical difficulties which have come to my notice in the twelve months I have been in the Commercial Court to support the statement that apprehensions of difficulties arising from the dual Court system were fully justified.

During 1980 I embarked on the hearing of an action between Hughes Motor Services Pty. Limited and Wang Computers Pty. Limited. Initially the statement of claim sought damages, not only in respect of negligent advice allegedly given by the defendant to the plaintiff and for various alleged breaches of contract, but also for allegedly misleading or deceptive conduct contravening S.52 of the Trade Practices Act, 1974. When it was perceived by those advising the plaintiff that the State Court had no jurisdiction with respect to the lastmentioned matter by reason of the exclusive jurisdiction of the Federal Court, that part of the statement of claim was deleted and a new action instituted in the Federal Court which was ultimately stayed (see 1978 A.T.P.R. 17961).

The action before me was ultimately disposed of by settlement but for present purposes, the point I make is that, assuming that the plaintiff had a good cause of action under the Trade Practices Act, it was considered necessary that it should litigate its claim in two different Courts in two sets of hearings. Surely an undesirable situation. Whether the problem in the Hughes Motor Case would have been alleviated by the recent decisions of the High Court, is open to argument. I should imagine it would be fairly easy to differ on the question whether a claim under S.52 of the Trade Practices Act and one based on Hedley Byrne are associated or within the accrued or ancillary jurisdiction of the Federal Court. Also would the other defendant against whom no claim was made under the Trade Practices Act have been amenable to the jurisdiction of the Federal Court?

It is an everyday occurrence to have actions for the price of goods sold to which defences will be mounted alleging breaches of implied conditions under the Sale of Goods Act, perhaps fraudulent and innocent misrepresentations of all kinds based on common law principles, perhaps breaches of State Consumer Act provisions and also breaches of Ss. 52 and 53 of the Trade Practices Act. The last two are matters of exclusively federal jurisdiction.

In one action which is presently pending in the Commercial List, the pleader adopted the rather desperate remedy of claiming that the contract of sale was illegal by reason of the infringement of the Trade Practices Act provisions and in that roundabout and circuitous manner seeks to avail himself of the protective umbrella of the provisions of that Act. It appears to have escaped attention that quite anomalously S. 163A of the Trade Practices Act contemplates

concurrent jurisdiction in State Courts to grant declarations in relation to the operation or effect of any provision of the Act. In other words, whilst damages may not be recoverable a declaration by way of a defensive weapon may be available. If this be so, it rather tends to make suspect the argument that there was some deep policy reason why S.86 of the Trade Practices Act should make the jurisdiction of the Federal Court exclusive. The justification which has been advanced for S.86 has been that in a new field of law, a consistent body of doctrine and expertise in the judges would more quickly be developed by having the one court dealing with all matters. Quite apart from the possible field of declaratory relief, it is still an open question whether State Courts may determine matters involving the interpretation and application of the Act where provisions of the Act are relied on by way of defence (cf. Hollywood Premier Sales Pty. Limited v. Faberge Australia Pty. Ltd. (1976) 2 N.S.W.L.R. 144, W.R. Carpenter Finance Corporation Limited v. Moloney 1979 A.T.P.R. 18306, Westco Motor Distributors Pty. Ltd. v. Palmer 1979 2 N.S.W.L.R. 93 (cf. Prof. Goldring, 1978 A.C.L.D. DT 79). It would be more than somewhat odd were a State Court unable to give effect to a defence arising under the Act. Thus a defendant who wished to rely on a contract infringing S.45 of the Act as a means of resisting enforcement of a contract in a State Court would be left defenceless. But even if available as a defence, he certainly could not claim damages by way of cross claim. One cannot pen these words without feeling a degree of embarrassment at the thought of having to justify such curial deficiency to a litigant who comes to Court seeking nothing more than a determination on the merits.

