

**Corporations and Corporate Insolvency Jurisdiction of the  
Federal Court – From Passer-by to Chameleon Lodger**

**The Hon Justice Michelle Gordon\***

Introduction

The 40 year history of the Federal Court's corporations and corporate insolvency jurisprudence mirrors Australia's legal, economic, political and social history. The Court's jurisprudence in this area is an integral part of Australia's intellectual development – it finds reflection in, and coincides with, the maturity of Australia as a nation, the considerable growth in Commonwealth legislation and the corresponding growth in the jurisdiction of the Federal Court. What this history reveals is that, although there have been ebbs and flows in the Federal Court's corporations work, the Court has been an enduring and important component of Australia's corporate and economic life. But a milestone, even one as significant as a 40th, is just that – a milestone in the development of an institution. This chapter addresses significant legal, economic, political and social events that have directly and indirectly affected this area of the Federal Court's jurisprudence and then considers what that history might say about the future.

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## The Creation of the Federal Court in 1977

The existence of the Federal Court is first acknowledged in the opening pages of volume 25 of the *Federal Law Reports*, but it is not until volume 29 that the first reported case appears. By my count, eight Federal Court decisions were reported in that volume — five concerning the still-new *Trade Practices Act 1974* (Cth) ('TPA'),<sup>1</sup> two bankruptcy cases<sup>2</sup> and just one industrial relations case.<sup>3</sup> The next volume — number 30 — contains a similar mix of cases.<sup>4</sup> The modesty of these beginnings should not come as a surprise. At the time of the Court's inception,<sup>5</sup> the totality of the Court's jurisdiction was conferred by only 16 Acts<sup>6</sup> aside from the *Federal Court of*

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- 1 *Trade Practices Commission v Milreis Pty Ltd* (1977) 29 FLR 144 (a constitutional challenge to an action against trading corporations allegedly acting in breach of s 45 of the TPA); *Given v CV Holland (Holdings) Pty Ltd* (1977) 29 FLR 212 (a prosecution for false representation); *Thompson v Mastertouch TV Service Pty Ltd [No 1]* (1977) 29 FLR 270 (prosecution for false statement); *Weitmann v Katies Ltd* (1977) 29 FLR 336 (misleading or deceptive conduct); *Larmer v Power Machinery Pty Ltd* (1977) 29 FLR 490 (meaning of 'in trade or commerce').
  - 2 *Re Groom; Ex parte Bankrupt* (1977) 29 FLR 324; *Re Munson; Ex parte Deputy Commissioner of Taxation* (1977) 29 FLR 479.
  - 3 *Johns v Allen* (1977) 29 FLR 249.
  - 4 Three bankruptcy decisions, five industrial relations decisions and five concerning the TPA.
  - 5 1 February 1977: see Commonwealth, *Gazette: Special*, No S 3, 18 January 1977.
  - 6 As a consequence of the *Federal Court of Australia (Consequential Provisions) Act 1976* (Cth), which transferred jurisdiction from the Australian Industrial Court: see *Administrative Appeals Tribunal Act 1975* (Cth) s 44;

Footnote continues

*Australia Act 1976* (Cth) ('*Federal Court Act*') itself.<sup>7</sup> None of them directly conferred so-called 'corporations' jurisdiction. And that was deliberate. It was intended that the Federal Court not enter 'any field of original jurisdiction ... exercised by State courts'.<sup>8</sup> But it would be a mistake to underestimate the Federal Court's role in regulating corporate behaviour at that time.

Companies were then regulated by the *Uniform Companies Acts* enacted in each State and matters were litigated in State courts.<sup>9</sup> But from the earliest days, we can observe the Court

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*Broadcasting and Television Act 1942* (Cth) ss 90R, 92KA; *Compensation (Commonwealth Government Employees) Act 1971* (Cth) s 95; *Financial Corporations Act 1974* (Cth) s 23; *Health Insurance Act 1973* (Cth) s 122; *Insurance Act 1973* (Cth) s 88; *National Health Act 1953* (Cth) s 82ZM; *Navigation Act 1912* (Cth) s 375B; *Prices Justification Act 1973* (Cth) s 31; *Stevedoring Industry Act 1956* (Cth) ss 34, 45M; *TPA* s 86. See also *Bankruptcy Act 1966* (Cth) ss 27, 38, as amended by *Bankruptcy Amendment Act 1976* (Cth) ss 4, 6; *Trade Marks Act 1955* (Cth) s 114, as amended by *Trade Marks Amendment Act 1976* (Cth) s 7; *Patents Act 1952* (Cth) s 148, as amended by *Patents Amendment Act 1976* (Cth) s 7; *Income Tax Assessment Act 1936* (Cth) ss 196, 198, as amended by *Income Tax Assessment Amendment (Jurisdiction of Courts) Act 1976* (Cth) ss 5, 8; *Conciliation and Arbitration Act 1904* (Cth) s 118A, as amended by *Conciliation and Arbitration Amendment Act (No 3) Act 1976* (Cth) s 3.

<sup>7</sup> *Federal Court Act* ss 19, 24, 32.

<sup>8</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 21 October 1976, 2111 (Robert Ellicott, Attorney-General).

