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Judicial Exchange – Debalkanising the Courts

Author: The Hon Justice Robert French • Federal Court of Australia

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Table of Contents

Introduction

1. Many years ago my brother-in-law,[1] who comes from Sydney, obtained his doctorate in psychology from Princeton University. He was offered academic positions at the University of Western Australia and at Sydney University. He decided to accept the offer from Western Australia. His Sydney friends were horrified. 'How can you go to Perth?' – they asked. My brother-in-law, who describes himself as a former fringe member of the Sydney Push, replied pungently – 'One small town is much like another'. Now in his mid 70's and a Professor Emeritus at the University of Western Australia he continues, unfettered by age or geography, to conduct internationally recognised and published research in vision science. His riposte, as valid today as it was when he made it, reflects the proposition that parochialism is more a state of mind than a function of the State you are in. It reminds us also that although geographically dispersed around a huge continent we are, relatively speaking, a small society.

2. Parochialism is a mental virus, which can infect anybody. It does not have to be geographic. It can be institutional or occupational or even specialty based within occupations. It is a confining of thought and vision which prevents people and organisations from reaching their full potential. The legal profession is prone to it in a variety of ways and the judiciary is not immune. The opportunities for parochialism arise as between the courts of the different States and Territories, the State and Federal judiciaries and even between jurisdictions within a State or Territory – that is as between Magistrates, the District and County Courts, the Supreme Courts and their Courts of Appeal.

3. Australia's lawyers have moved decisively in recent times to the formation of a truly national legal profession. With the support of an agreement made in 2003 between Commonwealth, State and Territory Attorneys-General, they have developed a National Legal Profession Model Bill[2] which provides for, inter alia, uniform standards for entry qualifications and for conduct rules. Its stated objectives include the encouragement of competition leading to greater choice and other benefits for consumers and the integrated delivery of legal services on an Australia-wide basis.

4. Despite the existence of separate State, Territory and Federal Court systems there is a sense among Australian judges and magistrates from whichever geographical or subject matter jurisdiction they come from, that they are members of a national judiciary. This is reflected in a variety of ways including annual national conferences of Supreme and Federal Court judges, of District and County Court judges and of magistrates. It is reflected in the formation of Councils of Heads of Jurisdiction – the Councils of Chief Justices, Chief Judges and Chief Magistrates. It is also

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1 Professor John Ross

2 See Law Council of Australia website for a copy of the National Legal Professional Model Bill at www.lawcouncil.asn.au.

reflected in the participation by all jurisdictions in the work of the Australian Institute of Judicial Administration and, more recently, in the formation of the Judicial Conference of Australia and the Judicial College.

5. That sense of membership of a national judiciary is consistent with the constitutional theory, expounded by the High Court in *Kable*,[3] that State and Federal courts together comprise a national judicial system. Institutional unification or integration has been debated on many occasions since federation. Prominent contributors to that debate have included Sir Owen Dixon, Justice Rae Else-Mitchell, Sir Garfield Barwick, Sir Nigel Bowen, Sir Harry Gibbs, Sir Laurence Street, Justice Andrew Rogers and Sir Francis Burt. The debate has tended to focus on the difficulties associated with distinct federal and state jurisdictions and the development of the dual system of federal and state courts. Its major outcome has been the cross-vesting system which survives as between State and Territory courts and for the purpose of cross vesting from Federal to State courts. There remains a plurality of competent collegial State and Territory courts which locates the power to appoint the judiciary in various centres, maintains local political accountability, allows institutional adaptability to local conditions and provides opportunities for innovation and cross fertilisation of ideas. That plurality however brings with it geographical confinement and limits opportunities for participation by the judges of those courts in the judicial profession at a national level. There are also significant differences between the size of the courts in the two most populous States (NSW and Victoria) and those of the courts in the remaining States and Territories. There is a risk, because of that disparity in size and the numerical concentration of the legal profession and commercial and associated litigious activity in the two major centres, that the courts of the smaller States and Territories, and particularly the Supreme Courts, will be marginalised. This is a loss to the whole of the Australian system because there are many excellent judges in the smaller States and Territories who have much to contribute to the development of the law at a national level. There are benefits to be derived by the judges and the courts and the Australian community in the widening of opportunities for practical participation, through exchange arrangements, in the national judicial system. There are also benefits to be derived from exchanges between trial and appellate courts within the States and Territories.

6. The purpose of this paper is to propose the development of a comprehensive system of horizontal and vertical judicial exchanges throughout Australia with a view to advancing:

1. Individual judicial performance.
2. The performance of the courts as institutions.
3. Allocation of national judicial resources to areas of local need including the need for specific expertise.
4. The attractiveness of judicial appointment in all jurisdictions,

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3 *Kable v Director of* Public *Prosecutions (NSW)* (1996) 189 CLR 51

5. Consistent Australia-wide approaches to the administration of justice while maintaining healthy institutional pluralism.

6. National collegiality between Australian judges.

The proposal extends to the establishment of ad hoc composite State and Territory appeal benches in cases of general significance arising in a particular State or Territory appeal court or Full Court. This is an aspect of horizontal exchange at the appellate level. It effectively allows for the deployment, in appropriate cases, of a de facto national intermediate Court of Appeal.

7. The practical basis for these proposals is in part my own experience as a Judge of the Federal Court. Each of the Court's judges has a home base in which the bulk of his or her work is done. If the judges in one centre are overburdened assistance may be made available by assigning an interstate judge to deal with urgent hearings or matters which have been awaiting listing. The judges exercise both original and appellate jurisdiction. Appellate jurisdiction is exercised by Full Courts comprising three and, in exceptional cases, five judges who may come from any of the Australian States. Appeals from the Federal Magistrates Court can be heard by a single judge. Just as with the judges of the State and Territory courts each of the members of the Federal Court comes out of his or her local profession with its own distinctive culture. The mix of perspectives and approaches which results is a positive aspect of its appellate jurisdiction in particular.

8. As an additional judge of the ACT Supreme court I have sat with permanent members of that Court on appeals and will be sitting at first instance on two criminal trials shortly. As a member of the Supreme Court of Fiji, which is the final appeal court in that country, I have participated in a variety of matters criminal, civil and constitutional, with the Fijian Chief Justice and judges from the New South Wales Court of Appeal, the Supreme Court of Western Australia and the Supreme Court of New Zealand.

9. There are many benefits to be derived from exposure to diversity in judicial work. One of them is a sharpened sense of what is essential and what is inessential in the law. This is an understanding which lawyers sometimes find difficult to attain. To the extent that Australian judges can be exposed to diversity within the national judicial system they have the opportunity to be better judges and make their courts better courts.

10. Exposition of the benefits of judicial exchange however does not imply that judicial localism is an evil whose worst effects are to be mitigated. As de Jersey J pointed out in a paper given at an AIJA seminar in 1987 on proposals for change in the Australian Judicial System:

'There is…great advantage in having cases tried and appeals as of right heard by judges familiar with local conditions, practice and legislation although of course such features will sometimes assume little significance. But many actions based in

contract, tort or property can have a substantial local element as, of course, do criminal proceedings.' [4]

Historical context and constitutional framework

11. Depending upon its extent, judicial exchange between Australian Courts may be regarded as developing a degree of virtual partial integration between them. It has the immense advantage that it requires neither reshaping of those institutions nor constitutional change. Nor is there the diffusion of political responsibility which can accompany the creation of hybrid state/state or state/federal institutions. Exchange can be done for the most part administratively although statutory amendments may facilitate it. It does not require any sacrifice of the federal character of the judiciary nor any loss of the benefits of pluralism. It arguably creates opportunities to give effect to the established concept of a national judicial system which is part of our constitutional arrangements and to extract from it greater benefits than it presently yields. Consideration of a comprehensive exchange system should be informed by an awareness of the relevant historical context and constitutional framework and the considerable amount of intellectual energy that has been expended over the last 40 years in debate about the structure of the Australian court system.[5]

12. When the six Australian colonies became States of the Federation in 1901 each had a well-established Supreme Court modelled on the Supreme Court of Judicature in England. Queensland, New South Wales, Victoria and South Australia had intermediate trial courts. All had courts of summary jurisdiction. Appellate jurisdiction was exercised by Full Courts of the Supreme Courts and, on appeals from the summary courts, could be exercised by single judges of the Supreme and District or County Courts. Appeals to the Privy Council from decisions of the Supreme Courts existed as of right or by leave.

13. The structures of the judicial systems of the colonies did not change at federation. They have continued substantially unaltered save that Courts of Appeal have been created in New South Wales, Victoria, Queensland and Western Australia. District or County Courts now exist in all States except Tasmania. Supreme Courts and Magistrates Courts have been established in the Northern Territory and the Australian Capital Territory. There is also a Supreme Court of the Norfolk Island territory. In addition there have developed over time a variety of specialist courts and tribunals around Australia.

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4 P. de Jersey , '*Proposals for Change in the Australian Judicial System: Appellate Structures*', AIJA 6th Annual Seminar September 1987, Perth at 17-18

5 For a more detailed account see Chapter 3 of the 1987 Report of the Advisory Committee on the Australian Judicial System to the Constitutional Commission on which this outline is partly based. See also French, 'Federal Courts Created by the Parliament' in Opeskin and Wheeler (eds) '*The Australian Federal Judicial System*' (2000) at 123-159

14. It is an important historical fact that at the time of federation the Supreme Courts of the colonies were courts of high standing. This was reflected in Chapter 3 of the Constitution which allowed for federal jurisdiction to be exercised by the State Courts – the so called 'autochthonous expedient'. The relevant provisions are ss 71, 75, 76 and 77.