Another difficulty which has presented itself in practice was an action for possession of a petrol service station. The defendant relied upon the provisions of the Petroleum Retail Marketing Franchise Act. Had the matter proceeded to a hearing, in the event of an appeal, one assumes that so far as that part of the judgment concerning ejectment was concerned, any appeal would have gone to the Court of Appeal, whilst the challenge in relation to any aspect of the judgment dealing with the Petroleum Franchise Act would have lain to the Full Court of the Federal Court. The latter is a consequence of the provisions of Section 26(4) and (6) of the Petroleum Retail Marketing Franchise Act. I cannot imagine that S.32(2) of the Federal Court Act could be said to entitle the Full Court of the Federal Court to hear the ejectment part of the appeal. It does not require my words to emphasise the undesirability of a situation where the hearing of an appeal is split between two Courts. In another context, in Moorgate Tobacco Co. Limited v. Phillip Morris (supra), the joint judgment pointed out at p. 486:-

> "It is not to be supposed that the Parliament intended to permit an appeal to the Privy Council on an isolated question or questions abstracted from entirety of a case, unless the question or questions constituted or formed part of a non-federal claim which is distinct and unrelated to the federal claim. Were it otherwise, the paragraph would be productive of confusion and injustice, as Walsh, J. explained in Felton v. Mulligan (at p.410). The possibility that appeals on issues of fact common to both federal and non-federal claims could be taken to both the Privy Council and this Court is sufficiently alarming to deter us from accepting an interpretation of S.39(2)(a) which would admit of an appeal to the Privy Council on a non-federal claim being a cause of action different from the federal claim but standing on related facts."

In his Article in 10 Fed. L.R. 211, Mr. Gummow gave a number of examples of other likely areas of difficulty. Some of them tender a point which appears to have escaped consideration in the High Court. He points out at p.213 that:-

> "Original jurisdiction in federal matters such as copyright, trade marks, designs and patents is given by the statutes involved not to the Federal Court, but exclusively to the State Supreme Courts Copyright Act 1968, Part V; Judiciary Act 1903, S.39; Designs Act 1906, Ss.30 39; Patents Amendment Act 1976, S.7; Trade Marks Amendment Act 1976, S.7). This gives rise to considerable difficulty in practice, for which the Commonwealth is entirely responsible. The following examples are in point:
>
> (i) A plaintiff with a registered trade mark wishes also to proceed for misleading conduct contravening section 52 of the Trade Practices Act.
>
> (ii) A patentee is attacked for abuse of his monopoly, the plaintiff seeking both a compulsory licence under section 108 of the Patents Act and damages and injunctive relief for contravention of section 46 of the Trade Practices Act dealing with monopolisation.
>
> (iii) A defendant contravenes section 53(a) of the Trade Practices Act by falsely representing that his goods are of a particular standard or quality in fact possessed by those of the plaintiff, and in so doing also has infringed the copyright in the literary material used by the plaintiff to describe his goods."

None of the judgments in the High Court appear to recognise the exclusive nature of the original jurisdiction of the Supreme Court in the enumerated fields as a result of federal legislation. Just precisely what is it that overrides the specific federal legislation in this vesting of exclusive jurisdiction?

If one may somehow be permitted to disregard a federal provision such as the Trade Marks Act conferring exclusive original jurisdiction on State Supreme Courts and

hold that a trade mark dispute may be heard in the Federal Court in association with a dispute under the Trade Practices Act, does this mean that the reverse is also true? In other words, if a State Supreme Court in the exercise of its exclusive original jurisdiction entertains an action relating to infringement of Trade Marks, may it also hear a claim for injunction based on breach of Part IV of the Trade Practices Act, notwithstanding that S.86 of the latter Act gives exclusive jurisdiction to the Federal Court? Certainly, Gibbs, J. in Moorgate, after stating that once jurisdiction was attracted the High Court could deal with all questions necessary to be dealt with to enable the case to be finally disposed of, except such as were severable and distinct, went on (p.482):-

> "In my opinion, a similar principle applies when a State court is invested with federal jurisdiction. By the investiture, the State court acquires jurisdiction to deal with all matters necessary to determine the whole case (except matters which are severable and distinct from that which attracted jurisdiction)."

The following appears to me to be a brief summary of some of the subsisting problems in the dual Court system after the decisions of the High Court:-

(1) The tests propounded by the various judgments are, of necessity, imprecise and therefore difficult of application in a given case.

(2) It may not be possible to come to a decision until the conclusion of the evidence in the case as to whether or not the Court has jurisdiction to entertain the entirety of the dispute. In the event that it be decided

that jurisdiction is absent in relation to part of the dispute, any evidence directed to it will have been an exercise in futility.

(3) If the question of jurisdiction be incorrectly decided in the affirmative, any conclusion of the trial court on the merits may lack all legal effect.

(4) There will be many instances where neither Federal nor State Courts will have jurisdiction to dispose of the entirety of the dispute, either at first instance and/or on appeal. The Hospital Products Case is an adequate illustration of the point.