<sup>9</sup> Chief Justice T F Bathurst, 'The Historical Development of Corporations Law' (Speech delivered at the Francis Forbes Society for Australian Legal History, Sydney, 3 September 2013) 17 [52].

tentatively dipping its toes into company law through legislation passed in areas of special Commonwealth interest or concern, such as bankruptcy and insolvency, trade practices, taxation, industrial law and the Territories. As Sir Nigel Bowen aptly put it, the Court was 'the primary arbiter in respect of a wide range of matters arising from regulation by the Commonwealth Parliament on an Australia-wide basis of business conduct',<sup>10</sup> along with the administration of government and industrial relations.

The Court was well equipped for this role. Most of the foundational Judges had been Judges of the Australian Industrial Court and the Federal Bankruptcy Court. The issues were not foreign to them.

One of the Court's first dips into the interaction between the existing company law and its new-found jurisdiction under s 56 of the *Federal Court Act* and under the TPA was *Tradestock Pty Ltd v TNT (Management) Pty Ltd [No 1]*,<sup>11</sup> reported in volume 30 of the *Federal Law Reports*. It was delivered by Smithers J on 2 May 1977, fewer than three months after the first decision of the Court on 15 February 1977. Incidentally, it is also the first Federal Court case to appear on AustLII.<sup>12</sup> *Tradestock* involved an action brought under

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<sup>10</sup> Sir Nigel H Bowen, 'Comment: The Federal Court of Australia' (1977) 8 *Sydney Law Review* 285, 292.

<sup>11</sup> (1977) 30 FLR 343 ('*Tradestock*').

<sup>12</sup> [1977] FCA 1 (2 May 1977).

s 45 of the *TPA* by a lone Victorian company, represented by Ron Castan, against a series of other companies, variously represented by a number of future judges of the Federal Court (Lockhart and Sundberg), the New South Wales Supreme Court (Rogers), the Victorian Supreme Court (Chernov) and the Family Court (Waddy). Several of the defendant companies applied for a stay of the proceedings pending provision by the plaintiff company of security for costs. That application was founded on s 56 of the *Federal Court Act* but sought 'primarily by reference to the provisions of s 363(1) of the *Companies Act 1961* (Vic)',<sup>13</sup> which specifically dealt with the circumstances in which a company might be ordered to pay security for costs. Smithers J approached and resolved the issue by applying the principles relevant to s 363, noting that s 363(1) had a 'long history in companies legislation in England and in Australia'.<sup>14</sup> Things did not go in Mr Castan's favour that day, but the matter was to return to Smithers J later that year. Michael Black's name was added to the list of those representing one of the defendant companies. Mr Castan had more luck on that occasion, successfully having the security for costs order set aside in relation to several of the defendant companies — again, by reference to provisions of the *Companies Act 1961* (Vic).<sup>15</sup>

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13 *Tradestock* (1977) 30 FLR 343, 347.

14 *Ibid.*

15 *Tradestock Pty Ltd v TNT (Management) Pty Ltd [No 2]* (1978) 32 FLR 420, 438. See also *Ilat Nominees Pty Ltd v Murrangong*

This first dip into company law would set the mark — the new court would do the work it was given properly, and by reference to established principles, despite the fact that the cases were few and far between. In fact, it is not until volume 32 of the *Federal Law Reports* that we find the first reported Full Court decision dealing with a substantive company law issue.<sup>16</sup> Again, it arose in the context of a claim under the *TPA*, this time concerning a television broadcast of a misleading statement. The defendant company, Universal Telecasters, sought to make out a defence that it did not know of and had no reason to suspect the contravention. Each member of the Court — Bowen CJ, Nimmo J and Franki J — applied the English decision of *Tesco Supermarkets Ltd v Natrass*<sup>17</sup> to determine whether the knowledge of a particular person within the company, the sales manager, could be attributed to the company.<sup>18</sup>

The resort to, and reliance upon, fundamental principles of corporations law was essential but it was also an important part of the growing expertise of the Court in corporations law. At this time,

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*Nominees Pty Ltd* (1980) 48 FLR 385; *Drumduro Pty Ltd v Braham* (1982) 64 FLR 227; *Newtons Travel Services Pty Ltd v Ansett Transport Industries (Operations) Pty Ltd* (1982) 64 FLR 205; *J&M O'Brien Enterprises Pty Ltd v Shell Co of Australia Ltd [No 2]* (1983) 70 FLR 261; *Sent v Jet Corporation of Australia Pty Ltd* (1984) 2 FCR 201.

<sup>16</sup> *Universal Telecasters (Old) Ltd v Guthrie* (1978) 32 FLR 360.

<sup>17</sup> [1972] AC 153.

<sup>18</sup> See also *Trade Practices Commission v TNT Management Pty Ltd [No 1]* (1981) 55 FLR 197.

there was another important component of the Federal Court's early corporations law work. The Federal Court had appellate jurisdiction from the Supreme Courts of the Northern Territory and the ACT.<sup>19</sup> This meant that it had occasion to act as an intermediate appellate court in corporations law matters from its early years.

An example was *Day & Dent Constructions Pty Ltd (in liq) v North Australian Properties Pty Ltd (prov liq apptd)*.<sup>20</sup> At its core, the case was about whether the respondent company could set off an amount it had previously paid to the appellant company, which had been wound up, against a claim made by the appellant company. The case was determined by reference to s 86 of the *Bankruptcy Act 1966* (Cth) ('*Bankruptcy Act*') – which concerned mutual dealings between a bankrupt and a person claiming to prove a debt in the bankruptcy – as applied to the relevant companies by the *Companies Act 1978* (NT). Each of Forster J, McGregor J and Sheppard J gave separate reasons. The latter two judges, who reached different conclusions on the central issue, each gave lengthy consideration to existing authority on corporate insolvency.