15. Section 71 of the Constitution vests the judicial power of the Commonwealth in the High Court of Australia, such other federal courts as the Parliament creates and such other courts as it invests with federal jurisdiction. By s 77 the Parliament may invest any court of a State with federal jurisdiction in any of the matters referred to in ss 75 and 76. These include matters arising under the Constitution and involving its interpretation and matters arising under any laws made by the Parliament. That expedient was rejected in the United States because of the perceived parochialism and lack of independence of state courts in that country. Alexander Hamilton, in the Federalist Papers, said that it was impossible to foresee 'how far the prevailing of a local spirit [might] be found to disqualify the local tribunals for the jurisdiction of national causes'. The ways in which some State courts in the United States were constituted would render them 'improper channels of the judicial authority of the Union'. And those in which the judges held their office at pleasure or from year to year would be 'too little independent to be relied upon for an inflexible execution of the national laws'.[6] On the other hand the Australian State Supreme Courts at the time of federation were seen as being of a uniformly high standard which, as Professor Sawer observed was a situation 'in marked contrast with that which obtained in the United States shortly after its establishment'.[7]

16. At the time of federation, Henry Bourne Higgins argued for the deferment of the establishment of the High Court and that the supervision of the Constitution should be left to the State Supreme Courts. They were, after all, bound by the Constitution by virtue of covering cl 5. Notwithstanding that argument the *Judiciary Act* was passed in 1903 and provided for a High Court comprising a Chief Justice and two justices. Importantly, s 39 of that Act, subject to some exceptions and the limitations of their jurisdictions as to locality, subject matter or otherwise, invested State courts with federal jurisdiction in all matters in which the High Court has original jurisdiction or can have original jurisdiction conferred upon it. The exceptions related to the exclusive original jurisdiction of the High Court in matters defined in s 38 which was extended in 1907 to matters including the limits inter se of the constitutional power of the Commonwealth and the States and the limits inter se of the constitutional powers of any two or more States.[8] So the State Courts in 1903 had jurisdiction in matters arising under the Constitution or involving its interpretation and in matters arising under laws of the Commonwealth

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6 Hamilton, Jay and Madison, *The Federalist Papers* No 81 at 528

7 Sawer, *Australian Federalism in the Courts* (1967) Melb University Press at 20-21; see also Barwick, *The State of the Australian Judicature* (1977) 51 ALJ 480 at 482

8 *Judiciary Act 1907* s 38A

Parliament.[9] The Federal Court which, prior to 1997, had limited jurisdictions granted under particular statutes, was given general federal jurisdiction like that of the States by the enactment of s 39B(1A)(b) of the *Judiciary Act*.

17. Because of the provisions of the *Judiciary Act* and covering cl 5 of the Constitution, the State courts have, and have had since 1903, large areas of jurisdiction in common in matters arising under federal law and in matters involving the Constitution and its interpretation. Constitutional adjudication in Australia is decentralised. Subject to the notice and removal provisions of the Act it can be undertaken by all courts albeit the final arbiter is the High Court as Australia's ultimate constitutional court. This contrasts with the position in Europe where constitutional adjudication is centralised in constitutional courts such as those of France, Germany, Italy, Spain and Austria. As the Australian Law Reform Commission pointed out in its report on the judicial power of the Commonwealth, less than 8% of constitutional matters notified each year under s 78B of the *Judiciary Act* attract the intervention of the Commonwealth Attorney-General. The Commission found that there was unanimous support for the decentralised model. Any change to it could cause the High Court to be swamped with relatively minor constitutional issues, jeopardise its general appellate jurisdiction and generate the need for a new court of final appeal in non-constitutional matters.

18. The State courts also administer the common law which has sometimes been referred to as the unwritten law of the States and Territories. The notion that post–federation there was only one common law for the whole of Australia is now well established. It was foreshadowed by Quick and Garran:[10]

'Throughout the Commonwealth of Australia, the unlimited appellate jurisdiction of the High Court will make it – subject to review by the Privy Council – the final arbiter of the common law in all the States. The decisions of the High Court will be binding on the courts of the States; and thus the rules of the common law will be – as they always have been – the same in all the States. In this sense, that the common law in all the States is the same, it may certainly be said that there is a common law of the Commonwealth.'

19. Inglis Clark took a different view. He thought the High Court would have jurisdiction to decide questions arising under 'whatever portion of the common law will from time to time constitute a portion of the law of any State'.[11] He did not think that, except in relation to the executive powers of the Crown, there could be any federal common law in Australia. Indeed for a time the High Court itself took a similar view.[12]

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9 *Judiciary* Act *1903* s 39

10 Quick and Garran, *Annotated Constitution of the Australian Commonwealth* (1901) Legal Books (1976 reprint) at 785

11 Inglis Clark, *Studies in Australian Constitutional Law* (1901) at 192

12 *R v Kidman* (1915) 20 CLR 425 and see LJ Priestley, *A Federal Common Law in Australia* (1995) 6 Public Law Review 221 at 229-230

20. Judgments of the High Court in the 1990s foreshadowed the proposition that there is but one common law of Australia.[13] In *Kable*, McHugh J said:

'Unlike the United States of America where there is a common law of each State, Australia has a unified common law which applies in each State but is not itself the creature of any State.' [14]

In *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 564 it was said in the joint judgment of the Court:

'The Constitution, the federal, State and territorial laws, and the common law in Australia together constitute the law of this country and form "one system of jurisprudence".'

In *Lipohar v The Queen* (1999) 200 CLR 485 at 505, in their joint judgment Gaudron, Gummow and Hayne JJ expressly adopted the statement made by McHugh J in *Kable*. *Lipohar* was a case in which persons were charged in South Australia with common law conspiracy. The conspiracy was said to have been formed and performed outside South Australia but to have had a South Australian company as its target. The Supreme Court was held to have jurisdiction to entertain the charges. In so holding the High Court affirmed the existence of a single common law of Australia rather than a mosaic of bodies of State and Territory common law. The judges also said however that when the High Court had not ruled on a matter the rules for decision in the courts below it in the hierarchy would be defined by the doctrine of precedent. If the intermediate appellate courts of the States did not speak with a single voice on such a matter, then the rule enunciated by the appellate court of any particular State would be peculiar to that State *pro tem*. [15]

21. In addition to federal jurisdiction and the jurisdiction in relation to the common law there are many State statutes which follow common forms or reflect uniform legislative arrangements. The State Constitutions themselves have features which derive from the 19th century Imperial equivalent of constitutional word processors, albeit there have been changes over the years since federation.

22. The preceding observations are relevant, not only to the utility of judicial exchanges at the trial level, but also to a proposal advanced later in this paper for the formation of mixed jurisdictional intermediate appeal benches. In cases in which questions of cross jurisdictional significance arise in a particular State or Territory appeal court a composite bench could be formed comprising appeal judges from a number of States or Territories. The question might then be resolved in a way that would attract acceptance from jurisdictions right across Australia. Indeed the decisions of such a mixed intermediate court might be able to be treated as

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13 *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 15; *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 at 556; *Burnie Port Authority v General Jones Pty Ltd* (1992) 179 CLR 520 at 557

14 (1996) 189 CLR 51 at 112

15 200 CLR 485 at 506

binding authority under a development of State and Territory precedent doctrines.

The never-ending story - proposals for unification, integration and rationalisation of the Australian courts

23. The pluralism of the Australian court system has stood substantially unchanged since federation despite powerful proponents of its rationalisation and integration.

24. Sir Owen Dixon advocated, before the Royal Commission on the Constitution in 1927, the creation of a unified system of courts. The courts he envisaged would be neither federal nor state and would have authority to determine legal questions raised before them regardless of the source of the rights or obligations in issue. That proposal was not adopted. He returned to his theme, in a lecture given at Melbourne University in 1935 under the title '*The Law and the Constitution*'[16]. Reflecting upon the constitutional structure of the separate federal and state court systems he said:

'... it would not have been beyond the wit of man to devise machinery which would have placed the courts, so to speak, upon neutral territory where they administered the whole law irrespective of its source.'

Under the Dixon proposal the governments of the federation would each have contributed financially to the operation of the courts. Appointments would have been effected through some form of joint intergovernmental committee.

25. In 1958 Gough Whitlam, in a Parliamentary Speech, proposed the creation of a Federal Supreme Court which he said would be 'somewhat on the lines of the United States Circuit Court of Appeal'. Somewhat confusingly he also proposed that it be 'a commercial court for the whole of Australia' and 'might also deal with matters of status and domestic law.[17]

26. At the 1963 Australian Legal Convention Mr MH Byers QC and Mr PB Toose QC proposed the establishment of a new Federal Court to be invested with federal jurisdiction in all matters in which the High Court had original jurisdiction and in which the State courts had invested federal jurisdiction.[18] At the same conference the Commonwealth Solicitor-General, Sir Kenneth Bailey, advised that Sir Garfield Barwick QC, then Attorney-General, had been asked to develop a proposal for a new Federal Court for consideration by Cabinet. One of the immediate critics of the

16 (1935) 104 LQR 590

17 CPD H of R 27 August 1958 at 835-837

18 Byers and Toose, '*The Necessity for a New Federal Court: A Survey of the Federal Court System in Australia*' (1963) 36 ALJ 308

proposal was FTP Burt QC, later to become Chief Justice of Western Australia. His concern was expressed in terms of jurisdictional complexity and a reduction in the status of State Courts.[19] Gough Whitlam QC, then Deputy Leader of the Opposition, supported the proposal on the basis that the Commonwealth should be able to appoint judges to interpret and apply its laws.[20] Barwick published a justification of the proposal soon after he became Chief Justice in 1964.[21] In so doing he accepted that the investing of State Courts with federal jurisdiction was a potentially permanent and desirable feature of the Australian judicial system. The jurisdiction of the new Federal Court would be limited to 'special' matters.

