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THE WANDERING ARCH: A TOPOGRAPHICAL HISTORY OF THE HIGH COURT OF AUSTRALIA ON CIRCUIT

Abstract

This article examines the High Court of Australia's role as a travelling court, from Federation to its permanent installation in Canberra. Throughout its history, the Court faced major challenges to its circuit functions but ultimately retained its capacity to sit in various locations. The factors which militated against the continuance of circuits — (1) the cost to the Commonwealth; (2) accountability to the executive; (3) administrative centralisation; and (4) lessened prestige — were met with equally compelling aspects in favour of itinerancy: (1) the cost to litigants; (2) judicial independence; (3) the federal compact; and (4) institutional proximity. The ascendancy of the latter ensured the survival of the practice to the present day. Despite the advancement of communications and transportation, and with it, the falling away of more pragmatic justifications for the Court's circuits, they remain a unique feature of the Australian High Court which distinguishes it from its apex counterparts in other federal jurisdictions.

I Introduction

The High Court of Australia does not sit in one location but travels the country in the observance of a long tradition dating from the Court's first sitting in 1903. This represents something of an oddity amongst apex courts in federal jurisdictions. The United States of America ('US') abolished the 'circuit riding' of Supreme Court justices in 1911.[1] In Canada, the Supreme Court never sat on circuit, residing instead on Parliament Hill from 1876–1946 whereafter it moved into its

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1 Joshua Glick, 'On the Road: The Supreme Court and the History of Circuit Riding' (2003) 24(4) *Cardozo Law Review* 1753, 1829, citing *Judicial Code of 1911*, Pub L No 61–475, ch 231, 36 Stat 1087 (1911).

present-day premises.[2] While the frequency of circuits in Australia has reduced since 1903, it remains a consistent, although not uninterrupted, practice.

Throughout its existence, the Court underwent numerous incidences of conflict militating against its mobility. These were the products of historical circumstances in three distinct institutional eras, lending itself to reasonably easy periodisation. The first, from 1903–28, spans the initial itinerancy of the Griffith Court amidst clashes between the competing visions of early federalists. The second, from 1929–50, covers the impact of the twin crises of the Great Depression and the Second World War on the Court's circuit functions. The third, from 1951–80, examines a mature institution coming to grips with post-war centralisation and expansion of the federal judicature. This article will explore each of these eras in Parts II(B), (C) and (D) below. The article at Parts II(A) and (E) will also provide background on the periods before 1903 and after 1980 to help contextualise the distant beginning and ultimate present of circuit sittings.[3]

Following this historical overview, the article analyses the rationales which have underpinned the Court's movements. These include financial concerns for litigants, judicial independence, the relations between the Court and the states and territories within the federal compact, and institutional proximity in both practical and symbolic terms. It will be shown that the survival of circuit sittings in each institutional era came down to the ascendancy of the foregoing factors against the manifold criticisms from the 'other side of the coin': (1) costs to the Commonwealth; (2) accountability to the executive; (3) administrative centralisation; and (4) institutional prestige. This has been borne out in the Court's successful resistance to recurrent rationalising pressures leading to the residual circuit practice of today. Ultimately, it is argued that the travelling Court was, and to a significant extent still is, necessary for the administration of justice throughout the Commonwealth.

The article aims to contribute to the literature in two ways. First, by putting together an interstitial history of an oft-overlooked feature of the Court's functioning, on which scholarship has been limited.[4] Secondly, by clarifying the merits of such circuit sittings in the Australian context — its modern persistence therein being

2 EK Williams, 'The Supreme Court of Canada Moves into Its "New" Building' (1946) 32(2) *American Bar Association Journal* 68, 70.

3 As a note on terminology, whilst individual members of the bench travelled to attend first instance and interlocutory hearings, references in this article to circuit 'sittings' are to Full Court hearings proclaimed in advance in Commonwealth notices, unless otherwise specified.

4 See, eg: JM Bennett, *Keystone of the Federal Arch: A Historical Memoir of the High Court of Australia to 1980* (Australian Government Publishing Service, 1980) 99–105; Crispin Hull, *The High Court of Australia: Celebrating the Centenary 1903–2003* (Lawbook, 2003) 35–9; Gim Del Villar and Troy Simpson, 'Circuit System' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (Oxford University Press, 2001) 96; Rob McQueen, 'The High Court of Australia: Institution or Organisation?' (1987) 59(1) *Australian Quarterly* 43, 45–7.

of relevance to other Commonwealth jurisdictions considering implementation (or, it might be said, the reinstitution[5]) of circuits, on which there has been growing commentary.[6] Currently, the Court is undergoing further transformation due to the COVID-19 pandemic, increasing its reliance on video-link and alternative sitting practices.[7] With the resumption of in-person Canberra hearings, whether this modus vivendi will persist remains to be seen. No doubt this means there is scope for further research on the changing procedural practices of the Court. There are also discrete issues raised in this historical survey, such as the relationship of judicial independence with mobility, itinerant justice, and a politico-economic analysis of circuits, presenting additional avenues for research in this area. In any event, as the Court's current practices are in such a protean state, there is clear value in examining the origins, merits and challenges of the Court's circuits, which are now more than a century old.

II Topographical History of the High Court of Australia

A *Building the Arch: Origins, 1890–1903*

Alfred Deakin spoke prophetically when describing the High Court as the 'keystone of the federal arch' in 1902.[8] In his now well-known second reading of the Judiciary Bill 1902 (Cth) in the House of Representatives, Deakin forcefully campaigned for an independently Australian constitutional tribunal of the highest order.[9] This occasion was also where Deakin unfurled his grand vision for an itinerant court, bestriding the length and breadth of the nascent Commonwealth:

> When I speak of a High Court I mean a High Court for the people of Australia. I do not mean a High Court that is to sit at the federal capital alone, or at a State capital never to be seen outside it, and only known to the people of the States by report and hearsay. I mean a court whose Judges will undertake circuits, and be able to visit every State in the Union. If we have a federal court at all it must

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5 See *Alexander E Hull & Co v M'Kenna* [1926] 1 IR 402, 403–4 (Viscount Haldane), in which his Lordship proclaimed that the Judicial Committee was not fixed in one location, but everywhere throughout the British Empire. See also Philip Joseph, 'Towards Abolition of Privy Council Appeals: The Judicial Committee and the Bill of Rights' (1985) 2(3) *Canterbury Law Review* 273, 282 n 49.