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<sup>19</sup> See *Federal Court Act* s 24 (until 1985 for the Northern Territory and 2002 for the ACT: see *Statute Law (Miscellaneous Provisions) Act (No 1) 1985* (Cth) sch 1; *Jurisdiction of Courts Legislation Amendment Act 2002* (Cth) sch 1 pt 1).

<sup>20</sup> (1981) 54 FLR 277.

These were comparatively humble beginnings. But the fact that these cases were decided – and were decided properly – was important, because things were about to change.

### Expansion of the Court's Jurisdiction in the 1980s

That change was foreshadowed in a 1979 case decided by Lockhart J,<sup>21</sup> who accurately observed that

Australia's federal system of government has produced in practice, thus far, a dichotomy of jurisdiction in relation to insolvencies, the States having jurisdiction over the winding up of companies and the Commonwealth as to bankruptcy and the winding-up of companies in Territories.<sup>22</sup>

However, as his Honour went on to explain:

There has been an increasing tendency in Australia for uniformity of laws as to companies and for the homogeneity of laws, procedures and practices relating to the administration of insolvencies, be they State or federal, companies or natural persons.<sup>23</sup>

So, what were those changes and what brought them about? Economically and politically, the late 1970s and early 1980s marked a period of economic liberalisation and deregulation. The Australian dollar was floated in 1983 and the financial system was deregulated.

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<sup>21</sup> *Re Csidei; Ex parte Andrew* (1979) 39 FLR 387.

<sup>22</sup> *Ibid* 394.

<sup>23</sup> *Ibid* 395.

At the same time, Robert Holmes à Court made his assault on the Broken Hill Proprietary Co Ltd. Then, in October 1987, the stock market crashed. The Court was not immune from these events. They coincided with, and had a significant impact on, the Court's corporations jurisdiction.

First, early in this period, the cooperative company law scheme came into operation. The Commonwealth enacted legislation for the ACT which was then applied individually by each of the States. That scheme was 'largely a consolidation and updating of previous companies legislation'.<sup>24</sup> Part of this connected scheme was the establishment of the National Companies and Securities Commission ('Commission') — ASIC's predecessor.<sup>25</sup>

This latter development gave the Federal Court an indirect role in regulating companies. Applications for judicial review of decisions and conduct of the Commission could be brought to the Federal Court under the *Administrative Decisions (Judicial Review) Act 1977* (Cth). An important example was News Corporation's challenge to proceedings initiated by the Commission to investigate alleged contraventions of company law provisions in relation to the

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<sup>24</sup> Chief Justice Bathurst, above n 9, 17 [54].

<sup>25</sup> See *National Companies and Securities Commission Act 1979* (Cth) s 5(1).

acquisition of shares.<sup>26</sup> The case eventually reached the High Court, which clarified the Commission's powers and functions.<sup>27</sup>

Other company law issues dealt with by the Federal Court in the 1980s included whether a transaction made by a company after the presentation of a winding-up petition should be validated;<sup>28</sup> the entitlement of a provisional liquidator to remuneration despite the subsequent dismissal of the winding-up petition;<sup>29</sup> whether certain agreements gave rise to an 'interest' under the *Companies Act 1961* (Qld);<sup>30</sup> and the interaction between provisions of the *Bankruptcy Act* and the *Companies (Tasmania) Code* (Tas) in relation to the liability of a bankrupt director for the payment of a company debt.<sup>31</sup>

Second, in the early 1980s, after a hesitant beginning,<sup>32</sup> the concept of 'accrued' jurisdiction came to be fully understood.

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<sup>26</sup> See *News Corp Ltd v National Companies and Securities Commission* (1984) 5 FCR 88.

<sup>27</sup> *National Companies and Securities Commission v News Corp Ltd* (1984) 156 CLR 296.

<sup>28</sup> *Jardio Holdings Pty Ltd v Dorcon Constructions Pty Ltd* (1984) 3 FCR 311.

<sup>29</sup> *Day v Mount* (1984) 2 FCR 237.

<sup>30</sup> *Jones v Acfold Investments Pty Ltd* (1985) 6 FCR 512.

<sup>31</sup> *Official Trustee in Bankruptcy v CS & GJ Handby Pty Ltd* (1989) 87 ALR 734.

<sup>32</sup> *Moorgate Tobacco Co Ltd v Philip Morris Ltd* (1980) 145 CLR 457, 469, 472, 477; *Philip Morris Inc v Adam P Brown Male Fashions Pty Ltd* (1981) 148 CLR 457, 512.

Appropriately enough, it was *Fencott v Muller*,<sup>33</sup> involving a *TPA* claim in the Federal Court, that solidified the position. The High Court upheld the decision of Toohey J at first instance<sup>34</sup> on the issue of jurisdiction, holding that the Federal Court had jurisdiction to consider a number of non-federal claims that arose out of facts in common with a claim under the *TPA*.<sup>35</sup>

The importance of this development for the jurisdiction of the Federal Court cannot be overstated. As has been noted since,

[t]he perception that the Federal Court had a very limited jurisdiction overlooked the fact that once jurisdiction of the Court was attracted in a matter arising under any law of the Parliament conferring jurisdiction on it, the Court could decide the whole controversy of which that matter was part.<sup>36</sup>

Other company law issues arose directly and indirectly in the jurisdiction of the Federal Court because of the *TPA*. In *Seymour v*

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33 (1983) 152 CLR 570. See also *LNC Industries Ltd v BMW (Australia) Ltd* (1983) 151 CLR 575; *Burgundy Royale Investments Pty Ltd v Westpac Banking Corporation* (1987) 18 FCR 212.