27. In 1967 Sir Nigel Bowen, who had succeeded Sir Garfield Barwick as Commonwealth Attorney-General, announced a proposal for the establishment of a relatively small new Federal Court. He introduced the Commonwealth Superior Court Bill into the Parliament in November 1968. The proposed new court would have incorporated the existing Commonwealth Industrial Court and the Federal Bankruptcy Court. In his Second Reading Speech the Attorney General said that the Court could operate, inter alia, as '… the general court of appeal from Territory Courts other than the Supreme Court of Papua New Guinea'. It would have exclusive jurisdiction to hear appeals from State courts exercising federal jurisdiction below the levels of the Supreme Courts of the States. It would also hear appeals from its own judges exercising original jurisdiction.[22] In the event the Bill was allowed to lapse.

28. Justice Rae Else-Mitchell, a former Judge of the Supreme Court of New South Wales, wrote of the disadvantages of the constitutionally divided system in 1969 and 1970.[23] His 1969 paper was a criticism of the creation of the proposed Commonwealth Superior Court. In his 1970 paper he proposed 'the creation for the whole of the Commonwealth of a single integrated judicial system which would have some of the qualities of an independent statutory corporation, entrusted with judicial and ancillary administrative functions'.[24] He identified as 'the ideal tribunal' one which could entertain any complaint or cause of action and determine every question arising before it. Its judges would be people of the widest experience whose judicial life had not been confined to a single discipline or specialty:

'… Specialization may have some virtues but it needs little imagination to comprehend the effect upon the outlook of judicial officers who are obliged to

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19 Burt, Comment (1963) 36 ALJ 323

20 Whitlam, Comment (1963) 36 ALJ 327

21 Barwick , '*The Australian Justice System: The Proposed New Federal Superior Court*' (1964) 1 Federal Law Review 1

22 (1968) CPD H of R 3146, 21 November 1968 cited by Else-Mitchell 3 Federal Law Review 187 at 199

23 lse-Mitchell, '*Burying the Autochthonous Expedient*' (1990) 3 Federal Law Review 187; Else-Mitchell, '*The* Judicial *System – The Myth of Perfection and the Need for Unity*' (1970) 44 ALJ 516

24 Else-Mitchell, 44 ALJ 516 at 518

spend the whole of their time in the administration of a particular branch of the law such as Bankruptcy, Divorce, Taxation, Equity or the criminal law; the same comment may indeed be made of most categories of appellate work which are conducted in an air of "Himalayan rarefaction" where human qualities seldom intrude unless the appellate Judges maintain regular experience of trial work.'[25]

Nigel Bowen's successor as Attorney General, Senator Ivor Greenwood, announced in 1972 that the idea of a Federal Superior Court had been abandoned.[26] The Supreme Courts of the States and Territories were to be invested with original jurisdiction in additional matters in which the High Court had original jurisdiction.

29. The proposal for a new Federal Court did not stay abandoned for long. In December 1973 Senator Lionel Murphy, at that time Commonwealth Attorney-General in the Whitlam government, introduced a new Supreme Court of Australia Bill. It would have removed the bulk of federal jurisdiction from State Courts. It was defeated in the Senate.

30. In 1976 RJ Ellicott QC, Attorney-General in the Liberal Government elected in 1975 after the dismissal of the Whitlam government, introduced the Federal Court of Australia Bill. It was passed and became the *Federal Court of Australia Act 1976* (Cth). The new court commenced its operations on 1 February 1977. Its jurisdiction, as initially conferred, covered a relatively narrow band of subject matters but has expanded in the decades since its creation. The enactment of s 39B(1A) of the *Judiciary Act* in 1997 giving the Court federal jurisdiction coextensive with that of the States save for criminal matters completed its conversion into what Professor James Crawford predicted in 1993 would be a 'superior court of general jurisdiction in Australia'.[27] The creation of the Federal Court is relevant to the present discussion because of the impetus it provided to the debate about the rationalisation and integration of the Australian judicial system.

31. In the first State of the Australian Judicature Address, delivered in 1977 at the Australian Legal Convention, Sir Garfield Barwick, pointed to the degree of uniformity which had been achieved in Australian law to that time. The precedential decisions of the High Court binding all State courts covered the common law, approaches to statutory interpretation and the construction of common form statutes.[28] He spoke briefly of unification of the judicial system but confined his remarks to appellate jurisdiction. He saw great merit in all major appellate work from inferior State and Federal courts being vested in a new Federal Court able to sit in divisions and so be accessible across the whole country. What he called 'the appellate facilities in the States' would be dispensed with other than appeals to State Supreme Courts from minor courts. Sir Garfield realised however that at the time he was speaking '… such a course is, to say the least, more than unlikely'. It can be said with confidence that it remains so.

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25 Ibid at 520

26 CPD Senate 27 October 1972 at 2086-8

27 Crawford, 'Australian *Courts of Law*' OUP 3rd Edition (1993) at 168

28 Barwick, *The State of the Australian Judicature* (1977) 51 ALR 480 at 483

32. The establishment of the Federal Court of Australia elicited strong expressions of disquiet about its effect on the judicial system in Australia. Although raised in terms of the complications generated by overlapping federal and state jurisdictions it seems that there was underlying concern about the effect of the new court upon the work and standing of State courts.

33. Sir Laurence Street, then Chief Justice of New South Wales, referred to the creation of '… an intermediate jungle in which we have neither an effective all-embracing State system nor an effective all-embracing Court system'.[29] But one person's jungle is another person's well ordered ecosystem. In 1978 the then Commonwealth Attorney-General, Senator Peter Durack, introduced into the Parliament the *Jurisdiction of Courts (Miscellaneous Amendments) Act* 1978 (Cth) which divested the High Court of its original statutory jurisdiction other than as a court of disputed returns, conferred complete original jurisdiction in taxation and intellectual property matters on State and Territory Supreme Courts and exclusive appellate jurisdiction in those matters on the Federal Court. The changes were said to be in line with the Government's policy of '… a coordinated structure of State and Federal Courts in Australia' and were designed 'to avoid the disadvantage of a dual court system which could easily develop under a Federal system and which has caused so many problems in the United States'. [30] Senator Durack also said:

'*Although a unified court system would be the ideal I must accept that this is unlikely to be achieved for the time being. The policy of a coordinated system is a satisfactory alternative and is in the view of the government a practical one.*'[31]

In July 1978 the Australian Constitutional Convention resolved, at a plenary session in Perth, that the Constitution be amended to make express provision empowering State parliaments to vest a federal court (other than the High Court) with jurisdiction, both original and appellate, arising under State law.[32] It also recommended that the Constitution be amended to provide for agreements between the Commonwealth and the States for the creation, jurisdiction, financing and administration of Australian courts provided that such agreements would have effect notwithstanding anything in Chapter III but without prejudice to the position of the High Court as the ultimate arbiter of constitutional questions.

34. The 21st Australian Legal Convention in 1981 was the occasion for presentations by Sir Harry Gibbs, then Chief Justice of the High Court, and by Justice Andrew Rogers of the Supreme Court of New South Wales, which raised concerns about the interaction between the Federal and the

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29 Street, '*The Consequences of a Dual System of State and Federal Courts*' (1978) 52 ALJ 434; See also Campbell, '*The Relationship between the Federal Court and the Supreme Courts of the State*', (1979) 11 UQLJ 3; Rogers, '*Federal/State Courts – The Need to Restructure to Avoid Jurisdictional Conflicts*' (1980) 54 ALJ 285

30 CPD Senate 28.9.1978 at 1062

31 Ibid

32 Proceedings of the Australian Constitutional Convention, Perth, 26 July 1978 at xx

State courts. In his address on the *State of the Australian Judicature* Gibbs CJ saw:

'… no necessary reason why laws emanating from different sources should not be administered as one system of courts, and until 1977 the Supreme Courts of the States did administer a coherent body of law which derived from statutes of the Imperial, Commonwealth and State Parliaments, regulations made by the executive, by-laws of local authorities and the rules of the common law and equity.' [33]

Gibbs CJ acknowledged that the clock could not be wound back on the creation of the Federal Court. He focussed upon the fragmentation of jurisdiction between the two court systems. The quickest and simplest remedy, as he saw it, was to repeal all statutory provisions making the federal jurisdiction of one court or the other exclusive. A more fundamental remedy would require the Commonwealth and the States to cooperate in establishing one system of courts. He proposed two ways in which this could be done:

1. Constitute one court with a number of coordinate divisions so that judges of some divisions would be appointed by the States and those of other divisions by the Commonwealth.