6 See below nn 310–17 and accompanying text.

7 See below Part IV.

8 Commonwealth, *Parliamentary Debates*, House of Representatives, 18 March 1902, 10967 (Alfred Deakin, Attorney-General).

9 Ibid 10989; Sir Anthony Mason, 'The High Court of Australia: A Personal Impression of Its First 100 Years' (2003) 27(3) *Melbourne University Law Review* 864, 865 ('The High Court of Australia'); Sir Gerard Brennan, 'Courts for the People — Not People's Courts' (1995) 2(1) *Deakin Law Review* 1, 1–3. See generally Alfred Deakin, 'Cricket … If There Were Three Elevens in the Field' in Sally Warhaft (ed), *Well May We Say...: The Speeches That Made Australia* (Text Publishing, 2014) 146.

> be a court sitting at State capitals, and, if possible, in other parts of the States, in order that the whole continent may be brought within touch.[10]

The notion of a travelling supreme court of appeal in Australia was by no means new. In 1856, South Australian Governor Richard MacDonnell had endorsed a scheme for an appellate panel of Supreme Court justices from the various Australian colonies, to visit each colony at least twice a year.[11] While this never materialised, the ghost of a superior 'scratch court' of Supreme Court Chief Justices would consistently rear its head over the several decades leading up to the *Judiciary Act 1903* (Cth).[12] In 1881, an Inter-Colonial Conference had recommended that the Imperial Government pass legislation to create an Australasian Court of Appeal, annexing a model Bill.[13] Clause 9 of the Bill stated that 'provision shall be made as far as practicable for hearing appeals at least once a year in the colony in which the judgment appealed from shall have been given'.[14] While this proposal withered, the High Court would end up eventually adopting this approach.

Surprisingly, the Australian federal conventions ('Convention Debates') shed little light on the itinerant Court's origins. The limited opinion expressed on the matter was sharply divided. Richard O'Connor noted the necessity of not legislatively fixing 'the place for circuit', to avoid the inconvenience of altering the locations depending on where the centre of government landed.[15] Joseph Carruthers assumed outright that the 'Court of Appeal would not be one that would go wandering about taking justice to the very doors of people' and that 'it … w[ould] sit in the capital city of the Federation'.[16] Josiah Symon, who would reiterate these reservations as Attorney-General, expressed doubt as to the efficacy of circuits.[17] Deakin was supportive of a system which would ensure the reach of federal judicial power across the entire

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10 Commonwealth, *Parliamentary Debates*, House of Representatives, 18 March 1902, 10984 (Alfred Deakin, Attorney-General).

11 Bennett (n 4) 4.

12 See: Commonwealth, *Parliamentary Debates*, House of Representatives, 18 March 1902, 10986 (Alfred Deakin, Attorney-General); Commonwealth, *Parliamentary Debates*, House of Representatives, 9 June 1903, 618 (Patrick Glynn); *Official Report of the National Australasian Convention Debates*, Adelaide, 31 March 1897, 368–9 (Edmund Barton).

13 JM Bennett and Alex C Castles (eds), *A Source Book of Australian Legal History: Source Materials from the Eighteenth to the Twentieth Centuries* (Law Book, 1979) 236. See Australasian Court of Appeal Bill 1881 (Imp), reproduced at 236–41.

14 Australasian Court of Appeal Bill 1881 (Imp) cl 9, quoted in Bennett and Castles (eds) (n 13) 238.

15 *Official Report of the National Australasian Convention Debates*, Adelaide, 20 April 1897, 990 (Richard O'Connor).

16 *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 31 January 1898, 325 (Joseph Carruthers).

17 Ibid 298 (Josiah Symon).

Commonwealth, but did not point to circuits as a solution at this juncture.[18] Many of these views were ventilated in the course of discussing appeals to the Judicial Committee of the Privy Council ('Privy Council'), often criticised by the federalists for its geographical remoteness.[19] What is notable is that the founders in all likelihood considered that the Court would be 'the only general federal court',[20] but left the issue in the *Australian Constitution* to Parliament, enabling the emergence of the current Federal Court, and its consequent effects on the High Court's jurisdiction.[21]

Following Federation, both Deakin and Sir Samuel Griffith were in agreement on the necessity of an itinerant court.[22] That Griffith endorsed Deakin's view is unsurprising considering his diligent circuit attendances as Chief Justice of Queensland, an experience which impressed upon him the importance of bringing law to the frontier.[23] Subsequently, Griffith, as Chief Justice of Australia, would lead the charge on making the vision of Commonwealth circuits a reality.[24] After the 1902 second reading speech, itinerancy continued to be emphasised in the 1903 Judiciary Bill debates,[25] alongside those of the High Court Procedure Bill 1903 (Cth).[26] Deakin noted the necessity of using state court facilities until a proper seat of government in a federal capital could be established,[27] and the absolute requirement of a five-person bench to be able to attend to circuit and principal registry matters.[28] Regardless, strong dissent was raised in the House on the basis of delays from judges indisposed on circuit,[29] and the burden of travelling — 'thousands of miles, to Coolgardie' in Sir John Quick's words[30] — all of which would financially impact litigants.

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18 *Debates and Proceedings of the Australasian Federation Conference*, Melbourne, 10 February 1890, 25–6 (Alfred Deakin).

19 See, eg, *Official Report of the National Australasian Convention Debates*, Adelaide, 20 April 1897, 976–7 (George Reid).

20 Geoffrey Lindell, *Cowen and Zines's Federal Jurisdiction in Australia* (Federation Press, 4th ed, 2016) 253.

21 See *Australian Constitution* s 71. See below Part III(C).

22 See Roger B Joyce, *Samuel Walker Griffith* (University of Queensland Press, 1984) 257, citing Letters from Alfred Deakin to Samuel Griffith, 18, 29 January, 8, 21 February, 12 March, 3, 17, 24 April 1901, archived at Dixson Library, Correspondence of Samuel Griffith, MSQ 190, 203–10, 229–36, 257–64, 281–8.

23 See Joyce (n 22) 240–5.

24 See below Part II(B).

25 Commonwealth, *Parliamentary Debates*, House of Representatives, 9 June 1903, 607–8 (Alfred Deakin, Attorney-General).

26 Commonwealth, *Parliamentary Debates*, House of Representatives, 1 July 1903, 1624 (Alfred Deakin, Attorney-General).

27 See Commonwealth, *Parliamentary Debates*, House of Representatives, 9 June 1903, 608 (Alfred Deakin, Attorney-General).