34 *Muller v Fencott* (1982) 57 FLR 35.

35 See *Fencott v Muller* (1983) 152 CLR 570, 610.

36 Justice Steven Rares, 'The Significance of the Commercial Jurisdiction of the Federal Court of Australia' (Paper presented at the Commercial Law Association's 2008 Leading Edge Seminar Series, 5 September 2008) 6 [20]. See also Chief Justice Michael E J Black, 'The Federal Court of Australia: The First 30 Years — A Survey on the Occasion of Two Anniversaries' (2007) 31 *Melbourne University Law Review* 1017, 1029.

*Southern Districts Video Pty Ltd (in liq)*,<sup>37</sup> Toohey J had to consider whether a company in liquidation was the subject of a creditors' voluntary winding-up under the *Companies (Western Australia) Code* (WA). That, in turn, gave rise to a further question: whether, in Federal Court proceedings initiated under the *TPA*, the Companies Code required a party to obtain leave from the Supreme Court of Western Australia to commence proceedings against a company in liquidation. Resolution of that question involved, among other things, consideration of the operation of s 79 of the *Judiciary Act 1903* (Cth) ('*Judiciary Act*'), with Toohey J following the approach of Smithers J in *L Grollo & Co Pty Ltd v Nu-Statt Decorating Pty Ltd [No 2]*.<sup>38</sup>

The relationship between company law, proceedings in the Federal Court and s 79 of the *Judiciary Act* was a recurring issue, ultimately attracting the attention of the High Court many years later in *ASIC v Edensor Nominees Pty Ltd*.<sup>39</sup>

Third, in 1987, the cross-vesting regime conferred jurisdiction on the Federal Court in matters in which it would not otherwise have had jurisdiction.<sup>40</sup> In appropriate cases, the Federal Court could grant

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<sup>37</sup> (1985) 4 FCR 596 ('*Seymour*').

<sup>38</sup> (1980) 47 FLR 44.

<sup>39</sup> (2001) 204 CLR 559.

<sup>40</sup> See *Re Wakim; Ex parte McNally* (1999) 198 CLR 511, 565–6 [83]–[86] ('*Re Wakim*').

leave under the Companies Code for proceedings to be commenced against companies subject to winding-up orders.<sup>41</sup> That regime was soon to be followed by legislation providing for cross-vesting of jurisdiction in matters arising under the Corporations Law.

Fourth, the *Admiralty Act 1988* (Cth) was enacted — an Act of great importance in regulating international commercial dealings. Its importance continued to grow as a result of the economic reforms of the 1980s and Australia's greater integration into the global economy. With each of these changes — some entirely focused on the corporations law and others directed at areas which intersected with corporations law — the Federal Court's jurisdiction and expertise in corporations law grew. And that was fortuitous.

#### Conferral of Jurisdiction under the *Corporations Law* on the Federal Court in 1991

Black Monday arrived in October 1987, and a global economic downturn was soon to follow. For the Court, the nature of its work would change in more ways than one. The Corporations Law came into effect on 1 January 1991,<sup>42</sup> superseding the cooperative scheme of the previous decade. The Acts of each of the States

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41 *Glass v Tarea Management (North Shore) Pty Ltd (in liq)* (1990) 25 FCR 242. See also *Australian Trade Commission v Film Funding & Management Pty Ltd* (1987) 24 FCR 595.

42 See *Re Wakim* (1999) 198 CLR 511, 566–8 [87]–[92].

implementing the Corporations Law directly conferred corporations jurisdiction on the Federal Court for the first time. At the same time, the Australian Securities Commission replaced the National Companies and Securities Commission and the various State regulators. Within two months, Heerey J had decided a case about the validity of a general meeting requisitioned by shareholders.<sup>43</sup> And within the year, the Court had considered issues including: whether a possessory lien was a 'registrable charge' within the meaning of the Corporations Law;<sup>44</sup> the validity of a notice of demands for debts due;<sup>45</sup> the prohibition on the offering of participation interests other than by a public company;<sup>46</sup> the issuance of discounted shares by a no liability company;<sup>47</sup> and applications for winding-up.<sup>48</sup> The list goes on. No longer was the Court's corporations jurisdiction tied to other Commonwealth legislation and its accrued jurisdiction.

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43 *National Mutual Life Association of Australasia Ltd v Windsor* (1991) 28 FCR 214.

44 *Seka Pty Ltd (in prov liq) v Fabric Dyeworks (Aust) Pty Ltd* (1991) 28 FCR 574.

45 *Horans Steel Pty Ltd v Leac Engineering Pty Ltd* (1991) 105 ALR 143.

46 *Australian Securities Commission v Woods & Johnson Developments Pty Ltd* (1991) 31 FCR 560.

47 *Re Esmeralda Exploration Ltd* (1991) 33 FCR 192.

