

Chapter 6

The Federal Court and Constitutional Law

*Justice John Griffiths and James Stellios**

‘... one wonders whether the new court would ever decide a constitutional case’.¹

Introduction

The development of constitutional law is the foundational enterprise of the Australian judiciary. It unites all courts in Australia, irrespective of their federal, State or Territory character, or their place in the judicial hierarchy, in a common and shared project. The Federal Court plays an important role in that enterprise, and its very creation gave rise to important constitutional implications. However, the role to be played by the Court in developing constitutional law was not always clear. As with its place in the judicial scheme for the exercise of federal jurisdiction, there was uncertainty over what contribution the Federal Court could make to the development of constitutional principles.

The history of the Court’s development reveals three important institutional questions faced by the Court’s creation. First, the establishment of a lower federal court, of coordinate status with State Supreme Courts, presented jurisdictional difficulties. These difficulties ultimately would need a constitutional solution for the effective operation of the Federal Court. Secondly, the Federal Court was created to alleviate the High Court’s workload to enable the High Court to focus on its constitutional function. What role would a lower federal court play in the development of constitutional law when the very purpose of its creation was to allow the High Court to play that role? Thirdly, many questions of constitutional law concern the scope of State power. What role would a lower federal court play in determining constitutional questions about State power? This chapter addresses these three institutional dimensions of the Federal Court’s creation.

Constitutional Law: the Foundational Enterprise

The establishment at federation of an entrenched Constitution for the Commonwealth of Australia effected a seismic shift in Australian constitutionalism. Not only were the

* Research for this chapter benefited from the Australian Research Council’s Discovery Projects funding scheme: DP140101218. The authors thank Kieran Pender for his excellent archival research.

1 Author Unknown, ‘Memorandum – Federal Superior Court: Jurisdiction’, 1965, NAA A432 1961-2132 Part 1.

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