28 See ibid 607.

29 Ibid 625 (Patrick Glynn).

30 Ibid 648 (Sir John Quick).

The Bill emerged from the House in amended form; the number of judges was cut from five to three.[31] This amendment would lead to future critique about delays and workload, as initially voiced in the House. However, having 'scraped so many rocks' and 'skirted so many quicksands', the Bill received royal assent in August 1903.[32]

B *The Arch Raised: Itinerancy from Federation, 1903–28*

The provisions of the *Judiciary Act* enabled sittings in multiple locations from the outset. As ss 12 and 13 of the original Act provided:

> **Place of sitting.**
>
> **12.** Sittings of the High Court shall be held from time to time as may be required at the principal seat of the Court and at each place at which there is a District Registry.
>
> **Matter heard at one place may be further dealt with at another place.**
>
> **13.** When any cause or matter has been heard at a sitting of the High Court held at any place the Justice or Justices before whom the matter was heard may pronounce judgment or give further hearing or consideration to the cause or matter at a sitting of the High Court held at another place.[33]

This latent facility was translated into a positive policy of circuits following a conference between Prime Minister Alfred Deakin, Attorney-General James Drake, and the prospective justices.[34] To this effect, the Governor-General declared Melbourne the principal seat of the Court, pending the establishment of the seat of government.[35] As contemplated in parliamentary debates, the principal registry made use of existing facilities in the Victorian Supreme Court.[36] On 6 October 1903, Chief Justice Griffith and Justices Barton and O'Connor assembled in the Banco Court of the Supreme Court House, in a commemorative event which reportedly

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31 See *Judiciary Act 1903* (Cth) ss 21(2), 22.

32 See Alfred Deakin, 'The High Court Established', *Morning Post* (London, 25 August 1903), reproduced in JA La Nauze (ed), *Federated Australia: Selections from Letters to the Morning Post 1900–1910* (Melbourne University Press, 1968) 118, 119.

33 *Judiciary Act 1903* (Cth) ss 12–13, as enacted.

34 Letter from SW Griffith, Edmund Barton and RE O'Connor, Justices of the High Court to the Attorney-General of the Commonwealth, 14 February 1905, reproduced in Parliament of the Commonwealth of Australia, *Correspondence between Attorneys-General and the Justices of the High Court re Sitting Places and Expenses of the Court* (Parliamentary Paper No 26, 24 August 1905) 10, 10–11.

35 Attorney-General (Cth), 'Appointment of the Principal Seat and the Principal Registry of the High Court' in Commonwealth, *Commonwealth of Australia Gazette*, No 52, 2 October 1903, 626.

36 Ibid.

'taxed to its utmost extent' the accommodation available in the premises.[37] Chief Justice Griffith, on the occasion, made the prescient observation that '[w]e cannot but be conscious of the fact that the extent to which we obtain the confidence we are anxious to command will depend on what the future of the court will be'.[38]

On 16 October 1903, the Governor-General designated the respective Supreme Court Houses in the capitals of New South Wales, Queensland, South Australia, Tasmania, and Western Australia as district registries.[39] By this time the Rules of Court included wording which provided:

> APPEAL RULES
>
> SECTION I
>
> **1A.** Unless otherwise directed by the Court or a Justice such appeals and applications shall be heard at the seat of government of the State. The Court or a Justice may direct that any such appeal or application shall be heard at the seat of government of some other State.[40]

This facilitated burgeoning circuit travel, where appeals or related applications could be heard in one place and later transferred to a Full Court elsewhere. This was in addition to general rules which allowed any party to apply for a transfer from one district registry to another at the discretion of the Court or Justice presiding.[41] This was to be an essential incident of the Court's ability to deal with first instance and appeal matters in a multi-registry system where the Rules provided for sittings at any of those registries.[42]

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37 See 'The High Court: Judges Sworn In', *The Argus* (Melbourne, 6 October 1903) 5.

38 'The High Court: Opening Ceremony', *The Argus* (Melbourne, 7 October 1903) 9.

39 Attorney-General (Cth), 'Appointment of District Registry of the High Court in the State of New South Wales' in Commonwealth, *Commonwealth of Australia Gazette*, No 56, 17 October 1903, 669; Attorney-General (Cth), 'Appointment of District Registry of the High Court in the State of Queensland' in Commonwealth, *Commonwealth of Australia Gazette*, No 56, 17 October 1903, 669; Attorney-General (Cth), 'Appointment of District Registry of the High Court in the State of South Australia' in Commonwealth, *Commonwealth of Australia Gazette*, No 56, 17 October 1903, 670; Attorney-General (Cth), 'Appointment of District Registry of the High Court in the State of Tasmania' in Commonwealth, *Commonwealth of Australia Gazette*, No 56, 17 October 1903, 670; Attorney-General (Cth), 'Appointment of District Registry of the High Court in the State of Western Australia' in Commonwealth, *Commonwealth of Australia Gazette*, No 56, 17 October 1903, 670.

40 High Court of Australia, 'Rules of Court' in Commonwealth, *Commonwealth of Australia Gazette*, No 56, 17 October 1903, 671 r 2(4).

41 See *High Court Procedure Act 1903* (Cth) s 7(1), as enacted. This operated on the assumption that first instance matters would be heard at the relevant district registry from which the cause originated: see ords ix and xxx(1).

42 Until the advent of the Federal Court: see below Part III(C).

The result was a manic tempo from the outset. *The Sydney Morning Herald* observed, '[i]n all probability the first sitting of the High Court will be held in Sydney on Thursday week'.[43] This was confirmed when the Court issued a Rule of Court ordering sittings in Sydney on 15 October and 6 November 1903 at the Court House in Darlinghurst.[44] It was to then return to Melbourne on 18 November.[45] However, before 15 October, the Court fixed a date for Brisbane on 26 October.[46] Following the Brisbane sittings, the Court appointed further dates of 24 November (Adelaide) and 2 December (Perth).[47] Upon arriving in Adelaide, it again fixed dates for the new year of 23 February 1904 (Hobart), 1 March (Melbourne) and 15 March (Sydney).[48]

Overall, the Court's first, partial year of operation alone involved travel from: Melbourne to Sydney; Sydney to Brisbane; Brisbane to Sydney; Sydney to Melbourne; Melbourne to Adelaide; Adelaide to Perth; and then back to the principal registry of Melbourne from Perth in mid-December in preparation for the new year's hearings.[49] Some legs were only separated by a few days, and for a country the size of Australia the distances covered (by train and steamer no less) could only be described as extraordinary. This was especially so for judges primarily resident in Brisbane and Sydney.[50] Some legs were less than salubrious; the High Court toiled in a 'subterranean' room in the Perth Supreme Court House populated with vermin and malodorous furnishings.[51] This was the Griffith Court's practice for years, a testament to the commitment the early federal judges had to the Commonwealth judicial project.