FAMILY COURT OF AUSTRALIA

Notwithstanding the views expressed by Sir Garfield Barwick in his speech in 1959, when the time came for the exercise of federal legislative power in the entirety of the field of marriage and divorce by the enactment of the Family Law Act, 1975, a new Federal Court was established to exercise jurisdiction in all States except Western Australia. It is conceded that there were certain administrative reasons why this step was taken, the result nonetheless has been to bring about split jurisdiction. The inconveniences attendant upon the splitting of jurisdiction have been many.

The Chief Judge in Equity of the Supreme Court of New South Wales, Mr. Justice Helsham, was prompted to write to the Australian Law Journal, 52 A.L.J. 466, drawing attention to a number of the problems exercising judges of that Division.

Caveats are regularly placed on the title by one party to the marriage or the other, and it was felt that if by reason of the exclusive jurisdiction conferred upon the Family Court by the Family Law Act, the Supreme Court had no jurisdiction to order the removal of a caveat no other court had such jurisdiction. His Honour mentioned a situation where one party to a marriage sought to restrain a trustee holding money claimed to be held in trust for that party from removing it from the jurisdiction. Once again, His Honour doubted whether the Family Court had jurisdiction to make any order and if the jurisdiction of the Equity Court had been removed, there was a jurisdictional void.

The problem is particularly acute in cases where the custody of children is concerned. In Clarke v. McInnes (Helsham, C.J. in Eq. 6th March, 1978, 52 A.L.J. 238), His Honour stated the facts:-

> "Three small children were, by consent of their father, in the legal custody of their mother following a divorce. They lost their mother and legal custodian when she was killed in a motor car accident. Two people or groups of people were thereafter concerned with the welfare of those small children; their maternal grandparents and their father. Their grandparents made application for custody to the Court exercising jurisdiction under the Family Law Act, 1975. Their father made application for custody by way of a writ of habeus corpus to this Court. Unfortunately, the grandparents chose the wrong Court. The Court operating under the Family Law Act, 1975 has no power to deal with their application. They should have come to this Court which could deal with it. Unfortunately, the father chose the wrong Court. He came here. This Court has no power to deal with his application. He should have gone to the Family Court of Australia which could have dealt with it. Neither Court therefore can deal with the applications before it ... This is not an isolated instance. The Judges of this Division of the Supreme Court have had other occasions when the same sort of problem arose as to the custody of children.
>
> I am not even sure that this Court, the traditional guardian of the welfare of children, has any right to make these children wards of Court and so place them under the jurisdiction of this Court. The Family Court of Australia has no such right, so it could be that the traditional supervisory jurisdiction of this Court has gone and there is nothing to replace it."

Although no doubt matters concerning children are the most painful, instances of other difficulties engendered by the system of split jurisdictions are not lacking. In Jarvinen v. Baba (Supreme Court of New South Wales, Holland, J. 7th October, 1980, unreported), the facts were somewhat surrealistic. In 1972, the plaintiff and the defendant had their marriage dissolved by a court in Finland, according to Finnish law. In 1976, the wife returned to Australia and remarried. In 1978, the wife instituted proceedings in the Equity Division of the Supreme Court seeking the appointment of a trustee for sale pursuant to S.66G of the Conveyancing Act, 1919. Some months later, the husband reposted by filing an application for dissolution of marriage in the Family Court, together with an application for property settlement in respect of the same property. The wife contested the jurisdiction of the Family Court to dissolve the marriage and eventually in order to prevent the Equity Division proceedings coming on for hearing, the former husband sought an injunction in the Family Court to restrain the former wife from proceeding with her summons in the Equity Division. On the same day, the former wife applied in the Equity Court for an injunction to restrain the husband from proceeding with his application for an injunction in the Family Court. As His Honour said:-

> "It only has to be stated to show how absurd the situation is. Appications by parties in a particular forum for an injunction to restrain the opposing party from taking or going on with proceedings in another forum are not uncommon. When they are made all sorts of questions arise but in the end the practical question is usually one of convenience. However, applications by a party in one forum, where there are proceedings pending in another forum, to restrain the party who instituted the proceedings in the other forum from making an application in that other forum in the course of those proceedings to restrain the first party from prosecuting proceedings in the first party's forum are in my experience unheard of."

