

Foreword

Sir Anthony Mason AC, KBE, GBM

The very mention of “federal jurisdiction” is enough to strike terror in the hearts and minds of Australian lawyers who do not fully understand its arcane mysteries. The expression conjures up images of constitutional train-wrecks of which *Momcilovic v The Queen*¹ is a spectacular example. As in other cases, no one, including the judges and counsel in the courts below, realised that the jurisdiction exercised in *Momcilovic* was federal until the case reached the High Court. Another illustration of the hazards is the *Cassegrain* litigation mentioned by the author where the interaction of federal and State jurisdiction became a major problem.

Yet another illustration of the inherent complexities is that this area of constitutional law has generated more diversity and conflict of judicial opinion than any other area of Australian constitutional law. A significant number of High Court decisions reflect a division of opinion and there are, as a reading of this book reveals, many important questions which await a definitive answer.

The fourth edition of *Cowen and Zines's Federal Jurisdiction in Australia* by Professor Geoffrey Lindell identifies and explains not only these questions and the mysteries of federal jurisdiction but also provides a comprehensive and coherent account of federal jurisdiction generally. Since the third edition was published in 2002, there have been major developments in the areas discussed in the earlier editions. The fourth edition is therefore much more than an “update”. It amounts to a major re-working of the earlier editions, most notably the addition of new Chapters 8, 9 and 10.

The major changes are:

- Chapter 1 contains a new introductory analysis of the meaning and purpose of federal jurisdiction; further developments in relation to the all-important concept of “matters”, in particular the extent to which courts vested with federal jurisdiction may grant non-legally binding declarations of incompatibility with human rights norms; and a discussion of the scope of the legislative power of the Commonwealth Parliament to legislate with respect to federal jurisdiction and the extent to which it is exclusive.
- Chapter 7 contains a much expanded and separate discussion of the principle in the *Kable* and *Kirk* cases to take account of the more recent extensive judicial elaborations which have taken place.
- Chapter 8 analyses the law to be applied by courts exercising federal jurisdiction, in particular ss 79 and 80 of the *Judiciary Act 1903* (Cth).
- Chapter 9 contains an analysis of the appellate jurisdiction of the High Court.

1 (2011) 245 CLR 1.

FOREWORD

- Chapter 10 contains closing reflections on the present state of the law relating to federal jurisdiction, noting the beneficial outcomes flowing from a series of High Court decisions, while pointing up the shortcomings and complexities inherent in the system of dual jurisdictions (federal and non-federal) in effect mandated by the Constitution.

The author rightly points to the merits of a substantial number of High Court decisions, particularly those dealing with privative clauses and others clarifying the meaning and operation of ss 79 and 80 of the *Judiciary Act*. On the other hand, he has subjected to searching scrutiny several High Court decisions which have contributed, some (perhaps many) would say, unnecessarily to the problems of federal jurisdiction. In doing so, he has invariably drawn attention to the various and conflicting views which have been expressed by professional and academic commentators.

Of these decisions, *Momcilovic* stands out. In that case, a majority of the Court took a cribbed, cabined and confined view of the scope of judicial power, partly stemming from a doctrinal view of “matter” in s 76 of the Constitution. Whether or not the matter can be regarded as settled by the case, the majority conclusion was that a declaration of inconsistency (incompatibility) in the context of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) was beyond power, at least with respect to the exercise of federal jurisdiction. The author points out that in the United Kingdom a contrary view prevails and that a like view has been upheld in New Zealand in *Taylor v Attorney-General*.² In neither jurisdiction is the making of such a declaration seen to lie outside the scope of judicial power or to be inconsistent with it. The author refers to the Joint Opinion of S Gageler SC and H Burmester QC which convincingly demonstrates that the making of such a declaration satisfies the stringent demands of the constitutional requirements of the word “matter”, as it has been interpreted by the High Court.

The origin of the *Momcilovic* problem traces back to *Re Judiciary and Navigation Acts*³ where the Court assigned a restricted meaning to the word “matter”, narrowly reflecting the now outdated view of federal judicial power expressed by Griffith CJ in *Huddart, Parker & Co Pty Ltd v Moorehead*,⁴ thereby imposing restrictions on the scope of the Commonwealth Parliament’s legislative choices. A similar comment may be made about the *Boilermakers Case*.⁵ At the same time the author expressly acknowledges that the two decisions may now be so firmly embedded in our constitutional framework as to be beyond recall, the latter perhaps more so than the former, the consequences of the former being more wide-ranging.

In terms of its impact on the practical importance of the distinction between federal and non-federal jurisdiction *Re Wakim; Ex parte McNally*⁶ attracts the author’s criticism. Before the cross-vesting legislation met its untimely death in

2 [2015] NZHC 1706.

3 (1921) 29 CLR 257.

4 (1909) 8 CLR 330.

5 (1956) 94 CLR 254 (HC); affirmed (1957) 95 CLR 529 (PC).

6 (1999) 198 CLR 511.

FOREWORD

that case, the legislation had reduced the practical importance of the distinction. *Re Wakim* has restored the distinction to its former vitality so that it continues to haunt us.

In singling out the author's discussion of the more controversial High Court decisions, I have endeavoured briefly to convey my impression of the depth and reach of the author's grasp of his subject. The work is a mine of information, accompanied by sophisticated and elaborate analysis. This enables me to say that the fourth edition of the book not only builds on the work of the author's distinguished predecessors but surpasses it.

This tribute will come as no surprise to those who are familiar with the author's work. He is renowned for his meticulous and painstaking scholarship, qualities which are essential to an author brave enough to venture upon the treacherous seas of federal jurisdiction.

Cowen and Zines's Federal Jurisdiction in Australia is an outstanding work, destined to play an important part in the understanding and elucidation of the mysteries which beset this troubled area of our law. It will be of inestimable value to judges, practitioners and students alike.

Sydney
July 2016