It is also unsurprising that there was an early challenge to this practice and the freewheeling judges behind it. There is a significant amount of literature on the

43 'Sitting in Sydney', *The Sydney Morning Herald* (Sydney, 7 October 1903) 10.

44 High Court of Australia, 'Rule of Court' in Commonwealth, *Commonwealth of Australia Gazette*, No 55, 10 October 1903, 662.

45 Ibid. The first Full Court hearing occurred on the latter Sydney date, 6 November 1903: see: Bennett (n 4) 25; *Dalgarno v Hannah* (1903) 1 CLR 1.

46 High Court of Australia, 'Rule of Court' in Commonwealth, *Commonwealth of Australia Gazette*, No 56, 17 October 1903, 672.

47 High Court of Australia, 'Rule of Court' in Commonwealth, *Commonwealth of Australia Gazette*, No 61, 31 October 1903, 757.

48 High Court of Australia, 'Rule of Court' in Commonwealth, *Commonwealth of Australia Gazette*, No 68, 28 November 1903, 876.

49 See 'High Court's Sitting', *The Sydney Morning Herald* (Sydney, 28 November 1903) 11.

50 See Susan Priest, 'The Griffith Court, the Fourth Commonwealth Attorney-General and the "Strike of 1905"' (Speech, Sir Harry Gibbs Oration Lecture, 2012).

51 See Justice Michael Kirby, '85 Journeys to Perth' (High Court Dinner, Law Society of Western Australia, 24 October 2001). This would continue well into the second half of the century, until the intervention of Sir Ronald Wilson.

judicial 'strike' of 1905, so the events will only be covered briefly.[52] The *Judiciary Act* at the time of the Griffith Court did not provide for the payment of travelling expenses, and responsibility for such disbursements fell to the Attorney-General's Department.[53] In 1904, for instance, Attorney-General Henry Higgins had pressed the Court on whether a daily cap on travel expenses of £3 10s might be acceptable,[54] to which the justices jointly replied: 'the present arrangement is not only in accordance with law, but is calculated rather to diminish than to increase the actual expenditure in travelling expenses'.[55]

However, with the appointment of Josiah Symon as Attorney-General in August 1904, such quibbling culminated in overt conflict between the judicial and executive arms. When Griffith wrote to Symon on 13 December 1904 requesting the arrangement of a Hobart courtroom, Symon responded with a reiteration of his criticisms ventilated during the Convention Debates, pointing out '[a]n ambulatory Court of Appeal … is, so far as I am aware, without precedent'.[56] He believed appeals should be heard in the principal seat of the Court, with any exceptional travelling expenses to be calculated from there.[57] This sparked a series of escalating correspondences

52 See, eg: Justice Stephen Gageler, 'When the High Court Went on Strike' (2017) 40(3) *Melbourne University Law Review* 1098; Susan Priest, 'Australia's Early High Court, the Fourth Commonwealth Attorney-General and the "Strike of 1905"' in Paul Brand and Joshua Getzler (eds), *Judges and Judging in the History of the Common Law and Civil Law: From Antiquity to Modern Times* (Cambridge University Press, 2012) 292; WG McMinn, 'The High Court Imbroglio and the Fall of the Reid-McLean Government' (1978) 64(1) *Journal of the Royal Australian Historical Society* 14; Joyce (n 22) 262–6.

53 Gageler (n 52) 1105, citing Minute Paper for the Executive Council, 12 October 1903, archived at National Library of Australia, Papers of Sir Josiah Symon, MS 1736, 11/313.

54 Letter from HY B Higgins, Attorney-General to Justices of the High Court, 29 July 1904, reproduced in Parliament of Australia, *Correspondence between Attorneys-General and the Justices of the High Court re Sitting Places and Expenses of the Court* (Parliamentary Paper No 26, 24 August 1905) 1, 1.

55 Letter from SW Griffith, Edmund Barton and RE O'Connor, Justices of the High Court to the Attorney-General of the Commonwealth, 19 August 1904, reproduced in Parliament of Australia, *Correspondence between Attorneys-General and the Justices of the High Court re Sitting Places and Expenses of the Court* (Parliamentary Paper No 26, 24 August 1905) 2, 2.

56 Letter from JH Symon, Attorney-General to Sir SW Griffith, Chief Justice, 23 December 1904, reproduced in Parliament of Australia, *Correspondence between Attorneys-General and the Justices of the High Court re Sitting Places and Expenses of the Court* (Parliamentary Paper No 26, 24 August 1905) 3, 3. The courtroom, however, was begrudgingly arranged: at 4.

57 Letter from JH Symon, Attorney-General to Sir SW Griffith, Chief Justice, 23 December 1904, reproduced in Parliament of Australia, *Correspondence between Attorneys-General and the Justices of the High Court re Sitting Places and Expenses of the Court* (Parliamentary Paper No 26, 24 August 1905) 3, 4.

between the Court and the Attorney-General, all the while the former defiantly continued to go on circuit.[58]

The Argus newspaper canvassed the arguments for and against: 'until the number of cases to be heard in South Australia, Western Australia, Tasmania, and perhaps Queensland increase they hold that no injustice would be done to these states if the High Court only sat in Melbourne and Sydney';[59] versus '[e]ven if a thousand pounds was saved in travelling expenses, it is claimed that this would not compensate for the hardship inflicted upon persons living in Western Australia and Tasmania'.[60] In April 1905, the Attorney-General's Department refused to reimburse travel expenses entirely; in response, the Court adjourned an eight day civil jury hearing in Melbourne.[61] Following concessions at a Cabinet consultation with Prime Minister George Reid, the Court resumed sitting on 9 May.[62] However, Symon's ongoing refusal to cover expenses generated further friction, including a public statement disseminated by the Court in protest.[63] The impasse would only be broken when the Reid Government gave way to the Deakin Government, and Josiah Symon to Isaac Isaacs.[64] Isaacs was quick to assure the Court that 'the intention of Parliament in enacting the *Judiciary Act* was that the High Court … should sit in each State capital "as may be required"';[65] although this would not stop Symon reventilating the issue in the Senate.[66]

Having warded off this attack, the Court continued to sit around Australia. Their attitude was further vindicated with *The Commonwealth Law Review*'s publication of a unanimous series of opinions from the profession about the merits of circuits.[67] The consensus was that itinerancy 'saved expense, and drew upon the services

58 See Gageler (n 52) 1106–14.

59 'The High Court: Where Shall It Sit? An Interesting Situation', *The Argus* (Melbourne, 13 March 1905) 5.