His Honour took the view that he should allow the question of jurisdiction to be determined by the Family Court. In the result, the matter came before Nygh, J. in that Court on the 15th October 1980. One sincerely hopes that neither of the contestants was on Legal Aid, but even if they were paying their own costs, it meant that two Superior Courts of the land were occupied for at least a day each in the same month in hearing utterly useless jurisdictional points. Nygh, J. had no doubt that the Family Court had jurisdiction. So far as the jurisdiction of the Supreme Court of New South Wales was concerned, His Honour referred to some apparent conflict in the authorities in State Courts and concluded:-

> "It is not for this Court to determine whether or not the Supreme Court of New South Wales has concurrent jurisdiction. In the first instance that must be decided by that Court for itself and rightly or wrongly the Supreme Court of New South Wales has decided that it has. Only the High Court can ultimately resolve any conflict of jurisdiction. Without accepting the claim, I defer to their view as a matter of judicial comity."

His Honour held that he had jurisdiction to restrain a party from making application for relief in a Court having concurrent jurisdiction and proceeded to do so.

In Kuckuca v. Kuckuca (Supreme Court of New South Wales, Kearney, J. on 30th October, 1980, unreported), the plaintiff sought rectification of a conveyance of real property to, inter alia, the plaintiff and his former wife. There were proceedings still pending in the Family Court relating to the property.

The former wife submitted that by reason of this fact there was no jurisdiction in the Equity Court. In the result His Honour after a careful examination held that the proceedings did not bear a relevant or appropriate relationship to the proceedings for principal relief in the Family Court and did not constitute a "matrimonial cause" thereby conferring exclusive jurisdiction on the Family Court. I have taken these examples from unreported decisions of the Supreme Court of New South Wales but I have no doubt that equivalent situations have arisen in all the States. Quite apart from any question of costs, one hesitates to enquire into the anxieties and tension to which former spouses are subjected as their disputes wend their way along the tortuous jurisdictional paths which appear not to have been defined with any great clarity.

The High Court has twice in recent times been obliged to grant special leave to appeal to consider the jurisdiction of the Family Court to make orders in circumstances where spouses or former spouses have entered into partnerships or family companies during the subsistence of the marriage (see Reg. v. Ross-Jones; ex parte Beaumont 141 C.L.R. 504; Reg. v. Dovey; ex parte Ross 141 C.L.R. 526).

If the intention in creating the Family Court was to ensure uniformity of interpretation, this praiseworthy desire does not appear to have succeeded. It has been recognised by the announcement of the Attorney-General that he intends to create a permanent appellate body within the Family Court that not only have there been departures in the exposition of principle from judge to judge, but that there has not been uniformity in Full Court decisions themselves. The frequency with which the HIgh Court has been obliged to grant special

leave to appeal is another indication that clarity and uniformity of interpretation are tasks which fall to and are performed by the ultimate Court of Appeal.

POSSIBLE SOLUTIONS

It may be helpful to consider what assistance, if any, may be derived from the experience of other countries with federal systems in the resolution of problems of this nature.

The United States experience, of course, is well known. Earlier I have mentioned the historical reasons why a two-tiered structure was thought desirable initially and the fact that some of the same motivations continue to subsist. They are happily absent from the Australian scene and except as a frightening example of the complexities which may attend a dual State/Federal Court system, the American experience has nothing helpful to offer.

The majority of members of the High Court appear to have taken the view that the U.S. decisions on ancillary or pendent jurisdiction do not assist in the resolution of questions such as were presented by the Marlboro Case and the Hospital Products Case. This is not surprising when it is remembered that the leading authorities term the ancillary jurisdiction of the federal courts an "ill defined concept" (Wright Miller and Cooper, Federal Practice and Procedure Jurisdiction par. 3523).

I have already referred to the American position that a party may resile from having invoked the jurisdiction

of the Federal Courts should he prove unsuccessful on the merits and relitigate his case in a State Court. There is the further principle in Erie Railroad v. Tonkins (1938) 304 U.S. 64, embedded in United States law and practice to which consideration may need to be given. In effect, the decision of the Supreme Court establishes that in exercising pendent jurisdiction, Federal Courts, insofar as they apply State law, are bound to follow decisions of State Courts. Is that principle to be applied in exercise of what the High Court has described as the accrued or ancillary jurisdiction of the Federal Court? (The American practice is discussed in "Is There Life for Erie after the Death of Diversity" 78 Michigan Law Review 311). In other words, is a judge of the Federal Court to follow the decision of a State Court on a point of law arising from State law which he considers to be wrong?