2. Form a completely integrated court where members would be appointed by a Commission on which both the Commonwealth and the States would be represented.

Each of these propositions would have required constitutional amendment. [34]

35. In his paper Justice Rogers canvassed the possibility that persons might be appointed to judicial office in both State and Federal courts concurrently:

'… it appears to me to be a reasonably practicable way of setting out on the rocky road to achieving a unified rational court system.'

He said:

'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.' [35]

36. The notion of dual commissions between Federal and State Courts has been applied in the Family Court of Western Australia. That is a State Court created by State statute. It is invested with federal jurisdiction under the *Family Law Act 1975* (Cth). Its members also hold commissions as judges of the Federal Family Court. The idea of judges holding their primary commissions in one court and a commission as an additional judge of another court is well established in Australia in the case of the Supreme Court of the Australian Capital Territory. The judges who hold primary commissions in that court number five. There are some fifteen

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33 Gibbs, '*The State of the* Australian *Judicature*' (1981) 55 ALJ 677

34 Ibid at 679

35 Rogers, '*State*/Federal *Court Relations*' (1981) 55 ALR 630 at 645-646

judges of the Federal Court who hold commissions as additional judges of the ACT Supreme Court and who are used for both appellate and first instance work as circumstances require. Judges of the Federal Court hold office as Chief Justice and Judge of the Supreme Court of the Norfolk Island Territory. Judges of the Court also held commissions on the Supreme Courts of the Christmas Island and Cocos-Keeling Islands Territories until the reform of their legal systems and the vesting of jurisdiction in relation to them in the courts of Western Australia.

37. Two well known proposals for the integration of the judicial system were made by Sir Francis Burt, Chief Justice of Western Australia, at the Supreme Court Judges' Conference in Sydney in January 1982[36] and Sir Laurence Street in a speech to the Law Society of New South Wales in June 1982.[37] Sir Francis Burt began by referring to the previously ventilated concerns about Federal and State courts and their jurisdictional conflicts. He acknowledged however the need to accept political reality. He said:

'… it is simply unreal to seek a solution which would require any Government, Commonwealth or State, to vacate the judicial field entirely leaving the appointment to judges and the administration of the law to the other.' [38]

He rejected as 'the product of timid thinking' attempts to seek administrative or statutory solutions to the problem of dual federal and state systems. A proper resolution would require constitutional amendment. He canvassed a number of options including referral by the States of power to the Commonwealth to invest a federal court with jurisdiction to hear and determine matters within the jurisdiction of a State Supreme Court. He also canvassed the idea of Federal Judges holding State commissions but dismissed that as a solution that 'throws the baby out with the bath water'.[39]

38. Burt proposed that the Supreme Court of the States and Territories be given unlimited jurisdiction in matters arising under federal and state law and that the inferior courts have like jurisdiction within their geographical and subject matter limits. The Supreme Courts would also hear appeals from their inferior courts. An Australian Court of Appeal would be created as a federal court but, pursuant to a constitutional amendment, would be given jurisdiction to hear appeals from the State Supreme Courts. It would comprise initially judges of the Federal Court whose primary commission was on that Court. Additional judges would be appointed from the Supreme Courts of the States. Later appointments would be made by the Commonwealth Government acting on the recommendation of a judicial commission. Appointees would be required to have served at least two years in a State or Territory Supreme Court so they would all have had experience as trial judges. The Court would sit in

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36 Burt, *An Australian Judicature* (1982) 56 ALJ 509

37 Street, *Towards an Australian Judicial System* (1982) 56 ALJ 515. See also Moffitt, *Comment on the Proposal for Creating an Australian Court of Appeal* (1983) 57 ALJ 167; Neasey, *Comment Upon Proposals for an Australian Judicial System* (1983) 57 ALR 335; AIJA, *Proceedings of Seminar on An Integrated Court System for Australia* 13 August 1983

38 Burt 56 ALJ at 510

39 Ibid at 511

divisions organised on a State basis. Sir Francis thought the proposal reflected that advanced by Sir Garfield Barwick in his *State of the Judicature* address.[40]

39. Sir Laurence Street's idea emanated, like that of Sir Francis Burt, from expressed concern about jurisdictional conflict between State and Federal systems. His proposal was to 'get rid of this jurisdictional interface'.[41] He described the Australian system as one comprising:

'*… eight State and Territorial courts and one Federal court, each working within a watertight jurisdictional compartment.*' [42]

Street thought it unlikely that State governments would acquiesce in the subordination of their court systems to a national intermediate appellate body below the High Court. His proposal, which he called a partnership relationship between the Federal Court and the State and Territory Supreme Courts, would be effected by the following steps:

1. The creation of a Supreme Court of Australia with ten divisions, eight State and Territory, one Federal and one Appeal Division.

2. Each division to be headed by a Chief Justice, one of whom would be President and as such the head of the Court.

3. The Chief Justice and judges in each division to be appointed by the relevant government, save that the Chief Justice of the appeal division would be appointed by joint decision of Commonwealth, State and Territories.

4. Every judge would have national jurisdiction, but each division would sit in its own State or Territory.[43]

40. In 1983 the Australian Constitutional Convention recommended that the Constitution be amended 'to provide for Federal Courts and State Courts of Supreme Court level and above to be integrated into a single system of Australian Courts'. The single system would have had three levels being a trial level, an appeal level and the High Court as the final appeal court. The Convention Standing Committee to which the recommendation was referred, did not come back with mechanisms for its implementation. Rather it proposed cross-vesting at the trial level between the Federal and States and Territory courts and the creation of an Australian Court of Appeal as a Federal Court. The proposed Court of Appeal would use judges of the Federal and State Supreme Courts with a maximum of 20 permanent members. Appellate jurisdiction in industrial matters was to remain with the Full Court of the Federal Court and in criminal matters with the Full Courts or Courts of Appeal of the States. Subsequently however the 1985 Convention confined its recommended change to a system of cross-vesting at the trial level between the Federal Court, the State Supreme Courts and the Family Court of Australia.

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40 Ibid at 513

41 Street, 56 ALJ at 515

42 Ibid at 516

43 Ibid at 516

41. In December 1985 a Constitutional Commission was established by the then Commonwealth Attorney-General, the Hon Lionel Bowen. Its terms of reference required it to undertake a fundamental review of the Australian Constitution. Five advisory committees were set up to report to the Commission. One of them was a committee on the Australian Judicial System. In its report published in May 1987, the Committee, which was chaired by David Jackson, then a Judge of the Federal Court, recommended against any alteration of the structure of the Australian Judicial System. It supported cross-vesting and a constitutional amendment to ensure that States could validly cross-vest jurisdiction to Federal Courts.[44] If there were to be an integration of the court system in whole or in part the integrated court should be a Federal Court rather than some kind of hybrid.[45] The Committee was not unanimous in its recommendations. Indeed it was described in the Report of the Commission as 'deeply divided'.[46] The divisions reflected those among judges and the legal profession.

42. In its Report, the Committee referred to concerns about the impact of the Federal Court upon the status of the Supreme Courts of the States. It said:

'On each occasion when the Commonwealth vests jurisdiction in a Federal Court there is a corresponding decline in the role of the courts of the States and, if the areas of jurisdiction of the Federal Courts continue to expand, the courts (particularly the Supreme Court) of the States will become more and more restricted in the scope of their jurisdiction.' [47]

The Committee added that it did not follow that the volume of work done by the Courts of the States would decline but much of the variety would go leading to a decline in the quality of their appointees and a gradual loss of prestige.

43. The work of the Committee was canvassed in a number of papers presented at the 6th Annual Seminar of the AIJA on 25-26 September 1987. The papers were gathered under the rubric of 'Proposals for Changes in the Australian Judicial System'. They were testament to the want of consensus on the topic.[48]

44. When the Commission reported on 30 June 1998, it did not recommend any alteration to the Constitution to provide for the integration of the court systems of the Commonwealth and the States.[49] It

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44 The absence of such a provision led, in 1999, to the invalidation by the High Court of the vesting by State legislatures of State jurisdiction in the Federal Court – *Re Wakim* (supra)

45 Australian Judicial System – Report of the Advisory Committee to the Constitutional Commission, May 1987 at xi-xii

46 Final Report of Constitutional Commission par 6.13

47 Report of Advisory Committee at 28

48 Kennedy, 'Proposals for Change in the Australian Judicial System: An Overview'; de Jersey, 'Proposals for Change in the Australian Judicial System: Appellate Structures'; K Mason, 'Cross Vesting and Other Proposals for Cooperative Arrangements by the Advisory Committee and the Australian Judicial System; Hayne, 'Constitution Commission Australian Judicial System Advisory Committee Report: The Judiciary'

49 Commission Report at 365

did refer to the concerns of many that the existence and increase in the jurisdiction of Federal Courts had had a serious impact on the status and prestige of the Supreme Courts of the States and said:

'It is this aspect that has given rise to various proposals for restructuring the Australian court system.'

The Commission accepted that no case had been made out for the creation of a national Court of Appeal between the existing Courts and the High Court. It did recommend that the Constitution be altered to empower State and Territorial legislatures, with the consent of the Federal Parliament, to confer State and Territorial jurisdiction on Federal Courts.[50] It recommended against the transfer of State judicial power to the Commonwealth.