60 'The High Court: Where Shall It Sit? Opinions of the Judges', *The Argus* (Melbourne, 14 March 1905) 5.

61 Gageler (n 52) 1116–17.

62 See ibid 1118.

63 Letter from EPT Griffith, Associate to the Chief Justice to the Secretary, Attorney-General's Department, 22 June 1905, attaching a statement, reproduced in Parliament of Australia, *Correspondence between Attorneys-General and the Justices of the High Court re Sitting Places and Expenses of the Court* (Parliamentary Paper No 26, 24 August 1905) 35.

64 Gageler (n 52) 1128.

65 Letter from Isaac A Isaacs, Attorney-General to Sir Samuel W Griffith, Chief Justice, 22 August 1905, reproduced in Parliament of Australia, *Correspondence between Attorneys-General and the Justices of the High Court re Sitting Places and Expenses of the Court* (Parliamentary Paper No 26, 24 August 1905) 41, 41.

66 Commonwealth, *Parliamentary Debates*, Senate, 28 November 1905, 5837–9 (Sir Josiah Symon). See Judiciary Act 1903 Amendment Bill 1905 (Cth).

67 Everard Digby, 'The Home of the High Court and a High Court Bar' (1905) 3(2) *Commonwealth Law Review* 49, 49–58.

of lawyers best equipped to argue cases affecting the laws of their own States'.[68] Two important legislative amendments to the *Judiciary Act* arose thereafter. The *Judiciary Act 1906* (Cth) expanded the bench from three to five,[69] as originally planned. It was driven by concerns about the Court's workload, not least due to the risk of business falling into arrears due to travel.[70] After all, the Court's docket had expanded beyond the measure of anyone's predictions:[71]

> the High Court had, from its creation in October 1903 until the end of that year, heard two appeals and eight motions and applications; in 1904 there were thirty-nine appeals and forty motions and applications; … while in the first half of 1906 there had been forty-two appeals 'and a very large number of motions'.[72]

The issue was also partly attributable to the 'dual hats' worn by O'Connor J (and later Higgins J) as both President of the Court of Conciliation and Arbitration ('Arbitration Court') and puisne High Court justice, with considerable delays and much complaint arising from the preferencing of appellate over industrial work.[73]

Judicial workload was revisited in the *Judiciary Act 1912* (Cth), which expanded the Court to its current-day maximum strength of seven.[74] Attorney-General William Hughes gave a frank assessment of the Court's untenable circuit workload:

> In order to give some idea of the work of the Court, it may be pointed out that the judicial year is one of 200 days, and that last year the full Court sat 161 days, in addition to the time spent by the members of the Court in travelling. …
>
> It must be remembered that the Justices of the High Court travel all over Australia. No other Justices do that. The Supreme Court of America does not do it. It sits in Washington only, although some of its Justices go on circuit. But here the High Court travels, not over a State, but over a continent.[75]

However, even with an enlarged bench, a growing case docket and the commensurately growing needs of the Arbitration Court were a thorn in the side of the Knox Court,

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68 See Bennett (n 4) 102.

69 *Judiciary Act 1906* (Cth) s 2.

70 Commonwealth, *Parliamentary Debates*, House of Representatives, 18 July 1906, 1432–3 (Isaac Isaacs, Attorney-General).

71 See, eg, ibid 1435 (William Henry Wilks).

72 Bennett (n 4) 30.

73 See: Commonwealth, *Parliamentary Debates*, House of Representatives, 18 July 1906, 1432–3 (Isaac Isaacs); Commonwealth, *Parliamentary Debates*, House of Representatives, 20 July 1906, 1625 (Joseph Cook); Commonwealth, *Parliamentary Debates*, House of Representatives, 12 December 1912, 6983–5 (William Hughes, Attorney-General).

74 *Judiciary Act 1912* (Cth) s 2.

75 Commonwealth, *Parliamentary Debates*, House of Representatives, 12 December 1912, 6984–5 (William Hughes, Attorney-General).

putting strain on the availability of state courtrooms where both required separate facilities.[76] For the principal registry in Melbourne, such pressures eased when the Court moved into a standalone building situated on 450 Little Bourke Street on 20 February 1928, reportedly '[w]ith a complete absence of ceremonial'.[77] The Court finding the space insufficient, a second storey was added in 1935.[78] Similarly, a free-standing Sydney courtroom, situated north-west of the Darlinghurst complex,[79] was (unofficially) opened on 17 August 1923 and cost the state government the princely sum of £22,000.[80] In 1926, Attorney-General JG Latham proposed an amendment to the *Judiciary Act*, providing for the continued sitting of the Court in other locations even after the seat of government at Canberra had been established.[81] This minor administrative change was to have lasting ramifications until 1980.

C *The Arch Tested: Depression, Wartime and Centralisation, 1929–50*

The Court had survived the first major test to its circuit sittings, and '[t]hereafter the regular visitation of the court to the capital cities came to be taken for granted by governments and the community'.[82] The Court's routine outside the Sydney–Melbourne circuit became 'Hobart in February, Brisbane in June, Perth in September, and Adelaide in October', or near enough to those dates.[83] However, the Court did not emerge unscathed from the Great Depression in 1929, which was shortly followed by the outbreak of war, both posing major interruptions to the Court's established routine.

The Depression was immediately felt by the Court with the passage of the *Financial Emergency Act 1931* (Cth) ('*Financial Emergency Act*') as part of a raft of federal austerity measures. Part VII of that Act provided that, notwithstanding the *Judiciary Act 1903* or the *High Court Procedure Act 1903*, sittings of the Full Court could only be held at places specified by the Governor-General.[84] Single justices were free to continue their sittings as they wished, perhaps as a sop to litigants and the

76 Bennett (n 4) 43.

77 'High Court: New Building Opened', *The Argus* (Melbourne, 21 February 1928) 21; Department of the Environment and Heritage, 'High Court of Australia (Former)' (Australian Heritage Database Assessment, Place ID 105896, 16 June 2006) 1. It was observed '[t]he newly erected High Court of Australia building … contrasts poorly with the lofty splendour of the Victorian Law Courts buildings': 'New High Court Building', *The Argus* (Melbourne, 22 February 1928) 19.