In Canada, the recent decision of the Supreme Court in Reg. v. Thomas Fuller Construction Co. (1958) Ltd (1980) 106 D.L.R. (3rd) 193 has steered development in a direction completely different from that in Australia. The British North America Act, by S.101, conferred power on the Federal Parliament to establish a general Court of Appeal for Canada and "additional Courts for the better Administration of the Laws of Canada". In exercise of this power, the Supreme and Exchequer Court Act 38 Vict. C.11, established in 1875 both the Supreme Court of Canada and the Exchequer Court of Canada. From a very restricted area the jurisdiction of this Court, renamed the Federal Court, was greatly expanded in 1971. In Fuller's Case, the Federal Court undoubtedly had jurisdiction to determine the action between the plaintiff and the defendant. However, the claim between the defendant and a third party rested on State law. Similarly to the circumstances which gave rise to the recent decisions of the High Court, the

Supreme Court of Canada was called upon to determine whether the Federal Court had ancillary or pendent jurisdiction. Rejecting the existence of any such jurisdiction, Mr. Justice Pigeon, who wrote the majority judgment said (p.205):-

> "It must be considered that the basic principle governing the Canadian system of judicature is the jurisdiction of the Superior Courts of the Province in all matters federal and provincial. The federal Parliament is empowered to derogate from this principle by establishing additional Courts only for the better administration of the laws of Canada. Such establishment is not therefore necessary for the administration of these laws. Consequently, I fail to see any basis for the application of the ancillary power doctrine which is limited to what is truly necessary for the effective exercise of Parliament's legislative authority. If it is considered desirable to be able to take advantage of provincial legislation on contributory negligence which is not meant to be exercised outside the Courts of the province, the proper solution is to make it possible to have those rights enforced in the manner contemplated by the general rule of the Constitution of Canada, that is before the Superior Court of the province."

The Supreme Court's decision has been subjected to critical examination in an article "Constricting Federal Court Jurisdiction' A Comment on Fuller Construction" 30 Uni. of Toronto Law Journal 283. It is interesting to note the concern expressed by the authors at p.302 of the article, that there might come into existence a Canadian equivalent to the principle in the Erie Railroad Case to which I have earlier referred.

One solution which the authors of the article propound to deal with the problem is legislation to authorise Provincial Court Judges to sit in limited circumstances simultaneously as Judges of the Federal Court as well. Now that life tenure is no longer mandatory for federal Judges, this possibility is open in Australia. The authors put it thuswise (p.305):-

> "A procedure can be contemplated in which, on a showing that multiple litigation is both likely and likely to interfere substantially with the orderly resolution of a dispute, a judge of the provincial superior court could be authorised to preside at the trial both in that capacity and as a Deputy Judge of the Federal Court. While bifurcation at the intermediate appellate level might be unavoidable, such an arrangement would at least avoid the inefficiencies and possible inconsistencies in fact-finding which are arguably the most costly characteristics of a divided judicial system."

Of course, the implementation in Canada of any such suggestion is facilitated by the fact that all judicial appointments are made by the Federal Government and that the Federal Court Act already provides for the appointment of deputy judges from among judges of superior, county and district courts.

The authors deal with the various arguments which have been advanced for the establishment of Federal Courts such as a common and convenient forum, a national court exercising a national jurisdiction when enforcing a claim involving matters which frequently involve national elements, expertise, the availability of effective remedies and then go on to say:-

> "Each of these concerns can be accommodated within a unitary judicial system. Modern developments in procedural rules have made it possible for provincial courts to hear cases with out of province elements and Parliament can provide for the ready enforcement of out of province judgments in federal matters. Expertise in another area of federal law - bankruptcy - has been promoted by conferring jurisdiction on limited numbers of provincial superior court judges. The remedies available in provincial courts can be enlarged by federal legislation. The law of crown liability now treats the crown like any other defendant; like any other defendant, it can have its hearing in provincial courts, subject to any special statutory protection deemed advisable by the Parliament."

In West Germany the Basic Law has left provincial courts, the "Lander Courts", basically intact and has merely established various federal courts as the highest Courts of

Appeal thus there was created a Supreme Federal Court, a Federal Finance Court, Federal Labour Court and so on. In exceptional cases the Federal Courts are sometimes courts of first instance, for example, the Supreme Federal Court in cases of high treason (see Journal of International Commission of Jurists, Vol. 4, p.247 et seq.)