45. The cross-vesting scheme which involved complementary Federal and State legislation came into effect on 1 July 1988. The scope of exclusive jurisdiction conferred on the Federal Court was reduced so that in most matters its original jurisdiction became concurrent with that of the State Courts. There was nevertheless a class of matters designated in the cross-vesting legislation as 'special federal matters' that were required to be transferred to the Federal Court by a State Supreme Court in which the matter arose. Retention of such matters had to be justified by 'special reasons'. The system suffered a blow when the High Court held in *Re Wakim; Ex parte McNally*[51] that the States could not validly cross-vest Federal Courts with jurisdiction in matters arising under State law.

46. With the establishment of the cross-vesting scheme, the working out of a solution to the *Re Wakim* problem in relation to the Corporations law,[52] and the relatively settled content of the accrued jurisdiction doctrine, issues of jurisdictional conflict do not seem to figure prominently on the Australian legal landscape. There seems to be no pressure at present for any fundamental restructuring of the court system. As Brian Opeskin has written about proposals for an integrated Australian court system:

'… the extent of restructuring required to implement such a solution makes it a constitutional fantasy. There appears to be a strong political commitment for retaining something approximating the existing court structure for the foreseeable future and for good reason. Even if radical change were possible it is undesirable to establish a court system that divides political responsibility for its administration between several executives and parliaments, no matter how attractive the idea of avoiding sterile jurisdictional disputes between State and Federal courts.' [53]

47. The reduction of the potential for jurisdictional conflict leaves in place for consideration the negative effects of the Federal system on the State

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50 Commission Report rec 6.29 p 371

51 (1999) 198 CLR 511

52 By a referral of powers from the States to the Commonwealth.

53 Opeskin, '*Cross Vesting of Jurisdiction and the Federal Judicial System'* in Opeskin and Wheeler (eds) The Australian Federal Judicial System, MUP (2000) at p 333

systems of which the Advisory Committee to the Constitutional Commission wrote in 1987. It also leaves for consideration the need to avoid a decline in the quality of the judicial system as a whole by the dominance of the State systems of New South Wales and Victoria and the marginalisation in national legal discourse, of the courts of the smaller States.

48. If the courts of the States and Territories, from the Supreme Courts down, are to be institutions attractive to the best qualified Australian lawyers as providing opportunities for interesting and important public service, that will be reflected in their standing and authority generally and in the efficiency and the quality of their work. Judicial exchange is proposed, inter alia, as a way of contributing to maintaining and enhancing the standing and attractiveness of the State courts for potential appointees. There is a variety of ways in which exchange can be implemented.

The objectives of judicial exchange

49. The historical context, the constitutional framework, the longstanding debate about the shape of the judicial system and the challenges facing it today suggest objectives which can be met in part by programs facilitating exchanges of judges among Australian courts and between appellate and trial courts. These objectives can be related to a family of possible exchange programs which are not mutually exclusive. The programs can include long term and short term exchange and exchanges which, on the one hand, may be limited to visitation and observation and, on the other, extend to full participation in the work of the host court. The objectives, which overlap, include:

1. Improvement of individual judicial performance in terms of the efficiency and quality of the judicial officer's work.

2. Improvement of the overall functioning of courts procedurally and by reference to the efficiency and quality of the work of their members.

3. Improvement of the morale of judicial officers and associated retention of experienced officers for longer periods.

4. Improvement in the attractiveness of courts for prospective appointees.

5. Effective allocation of judicial resources between courts.

6. Enhancement of the standing of the courts within the legal profession and the wider community.

7. Improved awareness between courts of the development of the law in areas of common jurisdiction.

8. A more consistent body of national decision-making in areas of common jurisdiction.

9. Mutual awareness and acceptance of the respective functions of trial judges and intermediate appellate judges.

10. Improved quality of decision-making and efficiency of appellate judges.

The range of judicial exchange programs

50. The words 'judicial exchange program' cover a family of possible arrangements which can be entered into between courts in different States and Territories, between State and Federal Courts and between courts within States or Territories. They include the following:

1. Visiting judge programs in which a judge from one court visits another for a short period to observe the operation of the host court, to engage in dialogue and discussion with its members, to make presentations on matters of mutual interest and to report to both the home court and the host court on observations made.

2. Visiting judge programs in which a judge from one court visits another for a period and is appointed as an acting judge of the host court where he or she hears trials or participates in appellate work. Such a visitation could also involve the kind of observation, dialogue, discussion and report suggested for short-term non-participating visiting judges.

3. Ad hoc mutual assistance appointments where one court supplies a judge to another to assist in meeting a need of the host court for someone to hear trials or sit on appeals. When Owen J of the Supreme Court of Western Australia sat as HIH Royal Commissioner in Sydney, judges of the Supreme Court of New South Wales and retired judges of the Federal Court sat as acting judges of the Supreme Court. A similar arrangement was made when Ipp J was seconded to the Court of Appeal in New South Wales. The special interstate bench of the New South Wales Court of Appeal constituted to hear an appeal in which Justice Heydon, then a member of that Court was a party, is another example. It comprised Malcolm CJ (WA), McPherson JA (Qld) and Ormiston JA (Vic). Such assistance could also extend to assistance from judges with particular expertise to assist the host court with a case or cases requiring that expertise and/or to assist host court judges improve their own knowledge of law and procedure in the relevant area.

4. Vertical exchange programs within a State or Territory whereby appellate judges do some trial work and trial judges are rostered on to do some appeal work. To some degree this already occurs.

5. Vertical exchange programs whereby a judge from an inferior court may be appointed for a short time as an acting judge or commissioner of a court higher in the hierarchy. Such arrangements could be made between District or County Courts and the trial division of the Supreme Court or even the Court of Appeal. Similar arrangements could be made between Magistrates Courts and District or County Courts. This may be seen as having some advantages over a system of acting judges or commissioners appointed from the Bar.

Judicial exchange programs outside Australia

51. There are some examples of judicial exchange programs proposed or operating in other countries.

52. A horizontal exchange program has recently been proposed for the Provinces of Canada.[54] For some time, in some of the smaller Provinces, judicial exchange has occurred on an ad hoc basis to ensure that people who wished to be tried in the French language are able to have access to a French-speaking judicial officer for trial. Prince Edward Island, Newfoundland and Labrador amended the relevant statutes and use extra-Provincial judges on a case-by-case basis.[55]

53. In 2001 the Canadian Association of Provincial Court Judges set up a committee to work with the Canadian Council of Chief Judges with a view to establishing a more formal and longer term exchange program. A draft model Bill was prepared. A copy of the Bill is Annexure A to this paper. The principles under which the exchange was to operate were as follows:

1. Exchange periods would be between six months and one year (with a possible extension for another year if both jurisdictions agreed).

2. Each judge would be accountable to the host Province's Chief Judge and Judicial Council.

3. No costs associated with the exchange are incurred by either Provincial government.

4. Each judge would be subject to host Province travel allowances if required to travel on circuit during the term of the exchange.

5. Each judge would continue to receive pay and to accrue pension benefits from his or her home Province.

6. The program would be open to judges with more than five years' judicial experience.

54. As explained by Judge Robert Hyslop, the President of the Canadian Association of Provincial Court Judges, in 2004:

'Longer-term, a judicial exchange would improve collegiality nationally and offer judges a new perspective towards judging and administering a court. Ironically, since provincially appointed judges spend most of their time administering and interpreting federal legislation, there is much common ground across the country.' [56]

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54 I acknowledge the kind assistance of Judge Robert Hyslop, Immediate Past President of the Canadian Association of Provincial Court Judges in providing information about this proposal.

55 Hyslop, 'Judicial Exchange Among Provincially Appointed Judges – An Emerging Reality? Vox Judicia, Canadian Judges Forum, June 2004

56 Hyslop, Vox Judicia op cit

At last report the necessary legislation had not been enacted. This appears not to be because of any in principle opposition by governments, but because it is low on the list of legislative priorities.

55. In the USA the Federal Courts and some States have introduced judicial exchange programs between appellate and trial courts. The Federal program has operated for some years. There is a paucity of readily accessible information about its workings. The experience has been described as both 'rewarding and humbling' for Federal judges.[57] One of the notable participants was US Supreme Court Chief Justice William H Rehnquist, who presided over a civil rights trial in Richmond, Virginia and was reversed on appeal. This was the first time in the 20th century that a US Supreme Court Justice had presided over a trial. Judge Richard Posner of the US Court of Appeal presided over a case involving copyright infringements and he too was reversed.[58]

56. In May 1997 the Wisconsin judiciary commenced an intra-State vertical judicial exchange program between appellate and trial courts. This was done upon the initiative of Chief Justice Shirley Abrahamson. The program involved exchange of judges between Circuit Courts in Wisconsin and the Courts of Appeal of that State. As described on the Wisconsin Court System website it was created:

'… to help Court of Appeal judges understand the practices, procedures and problems of the trial courts, and to improve trial judges' understanding of what it takes to create a trial court record that will pass appellate review.'

The program was initiated in 1996-1997. During that period six Circuit Court Judges were assigned to the Court of Appeals Panels in Court of Appeals District III in Wisconsin. They participated in deciding six cases. Each was assigned to write one opinion of the Court and to supervise the preparation of one per curiam opinion. This was repeated in other Districts in successive years. Appeal judges in the Districts moved to the trial benches of the Circuit Courts for short periods of time. There they handled everything from jury trials to divorce and traffic courts. The program was adjudged a success by the participants and has now become permanent.