48 See, eg, *Dallhold Investments Pty Ltd (in liq) v Gold Resources Australia Ltd (prov liq apptd)* (1991) 31 FCR 587.

The Full Court also flexed its corporations law muscles, holding that the Federal Court could give leave to commence proceedings against a company in liquidation, notwithstanding that the order for winding-up was made by another court.<sup>49</sup> This was a departure from the position of Toohey J in *Seymour* under the previous regime. But under the new Corporations Law, this was an issue of critical importance, going to the heart of the national scheme. And the Court was acutely aware of that fact. Lockhart J gave the leading judgment. His Honour noted that for a lawyer like him:

who from early days at the Bar spent a deal of time practising in the Equity Division of the Supreme Court of New South Wales (including matters relating to the winding up of companies), it is on first impression a strange notion that a court, other than the court which made an order that a company be wound up, may have jurisdiction with respect to the winding up of that company.<sup>50</sup>

But, as his Honour went on to explain, this notion reflected the 'evident intent of all legislatures within Australia' that 'each of the Federal Court and the Supreme Courts may exercise jurisdiction in respect of civil matters arising under the Corporations Law'.<sup>51</sup> What is particularly interesting about Lockhart J's reasons is how he conceived the role of the Federal Court within this system. He observed the ease with which the Federal Court, being 'one court

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<sup>49</sup> *Acton Engineering Pty Ltd v Campbell* (1991) 31 FCR 1.

<sup>50</sup> *Ibid* 15–16.

<sup>51</sup> *Ibid* 16.

having jurisdiction throughout Australia', could transfer proceedings from one registry to another.<sup>52</sup> For his Honour, in that way, the Court provided 'a useful analogy to the concept embodied in the administration of the Corporations Law in Australia by the Federal Court and all Supreme Courts'.<sup>53</sup> His Honour considered that the Corporations Law recognised

that Australia is one nation with a federal system of government in which each of the Federal Court and the State and Territory Supreme Courts may exercise the jurisdiction possessed by each other under the Corporations Law in a sensible and orderly fashion.<sup>54</sup>

Before the enactment of the Corporations Law, there had been a proposal to place the Federal Court at the heart of the system described by Lockhart J, by conferring upon it exclusive appellate jurisdiction in matters arising under the proposed Corporations Law.<sup>55</sup> That proposal was not adopted and divergences of opinion soon emerged amongst the various courts as to how certain provisions were to be interpreted. It was not long before the High Court stepped in to state a principle of continuing importance:

uniformity of decision in the interpretation of uniform national legislation ... is a sufficiently important consideration to require that an intermediate appellate court ... should not depart from an

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52 Ibid 17.

53 Ibid.

54 Ibid.

55 See Chief Justice Black, above n 36, 1037.

interpretation placed on such legislation by another Australian intermediate appellate court unless convinced that that interpretation is plainly wrong.<sup>56</sup>

And as Michael Black, a former Chief Justice of the Federal Court, has pointed out,<sup>57</sup> that principle was stated in a case that determined that the interpretation placed on the relevant provision by the Federal Court was the correct one – a confirmation of the Court's expertise in corporations matters. Nevertheless, despite the principle, the Chief Justice remarked on the occasion of the 30th anniversary of the Court that he considered that the conferral of exclusive appellate jurisdiction on a court was still the best way to ensure uniformity. Perhaps unsurprisingly, he suggested the Federal Court was the 'obvious candidate'.<sup>58</sup>

Lockhart J was right about Australia at this time. Australia as a nation had evolved greatly since the establishment of the Court, not even 15 years earlier. The Corporations Law, and the Federal Court's role in administering it, reflected Australia as a nation with an important commercial life. But that was just the beginning. The 1990s and the turn of the new millennium saw the privatisation of a number of highly profitable enterprises. The Commonwealth Bank was sold in three parcels between 1991 and 1996. Qantas was sold

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<sup>56</sup> *Australian Securities Commission v Marlborough Gold Mines Ltd* (1993) 177 CLR 485, 492.

<sup>57</sup> Chief Justice Black, above n 36, 1038.

<sup>58</sup> *Ibid.*

in two parcels, one in 1993 and the other in 1995. Commonwealth Serum Laboratories was floated in 1994. And Telstra was sold off in three parcels: in 1997, 1999 and 2006. Investors included institutions and, often for the first time, mums and dads. The nation was changing and maturing, and so was the Federal Court.

### Substantial Amendments to the *Judiciary Act* in 1997

In 1997, the Commonwealth Parliament conferred jurisdiction on the Federal Court to determine all (non-criminal) matters arising under a law of the Commonwealth.<sup>59</sup> This was a significant step. It meant that the Parliament no longer had to specifically confer jurisdiction on the Court in each Act it passed. It also opened up the possibility of federal jurisdiction being attracted in a wider variety of cases.

### *Re Wakim* and the Subsequent Changes

Then, in 1999, the High Court delivered a blow to the Federal Court's corporations jurisdiction in *Re Wakim*. The effect of the decision was that the States could not confer jurisdiction on the Federal Court to determine matters under the Corporations Law. The

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<sup>59</sup> *Judiciary Act* s 39B(1A)(c), as inserted by *Law and Justice Legislation Amendment Act 1997* (Cth) sch 11.

result was not altogether surprising. There had been a near miss only the year before in *Gould v Brown*.<sup>60</sup>

The decision also put to rest the vision that Lockhart J had of matters being transferred between State courts and the Federal Court as simply as between Federal Court registries. And it had an immediate effect on the corporations jurisdiction of the Federal Court. In the 24 months before the decision, 1500 corporations law cases were filed in the Federal Court, about 62 cases each month. From July 1999 when the decision was handed down until March 2000, only six corporations law cases were filed.<sup>61</sup>

But subsequent events would soon change all that. When the legislation implementing the Work Choices policy was challenged in the High Court in 2006, the decision to uphold its validity saw the Court take an expansive view of s 51(xx) of the Constitution — the corporations power.<sup>62</sup> A by-product of the Commonwealth's greater capacity to pass laws under that head of power was the increased potential for matters to arise under a law of the Parliament and, in

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<sup>60</sup> (1998) 193 CLR 346.