Mr. W.J. Wagner in his "The Federal States and their Judiciary" examines various other countries which have dual systems of courts and it is interesting to note that in relation to Venezuela, which at one time was a federation with a dual set of courts, the author takes the view that it was the creation of the single systemof judicature, by the elimination of the State judiciary, which was the first decisive step on the way leading that country to a unitary form of government (p.133).

Notwithstanding the terror which such a prospect might strike in the hearts of those devoted to the ideals of federalism as a result of the experience of Venezuela to which I have just referred, the first possible solution which falls to be considered is that of a national judicial system. A most distinguished sponsor of that concept was Sir Owen Dixon, who expounded the desirability of such a system in a paper which he delivered at the University of Melbourne and which was reprinted under the title of "The Law and the Constitution" in 51 L.Q.R. 590. As one would have expected, His Honour's advocacy of Courts of Justice as independent organs which were neither Commonwealth nor State, is founded primarily on first principles and does not look for support to the practical daily difficulties of a dual system which have only become more menacing and manifest in recent times. Lest it be thought that passing

years might have worked a change in Sir Owen, he reiterated his support in Jesting Pilate p.53. The concept received enthusiastic support from Mr. Justice Else-Mitchell in a paper which was reproduced in 44 A.L.J. 516 and at p.519, His Honour put the alternative starkly:-

> "It will be at once apparent that any system which is to provide the citizen with a just remedy for wrongful acts, whether relating to his personal, proprietary contractual or any other rights, should ensure that the remedy can be invoked without a prior consideration of problems ofchoosing an appropriate forum and without the need for special forms or procedures being adopted according to the forum chosen. The problem of choice of a forum can also arise as between competing or parallel judicial systems and, whilst the prescription of territorial limitations may seldom cause injustice, the creation of a court with jurisdiction only over specified categories of matters can result in confusion and operate on occasions to deny justice to the parties."

Both the former Chief Justice (51 A.L.J. 491) and Gibbs, C.J. in his first speech as Chief Justice, looked forward to a unified natural judicial system. The Chief Justice of New South Wales also embraced the concept a long time ago (cf. 52 A.L.J. 434).

The question was the subject of thorough examination in 1977 at the Australian Constitutional Convention when the Judicature Committee made a report to Standing Committee "D" which in Part III paragraph 3 stated that after considering the arguments it was satisfied that the establishment of a unified Australian judicial system would be of great value, in particular as regards simplification of jurisdictional questions, both at original and appellate levels, judicial administration, the optimum use of judicial resources, uniformity of procedure and consistency of judicial precedent. It is appropriate to note that having so expressed itself, the Committee went on to point out that the task of achieving such a result involved technical and political considerations

which were beyond the resources of the Committee. It has to be recognised that indeed the problems of achieving a solution by this route are immense. In Canada the difficulties experienced in manning the Provincial Bench are a ready and stark illustration of the practical difficulties encountered. Appointments are made by the Federal Government but it requires the Provincial Government to determine on the creation of a judicial post. To say that ready agreement has not always been forthcoming is apparently to understate the position more than somewhat. This makes the suggestion for simultaneous federal and state judicial appointments of the one person suggested by the authors of the article in the Toronto Law Journal a somewhat surprising one. Nonetheless, it appears to me to be a reasonably practicable way of setting out on the rocky road to achieving a unified rational court system. Quite apart from any other advantage, what a boon it would be to exchange judicial personnel when a temporary log jam in work arises in one Court system or another. The creation of a Judicial Commission to advise on appointments and perhaps conditions of judicial service could solve some obvious problems. As far as I know, no work has been done in Australia to seek to determine the feasibility of this approach.

It has been suggested (51 A.L.J. 480 @ 491) that the exercise of judicial functions could be divided between State and Federal Courts by confining all the trial work to State Courts and all appellate work to the Federal Court. This it will be remembered is really the pattern adopted in West Germany, except that the intermediate appellate structure there is also a State function. Quite apart from any other difficulties, it is an approach doomed to disaster on political grounds.