78 See Department of the Environment and Heritage (n 77) 4.

79 'Buildings and Works: New High Court at Darlinghurst', *The Sydney Morning Herald* (Sydney, 24 January 1923) 8. 'Built in the Grecian style', reportedly 'its elevation harmonise[d] well with the existing buildings'.

80 'High Court's Home', *The Evening News* (Sydney, 17 August 1923) 8.

81 Commonwealth, *Parliamentary Debates*, House of Representatives, 21 May 1926, 2238–9 (JG Latham, Attorney-General). See also *Judiciary Act 1926* (Cth) s 2.

82 Bennett (n 4) 102.

83 Ibid 102–3.

84 *Financial Emergency Act 1931* (Cth) s 51 ('*Financial Emergency Act*').

Court in light of the arguments raised in 1905. As Treasurer Ted Theodore pointed out, 'fairly considerable savings will be effected in regard to travelling expenses, and this can be done without inconvenience to litigants who have matters to bring before the court in its appellate jurisdiction'.[85] Presumably this was an allusion to the Court's ability to transfer matters heard in one location to another under (the then) s 13 of the *Judiciary Act 1903*, even if the Full Court remained static.[86]

In August 1931, such an order was duly made by the Governor-General, prohibiting sittings of the Full Court in Brisbane, Adelaide, Perth and Hobart.[87] It remains to date the only instance of a legislatively implemented injunction on Court sittings, and, all the more surprisingly, it happened to be done with the consent of the Justices.[88] The controversy was significant.[89] The Premier of South Australia wrote to the Prime Minister in protest, suggesting that any costs saved to the Commonwealth would be offset by increased costs to litigants.[90] The State Attorney-General also conceded costs would increase.[91] The Adelaide Chamber of Commerce coordinated a united protest with the Chambers in Perth, Hobart and Brisbane about costs to litigants.[92] The Queensland legal profession urged restoration of state sittings.[93] Interestingly, the Tasmanian perspective seems to have been mixed in comparison to the enthusiasm of the other states. *The Mercury* newspaper applauded the change, noting that low volumes of work and mundane first instance applications did not justify Full Court attendances[94] — upon one such visit, it had observed 'a very large and very expensive steam hammer has been used to crush a very small nut'.[95] Perhaps contributing to judicial acceptance of curtailed sittings was the diminished size of the bench. In January 1931, Isaacs CJ had resigned from the bench to take up the post of Governor-General,[96] leaving Frank Gavan Duffy as Chief Justice.[97]

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85 Commonwealth, *Parliamentary Debates*, House of Representatives, 3 July 1931, 3407–8 (Ted Theodore).

86 Cf *Judiciary Act 1903* (Cth) s 12, as enacted.

87 Governor-General, 'Notice' in Commonwealth, *Commonwealth of Australia Gazette*, No 65, 6 August 1931, 1312.

88 See Bennett (n 4) 103.

89 See ibid.

90 See ibid 103, citing Letter from LL Hill to the Prime Minister, 4 November 1931, archived at National Archives of Australia, item 31/1654.

91 'Full High Court Sittings: Adelaide Omitted', *The Advertiser and Register* (Adelaide, 17 August 1931) 7.

92 See 'Sittings of the High Court: Protest against Limitation', *The Advertiser* (Adelaide, 15 December 1931) 4.

93 See 'The High Court', *The Courier-Mail* (Brisbane, 11 September 1933) 12.

94 See 'High Court Progresses', *The Mercury* (Hobart, 7 July 1931) 6.

95 'An Expensive Judiciary', *The Mercury* (Hobart, 11 February 1931) 6.

96 'Sir Isaac Isaacs', *The Sydney Morning Herald* (Sydney, 21 January 1931) 12.

97 'Chief Justice: Sir Frank Gavan Duffy', *The Sydney Morning Herald* (Sydney, 24 January 1931) 13.

No further appointment would be made until the end of the Second World War. In the intervening period, Parliament amended the *Judiciary Act* to reflect the reduced size of six,[98] with Attorney-General Latham commenting, '[s]ix justices are able to do the work'.[99]

However, this prognostication proved ill-fated as the decision was made in 1933 to restore inter-state sittings. With the worst of the Depression behind Australia (no doubt assisted by considerable savings from the judicature with the *Financial Emergency Act* measures[100] which apparently included the cutting of railway passes[101]), and growing concern over state resentment,[102] the Governor-General revoked the order prohibiting state Full Court sittings on 27 September 1933.[103] The press at the time welcomed the move as a timely removal of inconvenience posed to the states.[104]

Unfortunately, only a few years after the Court's tentative return to its pre-Depression practice, Australia would be plunged into the Second World War. Although no Order in Council was made, circuits were nonetheless constrained. Travels to Perth, for example, ceased entirely between 1938 and 1945.[105] While the Court sought to hold its regular sittings in the states, the notices became qualified in that '[n]o sittings will be held unless there is a substantial amount of business' — if a sitting in a location was omitted, then the subsequently located sitting would start from that date instead.[106]

Compounding the difficulty was the involvement of several Justices in full time war service:[107]

98 See *Judiciary Act* 1933 (Cth) s 2.

99 Commonwealth, *Parliamentary Debates*, House of Representatives, 24 November 1933, 5004 (JG Latham, Attorney-General).

100 See Bennett (n 4) 103, citing Memorandum of JG Latham, Attorney-General, 17 July 1933, archived at National Archives of Australia, item 31/1038.

101 See Clem Lloyd, 'Not Peace but a Sword!: The High Court under JG Latham' (1987) 11(2) *Adelaide Law Review* 175, 180.

102 See Bennett (n 4) 103, citing Memorandum of JG Latham, Attorney-General, 17 July 1933, archived at National Archives of Australia, item 31/1038.

103 Governor-General, 'Notice' in Commonwealth, *Commonwealth of Australia Gazette*, No 54, 28 September 1933, 1353.

104 See: 'High Court for Brisbane', *The Courier-Mail* (Brisbane, 20 September 1933) 14; 'High Court Sittings: To Be Held in All States', *The Mercury* (Hobart, 13 September 1933) 6; 'High Court Sittings: Resumption in All States', *The Age* (Melbourne, 29 September 1933) 9.

105 See Kirby, '85 Journeys to Perth' (n 51).

106 See, eg, High Court of Australia, 'Rule of Court' in Commonwealth, *Commonwealth of Australia Gazette*, No 128, 9 November 1939, 2350.