<sup>61</sup> See Ian Ramsay, 'States, Commonwealth Put on the Gloves: Challenges to Australia's Federal Corporate Law' [2000] (3) *Journal of the Securities Institute of Australia* 26, 27.

<sup>62</sup> *New South Wales v Commonwealth* (2006) 229 CLR 1 ('*Work Choices Case*').

turn, for the Federal Court to resolve disputes in corporations-related matters.

The decision in the *Work Choices Case* perhaps came a bit late for those who had longed for a federal corporations law.<sup>63</sup> Nonetheless, the goal had in the meantime been achieved with the enactment of the *Corporations Act 2001* (Cth) ('*Corporations Act*'). The constitutional basis of that Act did not rest on the corporations power but on the referral of power from each of the States.<sup>64</sup> The *Corporations Act* conferred jurisdiction on both the Federal Court and the Supreme Courts of each State and Territory. And the Federal Court recovered strongly from the setback of *Re Wakim*. In the year ending June 2008, it delivered 224 corporate law judgments — 31.6 per cent of the national total, and second only to the Supreme Court of New South Wales.<sup>65</sup>

But it was not just the number of matters heard by the Court that was increasing — so too were the size and complexity of those matters. The Federal Court decided a number of important corporations cases in and around 2007 and 2008. *ASIC v Citigroup*

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<sup>63</sup> See Chief Justice Bathurst, above n 9, 18 [57].

<sup>64</sup> See *Corporations Act* s 3(1).

<sup>65</sup> See Ian Ramsay and Are Watne, 'Which Courts Deliver Most Corporate Law Judgments? A Research Note' (2008) 26 *Company and Securities Law Journal* 392, 393.

*Global Markets Australia Pty Ltd [No 4]*<sup>66</sup> – a case concerning alleged contraventions of the *Corporations Act* arising out of fiduciary relationships and insider trading – is but one example. It was around this time that Sackville J in the *C7* matter bemoaned the rise of so-called 'mega-litigation'.<sup>67</sup>

And there was more mega-litigation to come.

### Global Financial Crisis and its Aftermath

In 2007 and 2008, Australia – along with the rest of the world – was affected by the Global Financial Crisis. The crisis generated much litigation – including for the Federal Court – involving many parties and complex questions of fact and law. That litigation included *Centro*, *Richstar*, *Fortescue*, *GDK*, *Primelife* and *Citigroup*, to name just a few. The difficult and important work of the Court over this period is demonstrative of the expertise the Court had built up in corporations-related issues since its inception.

Part of the legacy of the Global Financial Crisis is that the Federal Court has also developed a degree of expertise in the resolution and management of shareholder class actions. For

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<sup>66</sup> (2007) 160 FCR 35.

<sup>67</sup> *Seven Network Ltd v News Ltd* [2007] FCA 1062 (27 July 2007) [2]–[7], [11], [19]–[28], [46]–[74].

example, several local councils brought a representative proceeding against Lehman Brothers for losses on various highly complex financial instruments that the councils had acquired.<sup>68</sup> The councils made claims in contract, in negligence, for misleading and deceptive conduct, and for breaches of fiduciary duty.<sup>69</sup> *ABN AMRO Bank NV v Bathurst Regional Council*,<sup>70</sup> a Full Court decision of which I was a part, involved similar facts and circumstances.

Another prominent set of representative proceedings related to the collapse of the Centro Group, which ultimately settled during trial.<sup>71</sup> The Opes Prime collapse also played out, in part, in the Federal Court,<sup>72</sup> and the collapse of Storm Financial generated much litigation that continued long after the event.<sup>73</sup> Much real and virtual ink has been spilt over many thousands of paragraphs as a result of the Global Financial Crisis. The simple point I wish to make here is that the Federal Court had, and retains, the flexibility and the

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68 *Wingecarribee Shire Council v Lehman Brothers Australia Ltd (in liq)* (2012) 301 ALR 1.

69 *Ibid* 13–8 [10]–[28].

70 (2014) 224 FCR 1.

71 *Kirby v Centro Properties Ltd [No 6]* [2012] FCA 650 (19 June 2012).

72 See, eg, *Beaconwood Securities Pty Ltd v Australia and New Zealand Banking Group Ltd* (2008) 246 ALR 361.

73 See, eg, *Re Storm Financial Ltd (recs and mgrs apptd) (admin apptd)*, *ASIC v Storm Financial Ltd (recs and mgrs apptd) (admin apptd)* (2009) 71 ACSR 81; *ASIC v Storm Financial Ltd (recs and mgrs apptd) (in liq)* [2011] FCA 763 (9 June 2011); *ASIC v Richards* [2013] FCAFC 89 (12 August 2013).

expertise to respond to the challenges thrown up by the reality of Australia's economic and commercial circumstances.

And, of course, the Federal Court continued to decide disputes unrelated to the Global Financial Crisis – many of which, such as *Grimaldi v Chameleon Mining NL [No 2]*,<sup>74</sup> are likely to be of long-lasting importance.