Different opponents might prevent the implementation of another suggestion that there might be cross referral of powers between the States and the Commonwealth. The suggestion is fully explored by Bowen, C.J. (cf. 53 A.L.J. 814). Of course, I readily yield to His Honour in all matters including the political likelihood of such a plan being embraced by both the States and the Commonwealth but I venture to doubt that we can afford to wait for the requisite period. Even in the relatively non-controversial area of child custody, all positive action on the referral of powers seems to be in limbo, notwithstanding the clearly perceived needs (cf. Saunders 52 A.L.J. 187 and 254).

Some commentators have thought that a solution may be found to some of the difficulties by the exercise of judicial restraint in the exercise of jurisdiction (cf. 53 A.L.J. 806 @ 812). With great respect to this view, doubts exist as to whether this avenue is open. Sir Garfield Barwick in his article already referred to in 1 Fed.L.R. at p.10 et seq. pointed out that the doctrine of forum non conveniens is not part of English law and indeed this has recently been confirmed by the House of Lords. In those circumstances there is a strong basis for the proposition that a jurisdiction given unconditionally to a court must be exercised when properly invoked. As is pointed out in Federal Jurisdiction in Australia, p.75:-

> "There are many judicial statements in England, Australia and the United States to the effect that a grant of jurisdiction carries with it a duty to exercise that jurisdiction."

It is appropriate to note that in truth both State and Federal Courts have declined to exercise jurisdiction where it was thought that the other parallel system may be more convenient. In L. Grollo Darwin Management Pty. Limited v. Victor Plaster Products Pty. Limited 19 A.L.R. 621, the

appellant obtained a stay of an action in the Supreme Court of the Northern Territory in which the respondent had claimed the price of goods allegedly sold and delivered. A stay was granted for the reason that the appellant had initiated proceedings in the Federal Court pursuant to S.82 of the Trade Practices Act in respect of an alleged contravention of S.52 of the Act. Subsequently, on the application of the respondent, a Judge of the Federal Court stayed the appellant's action in the Federal Court on the ground that it was frivolous and vexatious within the meaning of the High Court Rules. His Honour was apparently of the view that the action in the Federal Court had not been brought as an action to be genuinely pursued. This view was not accepted by the Full Court of the Federal Court. Their Honours said (p.628) that there was a duplicity of proceedings in relation to the question whether the goods were supplied to the appellant:-

> "In these circumstances a discretion arose in the learned Judge to decide whether it was in the interests of justice that one of the actions should proceed before the other and if he considered that the action of the Northern Territory should proceed before the action in this Court and that a stay of this action was appropriate for that purpose then he had jurisdiction so to order. (See Driller v. Smail 1968 V.R. 396 at 403 and L. Grollo & Co. Pty. Limited v. Swanson Bros. Pty. Ltd. Australian Industrial Court 15th October 1976, unreported)."

Certainly in Driller v. Smail, Smith, J. expressed the view that where State and Federal Courts had concurrent jurisdiction, either Court had a judicial discretion to decline to proceed with the case upon the ground that it would be more satisfactory in all the circumstances to leave it to be determined by the other Court (p.403). The dispute arose in a bankruptcy and His Honour relied on two English decisions which also involved the concurrent jurisdictions of the

High Court on the one hand and the Bankruptcy Court on the other. There appears to have been no debate on the point that in the absence of something vexatious or oppressive, a plaintiff should be allowed to have his day in the Court of his choice.

In Hughes Motor Services Pty. Limited v. Wang Computer Pty. Limited 1978 A.T.P.R. 17,961, to which reference has already been made, Bowen, C.J. took the view that the Federal Court had a general power to control its own proceedings and placed reliance upon the decision in Grollo. In exercising the power to stay, His Honour considered a great number of matters need to be taken into account and these are enumerated by him at 17,965. However, in relation to the jurisdictional problem, as I say, His Honour was content merely to rely on Grollo.

Somewhat similarly, the Supreme Court of Victoria took the view that a stay of proceedings could be granted where the Court was an inconvenient forum. This view was expressed by Young, C.J. in Shillinglaw v. Shillinglaw (21st February, 1978, unreported). One of the decisions upon which His Honour placed reliance is the judgment of Mr. Justice Gibbs, sitting as the Supreme Court of the Australian Capital Territory in Cope Allman (Australia) Limited v. Celermajer (1968) 11 F.L.R. 488. However, reference to His Honour's judgment tends to repel the conclusion of existence of jurisdiction on this ground rather than to support it. At p.492 His Honour said:-