107 Justice Michael Kirby, 'Sir Edward McTiernan: A Centenary Reflection' (1991) 20(2) *Federal Law Review* 165, 177–8 (citations added).

> justices of the High Court took on extra-judicial responsibility. Latham as Minister to Japan;[108] Dixon as Minister to Washington[109] and later Kashmir.[110] McTiernan was also asked by Evatt (who by this time had resigned his seat on the court and was federal Attorney-General) to conduct an inquiry into the alleged falsification of records in connection with aircraft production.[111]

Justice Dixon was often taken away from hearings to attend to duties on the Central Wool Committee during the early war.[112] Even after the war and restoration of the bench to seven,[113] the Court continued to be affected with Webb J occupied as President of the International Military Tribunal for the Far East[114] when appointed to the Court on 16 May 1946.[115] During this time Starke J repeatedly refused to travel to 'the outstations', complaining about being treated as a 'carpet bagger roaming the country'.[116] This caused much consternation to Latham CJ in assembling a court on circuit.[117] Justice Williams also reportedly declined to travel to Adelaide or Perth on occasions.[118]

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108 See *Judiciary Act 1940* (Cth) (17 August 1940 to 8 December 1941).

109 See *Judiciary (Diplomatic Representation) Act 1942* (Cth) (3 June 1942 to 1 October 1944).

110 From May to September 1950: see Owen Dixon, *Report of Sir Owen Dixon, United Nations Representative for India and Pakistan, to the Security Council*, UN Doc S/1791 (15 September 1950).

111 See generally Fiona Wheeler, 'Parachuting In: War and Extra-Judicial Activity by High Court Judges' (2010) 38(3) *Federal Law Review* 485, 486 n 7, 494 (1 March to 10 July 1943).

112 See Philip Ayres, *Owen Dixon* (Miegunyah Press, 2007) 118. He would subsequently chair the Shipping Control, Commonwealth Marine War Risks Insurance and Salvage Boards, as well as the Allied Consultative Shipping Council: see generally Grant Anderson and Daryl Dawson, 'Dixon, Sir Owen (1886–1972)' in John Ritchie (ed), *Australian Dictionary of Biography* (Melbourne University Press, 1996) vol 14.

113 See *Judiciary Act 1946* (Cth) s 2. See also Commonwealth, *Parliamentary Debates*, House of Representatives, 29 March 1946, 807–9 (HV Evatt, Attorney-General).

114 See Wheeler (n 111) 495–6 (term ending 12 November 1948).

115 Governor-General, 'Commonwealth of Australia' in Commonwealth, *Commonwealth of Australia Gazette*, No 108, 13 June 1946, 1609.

116 Letter from Justice Starke to Chief Justice Latham, 217 October 1938, archived at National Library of Australia, Papers of Sir John Latham, ref 1009/62, quoted in Lloyd (n 101) 179. See also JD Merralls, 'That's Sir Hayden Starke' [2013] (153) *Victorian Bar News* 42, 45.

117 See Lloyd (n 101) 179–80.

118 Mason, 'The High Court of Australia' (n 9) 868.

Nevertheless, despite the vicissitudes of Depression and wartime, the Court returned to its habitual sittings going into the 1950s.[119] By this time, the approach had become somewhat more qualified than the days of the Griffith Court. As Sir Owen Dixon (the then Chief Justice) explained to the Perth Bar in 1952:

> There have been occasions when a year has been missed, they have been few, other than those I have mentioned. They have been due to the practice, which became more or less established, that the Court would not visit any capital city if there were less than three cases in its list. It may seem an arbitrary rule of practice but, in view of what is involved in the movement of a court, some rule has to be established upon these matters. It has been rare for Perth to have fewer than three cases, and I hope that it will be rarer in future.
>
> The fact that the Court must visit every capital in rotation makes it impossible to come here more than once a year, such are the demands upon its time of the very large lists in Sydney and Melbourne. No doubt if the interval between sittings were less than a year a greater number of appeals would be brought to the Court.[120]

Even so, when sufficient business presented itself, there emerged continuity with the tradition of old: 'Hobart in February to be out of the heat and watch the regatta, Perth in spring for the wildflowers, Adelaide in transit to Perth, and a winter visit to Brisbane at the time of the Doomben Ten Thousand'.[121]

D *The Arch Expanded: Affixation in the Capital and the Creation of the Federal Court, 1951–80*

In many respects, the Court's permanent affixation in Canberra had been presaged for some time. The early *Judiciary Act* debates had treated the bringing about of the principal registry in the national capital as assumed.[122] Walter Burley Griffin's 1912 capital plans had provided for a 'Courts of Justice' building.[123] In 1927, the *Judiciary Act* was amended to allow the exercise of supreme court jurisdiction by the High Court in the Australian Capital Territory, and there a district registry was

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119 See High Court of Australia, 'Rule of Court' in Commonwealth, *Commonwealth of Australia Gazette*, No 80, 3 November 1949, 3128.

120 Sir Owen Dixon, 'Address upon the Occasion of First Presiding as Chief Justice at Perth on 2nd September, 1952' in Judge Severin Woinarski (ed), *Jesting Pilate and Other Papers and Addresses* (Law Book, 1965) 252, 252 ('Address upon the Occasion of First Presiding').

121 David Marr, *Barwick* (George Allen & Unwin, 1980) 215.

122 See Commonwealth, *Parliamentary Debates*, House of Representatives, 9 June 1903, 608 (Alfred Deakin, Attorney-General). See also *Judiciary Act 1903* (Cth) s 10, as enacted.

123 Senate Select Committee on the Development of Canberra, Parliament of Australia, *Report from the Select Committee Appointed To Inquire into and Report upon the Development of Canberra* (Report, September 1955) Appendix B 93–4.

duly opened.[124] After some cavilling[125] and political pressure,[126] the Court attended its first Canberra sitting on 31 January 1933, exercising the Territory's original jurisdiction.[127] While restrictions on sittings further west may have prompted visits to the capital,[128] the absence of facilities necessary for the principal registry's transfer to Canberra was a contemporaneously noted problem.[129] A survey of the post-war notices indicates that Canberra sittings were rare, despite the district registry and permitting mechanisms under the *Judiciary Act*.