57. The European Parliament and Council have attached considerable importance to judicial exchange programs as part of a wider strategy for training judges of the Member States of the European Union. A pilot project was created by the European Parliament for 2004 and 2005. Its stated purposes are:

1. To develop exchanges between members of the judiciary in order to enhance the level of mutual confidence and to facilitate mutual recognition of decisions within the European Union.

2. To increase judicial awareness of EU instruments on judicial cooperation in civil and criminal matters by developing e-learning tools.

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57 Abrahamson, 'State of the Judiciary Address', 1996 Wisconsin Judicial Conference http://www.wisbar.org

58 Ibid

3. To develop contacts and networking between national institutions in charge of training of the judiciary.

The mechanisms for achieving these outcomes are exchanges of judges based on individualised training schemes, e-learning instruments to increase knowledge of EU instruments in criminal and civil matters and meeting officials responsible for training institutions.[59] The proposed Work Program for 2005 sets out objectives which have some resonance with the objectives of an Australian judicial exchange system suggested earlier in this paper. Judicial exchange is said in the Work Program to be:

'… aimed at enhancing their knowledge of each other's judicial procedures and their awareness of belonging to a common area.'

The utmost importance is placed on the development of 'mutual trust between the judicial authorities in the Member States, who must be closely involved in each stage of the project'. It is said:

'Ultimately these exchanges should lead to an enhancement in mutual trust between judges as well as judicial authorities, the setting up of cross-border networks and partners, a greater understanding of each others' systems and a greater knowledge of European Community and/or Union legislation.'

The Work Program which is expressed at a level of generality, no doubt appropriate to its application to a variety of Member States with much greater diversity in their judicial and legal systems than exists between the States of Australia, does not spell out with precision how judicial exchange involving work in national courts would operate. It sets out, as an initial requirement, identification of the statutory framework of exchanges and 'the legal framework for participation by judges and public prosecutors in the work of national jurisdictions…'.

58. It can be seen from the preceding examples that the idea of judicial exchange in its various manifestations is not novel although it appears to be relatively recent even when regard is had to the experience of other countries.

Judicial exchange experience in Australia

59. By way of preparation for this paper letters were sent to the heads of jurisdiction of the State and Territory Supreme, District and Magistrates' Courts inquiring about judicial exchange arrangements in Australia. The following is based largely upon oral and written responses to those letters.

60. An interesting case of inter-colonial judicial assistance occurred in Queensland in 1892. It involved an appeal against a judgment given by the second Chief Justice of Queensland, Sir Charles Lilley, in a claim for damages for misfeasance against the Queensland directors of a London-

[59] http//www.europa.eu.int/comm/justice-home/funding/civil-cooperation/funding-civil-cooperation- eu.html

based company, Queensland Investment and Land Mortgage Co. Two of the directors, former premiers of Queensland, were former political opponents of the Chief Justice. His dislike of them was well-known. The plaintiff was advantageously represented by the Chief Justice's son. Some 145 questions were put to the jury for determination. As the answers to those questions were not sufficiently adverse to the defendants, the Chief Justice substituted his own answers. He then gave judgment for the plaintiff. The appeal against his decision was heard and upheld by a specially convened Full Court comprising two Queensland judges, Cooper and Chubb JJ sitting with Windeyer J who had come up from the Supreme Court of New South Wales for the occasion.[60] The Chief Justice resigned shortly afterwards.

61. One hundred years later, in 1992, a general exchange scheme among Supreme Courts was proposed by Gleeson CJ, then of the Supreme Court of New South Wales. It was proposed to a Conference of Chief Justices and met with approval. It appears to have coincided with a report prepared by the former Registrar of the Federal Court, the late Jim Howard, in relation to the establishment of the Court of Appeal in the Northern Territory. Howard, who had been seconded for the purpose, suggested that the membership of the Northern Territory Court of Appeal, be supplemented by an external judge from time to time. This led to an exchange program between the Northern Territory and New South Wales. The *Supreme Court Act (NSW)* was amended to provide that a judge of the Supreme Court of another State or Territory or a judge of the Federal Court was eligible for appointment as an acting judge of the Supreme Court of New South Wales. Under the particular agreement with the Northern Territory the exchange judge's home jurisdiction continued to pay its judge's judicial salaries but out-of-pocket expenses and travelling allowances were met by the host jurisdiction. Asche CJ of the Northern Territory wrote to Gleeson CJ in January 1993 supporting the scheme and expressed the view that it might be the beginning of a national scheme creating the opportunity for judges all over Australia to sit in other States and Territories.

62. In 1994 Angel J of the Supreme Court of the Northern Territory sat in New South Wales. Priestley JA from New South Wales sat on the Northern Territory Supreme Court. In July 1995 Sir William Kearney was appointed an acting judge of the Supreme Court of New South Wales and sat in July and August of that year. The arrangement appears to have continued until 1998 but not beyond then. It has not led to any wider exchange arrangements.[61]

63. The Supreme Court of Western Australia was involved in an ad hoc process which was funded by the Commonwealth pursuant to an agreement to provide replacements for Owen J during the time that his Honour was acting as Royal Commissioner inquiring into the affairs of HIH. The Court was, for various periods, provided with judges or retired judges of the Supreme Courts of New South Wales, Queensland and South

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60 McPherson, Supreme Court of Queensland, Butterworths 1989 179 at 181

61 Correspondence Martin CJ 21 July 2005

Australia and of the Federal Court. The periods of service by the exchange judges were usually a few months. Some of the judges were from courts where they exercised or had exercised both original and appellate jurisdiction. Some, such as Sheller JA from the New South Wales Court of Appeal, were appellate judges. All were utilised at appellate level only. This was apparently because of the relatively short periods of their service. They could be provided with cases of limited duration and engaged in the writing of judgments without delay. While in Western Australia they were provided with accommodation funded by the Commonwealth. Acting Chief Justice Murray of the Supreme Court of Western Australia has written:

'The Judges of this Court found the experience an enriching one. Our visitors provided us with somewhat different perspectives and helpfully broadened the experience of those of us who were engaged with them in the appellate work of the Court. We could not so satisfactorily have utilised their services at first instance, except in relation to interlocutory matters, originating summonses and the like, where the trial of the action would be of limited duration. It was felt that if we engaged them in that sort of work we would not make adequate use of their judicial talents.' [62]

64. The District and County Courts have evidently not given detailed consideration to the possibility of judicial exchanges. An ad hoc interstate appointment occurred relatively recently when a judge from Queensland went to Melbourne to hear an appeal from the Magistrates Court to the County Court which involved a County Court judge charged with failing to lodge tax returns. The Chief Judge of the District Court of New South Wales has been trying to develop exchanges between District and County Courts. Under New South Wales legislation any judge of a District or County Court in Australia can be appointed a judge or acting judge of the District Court of New South Wales. No exchange process has been established as yet.[63]

65. At the Magistrates Court level there has been an interesting initiative between Tasmania and the Northern Territory. An exchange arrangement has been made and its implementation recently commenced. Peter Dixon of Tasmania, a Magistrate with 17 years experience, went to Darwin and served there for six months. Daynor Trigg, a Northern Territory Magistrate with 11 years experience, served in Hobart for the same period. [64]

66. An amendment to the *Magistrates Act 1967* (Tas) was made to provide for exchange arrangements. The text of the amendment which introduced a new s 16C into the Act is set out at Annexure B to this paper. The new section specifically provides for the arrangements to be made between the heads of jurisdiction. However the appointment of a visiting magistrate as a temporary magistrate of the Tasmanian Court is still a matter for the

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62 Correspondence, Murray ACJ, 26 July 2005

63 Correspondence, RO Blanch CJ, 9 August 2005, and P de Jersey CJ 14 July 2005

64 Information about the Magistrates' exchange scheme between the Northern Territory and Tasmania was kindly provided by Chief Magistrates Bradley and Shott.

Executive (s 16C(3) and (4). Formal arrangements were negotiated between the two Chief Magistrates and involved the following elements:

1. The home jurisdiction of the visiting magistrate is to be responsible for that magistrate's:

(i) salary and superannuation contribution;

(ii) airfares to and from the host jurisdiction (not extending to the magistrate's spouse);

(iii) leave entitlements accrued during the exchange period.

2. The host jurisdiction of the visiting magistrate is to be responsible for operational costs such as aircraft travel and accommodation expenses and telephone charges.

3. Housing is the responsibility of the visiting magistrate although it is open to exchange magistrates to swap houses.

4. Cars can be swapped. Northern Territory and Tasmania has substantially the same vehicle entitlements for their magistrates.

Any appointment of an exchange magistrate requires the prior approval of both Chief Magistrates.

67. In the Northern Territory the Chief Magistrate calls for expressions of interest from those who wish to participate in an exchange. If the exchange appointment is approved by him he will refer it to the Chief Magistrate of the proposed host jurisdiction. Chief Magistrate Bradley expects the participating magistrates to all have had six to eight years of experience on the bench.

68. Victorian and South Australian magistrates have adopted a more cautious approach. They have had small groups of magistrates visiting each other as observers for periods of three or four days. The scheme fits in with the short term educational judicial exchange programs mentioned earlier. It is likely to be accessible to a large number of judicial officers than arrangements which involve hearing cases in the host jurisdiction. No executive involvement in making appointments is necessary in such cases. [65] Under the visiting magistrates scheme the visitors will observe other magistrates in action and have discussions with them about procedure and other issues.