The effects of the Global Financial Crisis were felt for a considerable period of time. The landscape had changed globally and nationally. But there were other significant matters that affected the Court's jurisdiction.

2008 saw the introduction of the *Cross-Border Insolvency Act 2008* (Cth) ('*Cross-Border Insolvency Act*'). With it, Australia joined the likes of the United Kingdom, the United States, Japan, Poland, South Africa and New Zealand in implementing the Model Law on Cross-Border Insolvency of the United Nations Commission on International Trade Law ('UNCITRAL').<sup>75</sup>

The *Cross-Border Insolvency Act* was intended to provide more effective cooperation between foreign courts and insolvency practitioners, add greater certainty to coordination of multi-State

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<sup>74</sup> (2012) 200 FCR 296.

<sup>75</sup> *Cross-Border Insolvency Act* (Cth) sch 1.

insolvency proceedings, grant access to Australian courts to persons administering foreign insolvency proceedings, and ensure foreign creditors were not discriminated against on the basis of being foreign.<sup>76</sup> And it was not long before questions about its construction came before the Federal Court.

*Akers v Deputy Commissioner of Taxation*,<sup>77</sup> heard by the Full Court in 2014, addressed the power of the Court to make orders modifying the rights and obligations of representatives of foreign proceedings where assets were held in Australia.

Under art 21.2 of the Model Law, as incorporated into Australian law, the Court could entrust the distribution of the assets located in Australia of a foreign registered company to a foreign representative, if the Court was satisfied that the interests of Australian creditors were adequately protected. In that case, the company concerned — Saad Investments Co Ltd — was registered, and was being wound up in, the Cayman Islands.

At first instance, Rares J made orders recognising the foreign winding-up proceedings and the liquidators as the joint foreign representatives, and entrusting Saad's assets located in Australia to

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<sup>76</sup> Commonwealth, *Parliamentary Debates*, Senate, 13 February 2008, 242–3 (Joseph Ludwig).

<sup>77</sup> (2014) 223 FCR 8 ('*Akers*').

the joint foreign representatives.<sup>78</sup> Two years later, on subsequent application by the Deputy Commissioner, Rares J varied the original recognition orders to the effect that US\$7 million in proceeds of realisations and sales of the company's assets in Australia could not be remitted to the Cayman Islands. His Honour permitted the Deputy Commissioner to take enforcement steps against the company in Australia and in respect of the company's remaining assets in Australia.<sup>79</sup>

On appeal, Allsop CJ, with whom Robertson J and Griffiths J agreed, held that Rares J had power to make the modified orders.<sup>80</sup> Perhaps unsurprisingly, at the heart of the Full Court's reasons were the interests of creditors. Allsop CJ observed that:

Whilst the Model Law reflects universalism, there is nothing in the Model Law or the UNCITRAL Working Papers prior to its formulation, or in the [*Cross-Border Insolvency Act*], which would justify the stripping of rights of a local creditor by reason of recognition. The universalism that underpins [the scheme] is one for the benefit of all creditors, and the protection of local creditors is expressly recognised.<sup>81</sup>

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78 *Ackers v Saad Investments Company Ltd (in official liq)* (2010) 190 FCR 285, 297 [58]–[59]. See also the form of those orders extracted in *Akers* (2014) 223 FCR 8, 13–4 [18]. The first to third appellants — the joint foreign representatives — were the plaintiffs at first instance.

79 *Akers v Saad Investments Co Ltd* [2013] FCA 738 (30 July 2013) [53]. See also the form of those orders extracted in *Akers* (2014) 223 FCR 8, 15 [24].

80 *Akers* (2014) 223 FCR 8, 42 [140], [143]; see also 29 [80], 30 [87], 31 [92].

81 *Ibid* 36–7 [120].

According to the Chief Justice, the 'most potent informing principle [was] the notion of fair and equal treatment of all creditors, and the *pari passu* distribution of assets of the debtor company'.<sup>82</sup> The issues were significant. And their significance was not limited to cross-border insolvency. The manner in which these cases were heard and resolved is just as important to the future of this Court as were the first few cases involving company law issues that were heard in the 1970s.

Cross-border insolvency was not the only area of the Court's work to undergo significant change and expansion. 2009 saw an overhaul of personal securities registration and management, with the introduction of the *Personal Property Securities Act 2009* (Cth) ('PPSA'). That was followed in 2012 by the creation of the national, centralised Personal Property Securities Register. The aims of the reforms were to address the complexity of dozens of existing Commonwealth, State and Territory laws and to introduce a harmonised regime considered 'essential for any modern financial system'.<sup>83</sup> This harmonisation was another step towards a seamless national economy for Australia — a goal formally agreed to by the Commonwealth and each of the States and territories in the

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<sup>82</sup> Ibid 41 [138]; see also 29 [80], 30 [87], 31 [92], 42 [140], [143].

<sup>83</sup> Commonwealth, *Parliamentary Debates*, Senate, 26 November 2009, 9017 (George Brandis).

preceding 18 months.<sup>84</sup> And although the Federal Court was not the only Court on which the *PPSA* conferred personal securities jurisdiction,<sup>85</sup> these reforms evidently had an impact on the Federal Court's work.