> "However the question that I am bound to pose to myself is not simply 'which is the more convenient forum?' the principles to be applied in such a case as this were laid down by the High Court in Maritime Insurance Co. Limited v. Geelong Harbour Trust Commissioners (1908) 6 C.L.R. 194. At p.198 Sir Samuel Griffith, whose judgment was concurred in by the two other members of the court, said:

> 'I will read one or two passages from the judgment of the President, Sir Gorell Garnes, in which the other members of the Court of Appeal concurred, in Logan v. Bank of Scotland (1906) 1 K.B. 141, at p.150. He said: 'The court should, on the one hand, see clearly that in stopping an action it does not do injustice, and, on the other hand, I think the court ought to interfere whenever there is such vexation and oppression that the defendant who objects to the exercise of the jurisdiction would be subjected to such injustice' (I interpolate there the words supplied by Warrington, J. in Egbert v. Short (1907) 2 Ch. 205 at p.213)) 'in defending the action that he ought not to be sued in the court in which the action is brought, to which injustice he would not be subjected if the action were brought in another accessible and competent court'; and again (1906) 1 K.B. 141, at p.151: 'Yet it seems to me clear that the inconvenience of trying a case in a particular tribunal may be such as practically to work a serious injustice upon a defendant and be vexatious. This would probably not be so if the difference of trying in one country rather than in another were merely measured by some extra expense ... If, for instance, as was put in argument, a dispute of a complicated character had arisen between two foreigners in a foreign country, and one of them were made defendant in an action in this country by serving him with a writ while he happened to be here for a few days' visit, I apprehend that, although there would be jurisdiction in the court to entertain this suit, it would have little hesitation in treating the action as vexatious and staying it'."

Another decision on which reliance was placed is Telford Panel & Engineering Works Pty. Limited v. Elder Smith Goldsbrough Mort Limited 1969 V.R. 193 where again Mr. Justice Lush said at p.198:-

> "Subject to the rules relating to vexatious proceedings, it is for this Court to try actions brought before it in which it has jurisdiction, and it is not for this Court to send plaintiffs away, because, ideally, more complete justice might be done elsewhere."

With respect, it is difficult to extract from that statement the notion that a stay may be granted on grounds of convenience. Yet, the decision in Shillinglaw was cited as the applicable principle in Cacek v. Cacek, 1979 V.R. 385 at 391 to found the grant of a stay. It will suffice for present

purposes to submit that it is at the very least highly debateable that this avenue is available as offering a solution to the problems posed.

The most immediate and probably least difficult suggestion to implement, is that of making the jurisdictions concurrent. I have ventured to suggest in a note in 54 A.L.J. 285, that perhaps conferral of federal jurisdiction on State Courts may offer some measure of relief. I do not wish to traverse the same ground again. I would merely seek to accept what fell from Mr. Justice Mason in the Marlboro Case to the effect that the lodestar from which guidance may be obtained as to the course to be followed is the interest of the litigants. Is it not in the interests of litigants to offer them the choice of courts so that they may be sure there is one court available where a complete remedy may be had but if they prefer to take the risk, then they may chose another court? The point has been eloquently put by Wilson, J. in the Marlboro Case when he said:-

> "I am conscious of, and burdened by, the consideration that such a conclusion may well not be in the best interests of litigants, who naturally seek convenience and economy in the resolution of their disputes. However, burdened as I am by that consideration, it seems to me that any other decision will not only offend the true intent and operation of the Constitution as established by its proper construction but diminish its effectiveness in maintaining a viable federation. The Constitution itself in S.77(iii) rovides the Parliament with a solution to the problem". my emphasis)

It is not without interest to note that impartial users of the facility seem to favour concurrent jurisdiction (cf. The Report of the Trade Practices Review Committee par. 9.35; Submission to Trade Practices Consultative Committee on Concurrent Trade Practices Jurisdiction for State and Territory Supreme Courts by Mr. G. de Q. Walker (formerly Secretary of the Trade Practices Commission).

Bowen, C.J. pointed out, 53 A.L.J. 806 @ 813, that the status of a court "must depend on the quality of its performance". Mr. Walker suggested in his Submissions:-

> "If the State Supreme Courts were given concurrent jurisdiction under the Trade Practices Act, all courts would gain an incentive to strive towards the 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."

I suppose if we must have a dual system of Courts, there are worse ways of coping with the problem than that of giving the litigant the choice. The criteria they apply in making their choice will fairly demonstrate where the needs lie.