69. In relation to vertical exchange, the use of trial judges in appeal courts in Australia is already well established. In New South Wales trial judges often sit in the Court of Appeal and the Court of Criminal Appeal is always comprised of two and often three judges of the Common Law Division.[66] In Victoria, trial judges of the Supreme Court have served from time to time as acting judges of appeal. The Chief Justice of Victoria has commenced a permanent program whereby every trial judge is provided with some appellate experience. In the latter part of 2005 the Supreme Court will conduct a pilot program under which appeal judges will be able

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[65] I acknowledge the advice of Kelvin Prescott, Chief Magistrate of South Australia about this arrangement.

[66] Correspondence, Spigelman CJ 5 August 2005

to sit in the Trial Division. This will be a new initiative as appeal judges, other than the Chief Justice, have historically not sat on trials once appointed. These arrangements are able to be made under ss 80B and 80C of the *Constitution Act 1975* (Vic). The section providing for appeal judges to sit in the Trial Division (s 80C) was inserted in the Act in 2001.[67] In Western Australia the newly established Court of Appeal is tending for the present to use appeal judges in most of its cases. However, with Owen JA involved in the long running Bell litigation and given the present workload of the Court, two trial judges are being seconded to it for three month periods later this year.[68]

70. In New South Wales the Acting Judge Program of the Supreme Court has been extended on a number of occasions to the appointment of judges of the District Court to sit for a month or two as Acting Judges of the Supreme Court.[69]

Horizontal judicial exchange programs

71. In planning horizontal judicial exchange programs across State and Territory boundaries there are a number of factors to be taken into account.

72. The first consideration is constitutional. There must be no impediment to the appointment of a visiting judge as a temporary or acting judge of the host court. For example, it is difficult to see how, under Chapter III of the Commonwealth Constitution, any person could be appointed to the Federal Court on a temporary or acting basis. It may be that a category of permanent 'additional' judges 'on call' could be appointed but this throws up theoretical and practical issues which would require careful thought. Chapter III does not prevent a serving Federal Judge from accepting a temporary or acting or even a permanent part-time appointment on a State or Territory court. As already noted, a number of judges of the Federal Court hold commissions as additional judges of the Supreme Court of the Australian Capital Territory. Federal Court judges also serve as Judges of the Supreme Court of the Norfolk Island Territory and, in the past, have been judges of the now defunct Supreme Courts of the Christmas Island and Cocos-Keeling Island Territories. When Toohey J was appointed first Aboriginal Land Commissioner in the Northern Territory in 1976 he was also appointed to the Federal Court and to the Supreme Court of the Northern Territory.

73. A difficulty in relation to State or Territory exchanges would arise if there were any difference in qualifications for appointment between the home and the host jurisdiction. This can be overcome by including, as a qualification for appointment in the relevant statutes, membership of an equivalent court in another jurisdiction. There are such provisions in some State statutes already.

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67 Correspondence, Warren CJ, 26 July 2005

68 Correspondence, Murray ACJ, 26 July 2005

69 Correspondence, Spigelman CJ 5 August 2005

74. The Executive Governments of the States or Territories make judicial appointments be they temporary acting or permanent part-time even where, as in Tasmania and the Northern Territory, exchange arrangements are, in a substantive sense, 'court driven'. It could be expected that the Executive of a host jurisdiction, no doubt in the person of the relevant Attorney-General, would want to be satisfied of a number of matters before proceeding to any appointment including:

1. That the appointee is sufficiently experienced, competent and diligent to enable him to her to undertake the work of the host jurisdiction at a level of effectiveness no less than that of existing appointees.

2. That the exchange will involve little or no additional cost to government. This consideration may not apply where the appointment is to be made in order to meet a particular requirement of the host jurisdiction, such as:

(i) a conflict affecting host jurisdiction judges generally – eg when a local judge is a party;

(ii) a need to fill a short-term vacancy created by the illness or absence of a judge from the host jurisdiction;

(iii) a need to provide particular expertise to assist with the development of procedures or particular areas of work in the host court.

3. That an appointment of the kind contemplated has the general support or at least no opposition from the community, the local legal profession and the host jurisdiction judges.

75. The selection process may sometimes involve *ad hominem* or *ad feminam* judgments by the Heads of jurisdiction involved. It would be important that the judicial officers participating have a real prospect, by virtue of their experience, capacity and temperament, of making a substantive and substantial contribution to the work of the host court.

76. The cost issue is a significant element of any planning. Where the exchange is not funded by government then some cost burden will fall upon the participating judicial officers. This may be offset intangibly by the benefit of the experience. Housing swap and car swap arrangements may reduce the expenses associated with temporary relocation. Ideally of course, government might be expected to give financial support to the process as part of the professional development of its judges and the improvement of its court system. Plainly, however, any proposals going beyond those which are revenue neutral will require careful consideration.

77. The duration of exchange appointments will determine the extent to which opportunities to participate are available to members of the courts involved. The duration should obviously be long enough to be meaningful in terms of the objective of the exchange arrangement, but short enough to spread opportunities among those who wish to take part and who are qualified to do so. For trial level judges it is unlikely that an exchange for less than a month would be useful. For appellate judges a period as short as two weeks may suffice. This was the period typically served by a judge on exchange between the Courts of Appeal in the Northern Territory and New South Wales when their arrangement was subsisting.

78. Where the exchange is for visitation and observation only, then the period may be as short as a few days as is the case in the arrangements between the South Australian and Victorian Magistrates Courts.

Vertical exchange programs

79. Vertical exchange programs of the kind that operate in the State of Wisconsin can be undertaken within a single jurisdiction and so are unlikely to involve significant cost issues. They will, however, require the support of the members of the courts involved.

80. Appellate judges who undertake trial work should be advantaged in two ways:

1. Their judgments, especially on matters involving the conduct of trials, will be better informed by a current appreciation of the practical issues confronting trial judges.

2. Their judgments may be regarded by trial judges and the profession as more authoritative because they are rooted in a contemporary practical understanding of the trial process. They may then avoid the Else-Mitchell charge of ' Himalayan rarefaction'.[70]

81. Trial judges who have the opportunity to serve from time to time on appellate courts will not only gain a better understanding of the appellate role. They will also have the opportunity of standing outside the trial process in which they are routinely involved and viewing it in the light of appellate advocacy and the responsibilities of the appeal court. They will bring to the appeal court a detailed and up-to-date understanding of the work of trial judges.

82. Despite the formal legal relationship that exists between appellate and trial courts and the binding authority of appellate court decisions on trial courts, the mutual perceptions of their respective roles should be functional and practical rather than hierarchical. The fact that, in the United States, judges such as Chief Justice Rehnquist and Chief Judge Posner were prepared to subject themselves to the trial process and to appellate review marks a positive and functional perception of their roles. The same is true of those in Wisconsin State who move from the Appeal Courts to hear divorces and traffic cases and preside over jury trials. And quite apart from all of that, many judges who work in mixed original and appellate jurisdictions find that the combination of the two is more interesting than a restricted diet of just one or the other.

83. There is a tendency in some jurisdictions to appoint practising counsel at the bar for short terms as commissioners or acting judges to clear up backlogs in civil or criminal lists. There has been controversy about that process. It is said to raise questions about the impartiality and independence of persons so appointed. An alternative to such appointments is the short-term use of judges from lower courts to do trial

[70] 44 ALJ 516 at 520

work in the higher court. So, as already occurs in New South Wales, a District or County Court judge could be appointed for a time as an Acting Judge of the Supreme Court. Similarly magistrates could be appointed as Commissioners of the District or County Courts. It is, of course, still possible to raise questions about impartiality and independence being affected by the hope of permanent promotion. But unless and until promotion between courts becomes constitutionally or conventionally impossible, which is not the case, that question can be raised theoretically in any event.

84. There is an obvious benefit however. Such short-term inter-court appointments can assist in enhancing the State or Territory wide sense of collegiality between judges at the different levels. Anything that helps to replace a perception of inter-court relationships based on hierarchy with relationships based upon recognition of the important functions that each court carries out, has to be a good thing.

Inter-jurisdictional mutual assistance

85. Some judicial appointments to a particular court of judges from another State or Territory could be designed to meet particular needs of the host court. Such needs may arise at appeal or trial levels. They include the need to overcome difficulties generated by a local conflict of interest or help reduce a backlog of cases. Another area which would reward further exploration is the use of judges with particular expertise from one jurisdiction to help the development or improvement of that expertise in another.

86. Specific purpose arrangements are not truly 'exchange' because they do not necessarily involve the contemporaneous swapping of judges between host and home jurisdictions. However they would fall within the definition of judicial exchange when viewed in the longer term as part of a global framework of mutual assistance. And where one jurisdiction supplies a judge for a specific purpose to another jurisdiction, reciprocity may involve the supply of a judge from the host jurisdiction to fill the temporary vacancy caused by the supply of the specific purpose judge.