### Recent Developments

During 2016 and 2017, corporations and insolvency law has been the focus of a number of further reforms. In 2016, for example, the Commonwealth Parliament enacted the *Insolvency Law Reform Act 2016* (Cth) – 'An Act to amend the law in relation to personal and corporate insolvency, and for related purposes'. Further 'refinements' have been suggested.<sup>86</sup> And in September 2017, the 'Safe Harbour' amendments to the *Corporations Act* came into effect.<sup>87</sup> We are also yet to see what, if anything, might arise out of the *Harper Review* into competition policy – an area which plays a central role in the Court's corporations work.

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<sup>84</sup> See Council of Australian Governments, 'National Partnership Agreement to Deliver a Seamless National Economy' (2009).

<sup>85</sup> *PPSA* s 207.

<sup>86</sup> See *Refining the Insolvency Law Reform Act 2016* (3 May 2017) The Treasury <<https://treasury.gov.au/consultation/refining-the-insolvency-law-reform-act-2016/>>.

<sup>87</sup> *Treasury Law Amendment (2017 Enterprise Incentives No 2) Act 2017* (Cth).

And although the *Corporations Act* is now well established and ingrained in our nation's commercial life, there remains an important issue, yet to be resolved, about the construction and potential operation of ss 5F and 5G of the *Corporations Act* – which concern the interaction between State and Commonwealth laws on corporations matters. The provisions contain mechanisms which give State and Territory legislatures a degree of flexibility in legislating on matters otherwise governed by the *Corporations Act*. They are a reminder of the compromise that necessarily forms part of a Commonwealth corporations law enacted in reliance on a referral of power from the States. As foreshadowed by the Bell Group litigation that reached the High Court in 2016, these provisions are a potential flashpoint for Commonwealth-State relations in corporations matters in the future.<sup>88</sup>

### The Future

What, then, does the future hold? First, there is the issue of criminal jurisdiction. Of course, it would be open to the Commonwealth Parliament to confer criminal jurisdiction on the Federal Court for indictable offences in the *Corporations Act*. The Federal Court already has the expertise to deal with civil

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<sup>88</sup> See *Bell Group NV (in liq) v Western Australia* (2016) 90 ALJR 655, 658 [5]–[6].

contraventions under the *Corporations Act*,<sup>89</sup> and has the capacity to deal with indictable offences,<sup>90</sup> following on from the conferral of its criminal jurisdiction relating to cartels.<sup>91</sup>

Second, part of the answer to what the future might hold will depend on Australia's political and economic circumstances.

However, there are a number of general matters that should not be overlooked. As the last 40 years have demonstrated, Australia has changed legally, economically, politically and socially. The country has had to continually reflect and adjust. And so has the Court. The Federal Court has become a properly national Court. But the relationship between the nature of the Court's work and Australia's political, economic and legal life is not one way. The Court is certainly affected by those events. But, at the same time, it has a role to play in maintaining Australia's economic prosperity. A strong national commercial court is essential to Australia's economic prosperity. That is the challenge for the future — a challenge which

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89 See *Corporations Act* s 1311. See also *ASIC v Whitebox Trading Pty Ltd* (2017) 345 ALR 424, on the relationship between civil penalty proceedings, criminal offences under the Act, and the *Criminal Code* (Cth).

90 *Federal Court Act* pt III div 1A (Original jurisdiction (indictable offences)), as amended by the *Federal Court of Australia Amendment (Criminal Jurisdiction) Act 2009* (Cth).

91 See *Competition and Consumer Act 2010* (Cth) ss 44ZZRF, 44ZZRG, 163. See also Justice Michelle Gordon, 'Criminalisation of Cartel Conduct: Can Commercial Competition Litigators Become Criminal Defence Lawyers?' [2010] *Federal Judicial Scholarship* 23.

requires considerable effort and thought about what kind of legal system this country wants, needs and can provide. The challenge for the Federal Court, as well as other courts, is not only to ask and answer those questions but to act on them.

And we need to think outside the square. The headlines in the national papers read 'Lawyers must "wake up" to changes' and state that there are 'many ways to resolve disputes'. Stating these points is easy. But what can or should be done? And how should we seek to answer those questions? The judiciary does not have all the answers. The profession does not have all the answers. The disputing parties might have some ideas about what they want and need from a judicial system. If resolution is the aim, how might that be achieved? Might it be an ability to lodge notice of a dispute in the Court, before a proceeding is filed, which would seek to have the matter resolved, or even the issues narrowed, by a Registrar of the Court? The advantages of such a process are not limited to the disputing parties. Yes, those parties will have access to justice on a more cost effective basis; yes, the focus will be on resolution, not disputation; and yes, consistent with modern thinking, the benefits in the parties being directly involved in solving their own problems cannot be underestimated. But this, and other ideas like it, have more wide-ranging benefits. They ensure that scarce judicial resources are directed at disputes that in fact require the exercise of judicial power. That, in turn, increases access to justice and the

speed at which disputes are resolved. And that has got to be a good thing.

Another important matter is the question of appeals. Commercial parties want a result. Why not offer a service where the parties can, by written consent, agree that there will be no appeal, along the lines of commercial arbitration? The Court has the expertise and the infrastructure. What else does it need?

That list is not exhaustive. Others may have better ideas. For example, I have not even mentioned technology and the advantages it already provides, and will in the future provide, for the narrowing of disputes and for online resolution.

### Conclusion

If the last 40 years are any indication, the legal, economic, political and social life of this nation will continue to change and to do so at an ever-increasing pace. Whatever the nature and source of the changes, the Court needs to be flexible and innovative but continue to do its work to the highest of standards.

The opportunities, for the nation and for the Court, are unlimited but inextricably intertwined.