Mixed jurisdiction intermediate appeal benches

87. A system for the use of mixed jurisdiction intermediate appeal benches on matters of national significance was proposed ten years ago by Santow J and Mark Leeming of the New South Wales Bar.[71]

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[71] Santow and Leeming, Refining *Australia's Appellate System and Enhancing its Significance in our Region* (1995) 69 ALJ 348

88. Such a system would operate where there is pending in a State or Territory appeal court a matter of significance to more than one State or Territory and perhaps also to Federal jurisdiction. It might be a matter arising under the *Corporations Act* on which there are conflicting opinions in different State Appeal Courts or between a State or Territory Appeal Court and the Full Court of the Federal Court. It might be a matter involving a common question of statutory interpretation. In such cases, pursuant to a protocol which could be established between all the Chief Justices and Presidents of the Courts of Appeal, the Court of Appeal in which such a matter is pending might be constituted of local judges with the addition of two or three appeal judges from other jurisdictions. For constitutional reasons ad hoc appointments to the Full Court of the Federal Court would not be possible. However such a matter pending in the Full Court of the Federal Court could be transferred by agreement under cross-vesting arrangements to a State Court of Appeal constituted by a mixed bench including one or more Federal Court judges.

89. The effect of creating a system for the establishment of composite benches from time to time would be to constitute a de facto, ad hoc, intermediate national Court of Appeal. It is not beyond the bounds of possibility that State and Territory doctrines of *stare decisis* might be modified to accept the decisions of such composite benches as binding even though in a formal sense they may be decisions of a Court of Appeal of another State or Territory.

90. It is not necessary for present purposes to canvass the arguments in favour of such a system which are comprehensively covered in the Santow and Leeming paper. Its authors did suggest that cases for which such composite benches are constituted could be identified by the High Court. That seems however, with respect, an unnecessary complication. The important actors in the operation of any such system will be the Chief Justices and Presidents of the Courts of Appeal of the relevant State and Territory courts and the Chief Justice of the Federal Court. A protocol could be established between those persons setting out the processes and criteria for the identification of cases in which a composite bench would be appropriate and the ways in which the relevant judges and participating jurisdictions would be selected. The choice of participating judge would ultimately have to be a matter for the head of the relevant host jurisdiction and the President of the Court of Appeal in that jurisdiction working together with other Heads of jurisdiction. The system might be supported by the creation of a panel of judges in the various States and Territories and on the Federal Court who would hold additional commissions on all State and Territory Appeal Courts. Composite benches could then be drawn from that panel and it would not be necessary to undertake ad hoc temporary appointments on each occasion that such a bench was established.

91. There are many practical issues to be considered but the proposal to use composite appeal benches offers obvious benefits in the development of greater consistency between appellate courts in Australia. Less tangibly, such an arrangement would enhance the sense that judges belong to a national judicial system and the collegiality that comes with that perception.

Conclusion – taking the initiative

92. Proposals for judicial exchange will not be implemented without somebody taking the initiative. The Judicial Conference of Australia is an appropriate body to move forward on the development of such arrangements. Steps that could be taken to advance them include:

1. The formulation of a case for judicial exchange programs.

2. The identification of a range of viable judicial exchange programs including model selection criteria, administrative arrangements, costings and statutory changes if any, necessary to support them.

3. Formulation of model protocols for use between Heads of jurisdiction involved in exchange programs.

93. These important preliminary steps could be undertaken by a cross-jurisdictional working party of the Judicial Conference. The product of that work could then be put to bodies representing the Heads of the various jurisdictions throughout Australia. The input and support of the Law Council of Australia, the Australian Bar Association and the Australian Institute of Judicial Administration would be important. The proposal, if approved by the Councils of Chief Justices, Chief Judges and Chief Magistrates, could be put jointly by them, on behalf of the Australian judiciary, to the Standing Committee of Attorneys-General with a view to seeking its in-principle endorsement. The Heads of jurisdiction in each State and Territory would then need to pursue implementation by individual State or Territory governments.

94. In my opinion a judicial exchange system has much to offer both the judiciary and the Australian community. Formulating, promoting and implementing it will be a significant task. It is, however, a necessary aspect of the maturing of the Australian judiciary which is in itself an important element of our nation building.

Annexure A

Provincial Courts of Canada Model Bill for Judicial Exchange Arrangements

The following Bill for an Act to amend the Provincial Court Act, 1991 of Newfoundland and Labrador was prepared by Legislative Counsel in that Province as a draft of model legislation which could be introduced into each of the Canadian Provinces. It has not been enacted. However it provides a useful example of the kind of provisions which might support a judicial exchange program between States and Territories.

'A BILL

AN ACT TO AMEND THE PROVINCIAL COURT ACT, 1991

Analysis

Be it enacted by the Lieutenant-Governor and House of Assembly in Legislative Session convened, as follows:

SNL1991 cl 5 As Amended

1. The *Provincial Court Act, 1991 is amended by adding immediately after section 5.1 the following:*

Definitions

5.2 In this section and sections 5.3 to 5.6,

(a) "exchange judge" means a judge who has been approved by the judicial council of this province and the judicial council of a reciprocating jurisdiction to participate in a judicial exchange; and

(b) "reciprocating jurisdiction" means a province or territory of Canada that has enacted provisions respecting judicial exchanges that are substantially similar to sections 5.3 to 5.6.

Application for an exchange

5.3(1) A judge may apply to the judicial council of his or her court and to the judicial council of the court in the reciprocating jurisdiction with which he or she proposes to engage in an exchange for permission to serve as an exchange judge in a reciprocating jurisdiction.

(2) An application made under subsection (1) shall inform the judicial council of

(a) the reciprocating jurisdiction to which he or she is proposing to go;

(b) the duration of the proposed exchange; and

(c) the name of the judge in the reciprocating jurisdiction who has agreed to participate in the exchange.

(3) The judicial council may approve an application made under subsection (1) with or without conditions, or may reject the application.

Length of exchange period

5.4(1) A judicial exchange shall be for a fixed period which shall be not less than 6 months or more than a year, but the exchange judges, with the approval of their chief judges, may agree to one extension for no longer than one year.

(2) An exchange judge may apply to the chief judge of his or her host reciprocating jurisdiction to terminate his or her tenure with the court of that jurisdiction prior to the period agreed upon and the chief judge may grant the application where he or she considers it appropriate to do so.

(3) Where an exchange judge is permitted to terminate his or her tenure under subsection (2), the other judge who is participating in the exchange may, with the approval of his or her chief judge, serve to the end of the term originally agreed upon or may elect to return to the court of his or her own jurisdiction.

(4) Where an exchange judge terminates his or her exchange prior to the period agreed upon, another judge from his of her jurisdiction may, with the approval of the judicial council of his or her jurisdiction and the judicial council of the reciprocating jurisdiction, approve an exchange for the balance of the period originally approved for the exchange.

Eligibility

5.5 To be eligible to participate in an exchange as an exchange judge, a judge shall have not less than 5 years of experience as a judge.

Appointment of exchange judge

5.6(1) The Lieutenant-Governor in Council, following consultation with the chief judge, may appoint an exchange judge of the provincial court of a reciprocating jurisdiction to be a judge of the court during an exchange period as referred to in section 5.4.

(2) A judge appointed under subsection (1) shall

(a) hold office for the term set by the Lieutenant-Governor in Council, but the appointment is subject to his or her remaining a judge of the provincial court of the province in which he or she was appointed;

(b) have the powers and duties given by section 4 to a judge appointed under section 5; and

(c) be subject to the authority of the chief judge set out in section 8.

(3) Other than sections 4, 20 to 24, 32 and 33, this Act does not apply to a judge appointed under this section.

Salary, benefits and travel expenses

5.7 (1) This province is not liable for the salary and employment benefits of an exchange judge during the period of his or her exchange in this province.

(2) The expenses incurred by a judge as a consequence of an exchange are payable by the judge personally.

(3) Notwithstanding subsections (1) and (2), where an exchange judge is required to travel in connection with the performance of his or her judicial duties in this province, he or she shall be reimbursed for his or her expenses necessarily incurred in accordance with the scale for expenses of the judges of the court.

(4) An exchange judge insured under a policy of accident and sickness insurance, life insurance, disability insurance or other insurance is personally responsible for additional payments that may be required under the policy to ensure that benefits to which he is entitled under the policy are not affected solely by his or her serving as an exchange judge in a reciprocating jurisdiction.'

Annexure B

Magistrates Court Act (Tas) – Exchange Provision

The *Magistrates Court Act 1967* (Tas) was amended by the *Magistrates Court Amendment Act (No 2)* (2003) (No 60) in 2003. It includes the following provisions relating to inter-court exchanges.

'**16C. Inter-court exchanges**

(1) The Chief Magistrate may enter into an arrangement with the Chief Magistrate of another State of a Territory that provides for either or both of the following:

(a) a magistrate of this State to serve for a period as a magistrate in that other State or that Territory;

(b) a magistrate of that other State or that Territory to serve for a period as a magistrate in this State.

(2) An arrangement under subsection (1) is to be on such terms, consistent with this Act, as the Chief Magistrate and the other Chief Magistrate determine.

(3) Notwithstanding subsection (1), a person is not eligible to exercise powers or perform functions as a magistrate in this State pursuant to an arrangement entered into under that subsection unless he or she holds an appointment under section 4(4) as a temporary magistrate.

4. Appointment of magistrates

(4) The Governor may, for any temporary purpose, appoint such number of qualified persons as he considers necessary as temporary magistrates, and each person so appointed shall hold office for such period, on such terms, and subject to such conditions, as may be specified in the instrument of his appointment.'