This situation would change with the large-scale centralisation of government in Canberra. The National Capital Development Commission,[130] at the instigation of Prime Minister Robert Menzies, would contribute considerably to the development of Canberra and ensure the transfer of the physical organs of government to the capital.[131] From 1959, the Court appeared as a marked building in Sir William Holford's plans for the capital.[132] By the end of the 1960s, the concept had gone from a relatively modest building to a considerably enlarged edifice.[133] The decision was then made to site the High Court Building 'in the north-eastern sector of the parliamentary triangle',[134] with 'a two-stage architectural competition' commencing in July 1972.[135] The resulting design was 'an outstanding example of late modern Brutalist architecture'.[136] In a symbolic flourish, the wood used for the judicial chambers reflected 'different varieties derived from the different subnational parts

124 See: *Judiciary Act 1927* (Cth) ss 3–4; Commonwealth, *Parliamentary Debates*, House of Representatives, 23 March 1927, 960 (JG Latham, Attorney-General).

125 See also Bennett (n 4) 104, quoting Letter from Chief Justice Gavan Duffy to the Attorney-General, 16 May 1931, archived at National Archives of Australia, items 31/787, 29/3516.

126 See 'High Court: Canberra Sittings: Urged by Mr FM Baker', *The Canberra Times* (Canberra, 27 October 1932) 2.

127 See High Court of Australia, 'Rule of Court' in Commonwealth, *Commonwealth of Australia Gazette*, No 6, 2 February 1933, 140.

128 See Bennett (n 4) 104.

129 See 'High Court: Canberra Sitting: Under Consideration', *The Canberra Times* (Canberra, 6 July 1932) 2.

130 See generally *National Capital Development Commission Act 1957* (Cth).

131 See Sir Frederick White, 'Robert Gordon Menzies: 20 December 1894–15 May 1978' (1979) 25(1) *Biographical Memoirs of Fellows of the Royal Society* 445, 468, 470.

132 See Paul Reid, *Canberra Following Griffin: A Design History of Australia's National Capital* (National Archives of Australia, 2002) 264–5, 284.

133 Bennett (n 4) 107; Michael Pearson et al, *High Court of Australia Conservation Management Plan* (Management Plan, 15 March 2011) vol 1, 20.

134 Commonwealth, *Parliamentary Debates*, Senate, 13 May 1970, 1395 (Bob Cotton).

135 See Commonwealth, *Parliamentary Debates*, House of Representatives, 15 April 1980, 1761 (Bob Ellicott). See also Pearson et al (n 133) 22–3.

136 See 'The Building', *High Court of Australia* (Web Page) <https://www.hcourt.gov.au/about/the-building>.

of the Commonwealth'.[137] Not only were the working facilities on offer finally of an 'exceptional' standard,[138] the spatial largesse was considerable — it has been observed that the No 1 and No 2 courtroom benches and the level nine floor layout could very well accommodate two additional justices.[139]

Such architectural plans coincided with an announcement in 1968 by the Gorton Government to transfer the Court's principal seat to Canberra from Melbourne,[140] with the caveat that 'single justice sittings will continue to be held in the various capital cities'.[141] This did not prevent what appears to have been a further move of the principal registry from Melbourne to Sydney in September 1973.[142] After the proclamation in April 1980 of the *High Court of Australia Act 1979* (Cth) ('*HCA Act*'),[143] the Court and principal registry settled into its present-day premises at Lake Burley Griffin on 26 May 1980.[144] Up until this point, the Court had performed its circuits in the outlying states in mostly unchanged form; in fact, since 1963, the frequency of such sittings had increased, and enlarged Full Court panels of five had 'become more common' in Brisbane and Adelaide.[145] This was as the overall work on the Melbourne list tended to decline while the Brisbane and Adelaide lists increased during the 1960s.[146]

What cannot be ignored against this backdrop is the emergence of the Federal Court of Australia. The mooting of a superior federal court of record not only facilitated

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137 Michael Kirby, 'Remembrance of Times Past: Times Missed and Times Not Missed' (2018) 24(1) *James Cook University Law Review* 25, 29 ('Remembrance of Times Past').

138 See ibid 28.

139 Justice Michael Kirby, 'Law at Century's End: A Millennial View from the High Court of Australia' (2001) 1(1) *Macquarie Law Journal* 1, 7 ('Law at Century's End'). Certainly, there are no constitutional barriers to the enlargement of the bench in the future: at 7; especially if the volume of work (special leave or otherwise) increases precipitously as a result of new hearing practices: see below Part IV.

140 Commonwealth, *Parliamentary Debates*, House of Representatives, 26 March 1968, 420–1 (Nigel Bowen, Attorney-General).

141 Ibid 421.

142 See: Governor-General, 'Australia' in Commonwealth, *Australian Government Gazette*, No 102, 16 August 1973, 53; High Court of Australia, 'Rule of Court' in Commonwealth, *Australian Government Gazette*, No 129, 20 September 1973, 2.

143 Governor-General, 'Proclamation' in Commonwealth, *Commonwealth of Australia Gazette: Special*, No S 82, 18 April 1980. See also *High Court of Australia Act 1979* (Cth) ss 14, 30 ('*HCA Act*').

144 See, eg: 'Tribute to Judiciary: Queen Opens High Court Building', *The Canberra Times* (Canberra, 27 May 1980) 1; High Court of Australia, *Annual Report 2003–04* (Report, 2004) 11.

145 See Eddy Neumann, *The High Court of Australia: A Collective Portrait 1903–1972* (Department of Government and Public Administration, University of Sydney, 2nd ed, 1973) 9, citing Geoffrey Sawer, *Australian Federalism in the Courts* (Melbourne University Press, 1967) 38.

146 See Sawer (n 145) 39.

the Court's transfer to permanent premises in Canberra but was also a key justification of Barwick CJ's attempts to curtail the Court's circuits. When Maurice Byers and Paul Toose initially catalysed the conversation on a putative Federal Court in 1963,[147] the contemporaneous Dixon Court would not have been a receptive audience; as Dixon himself wrote in 1935, 'neither from the point of view of juristic principle nor from that of the practical and efficient administration of justice can the division of the Courts into state and federal be regarded as sound'.[148] The ascendancy of Barwick as Chief Justice in 1964, however, set the stage for change.

Barwick's own views (expressed at the time he was Attorney-General) in support of the proposal are illuminating:

> Basically, then, my own reason for supporting the creation of a new federal superior court is not to relieve State courts of their federal jurisdiction, but to relieve the *federal* supreme court, the High Court of Australia, of some of its present work. …
>
> [H]ow long the High Court can, and should, continue to hold at least one sitting each year in each of the State capitals is a matter which, though perhaps not immediately pressing, cannot indefinitely escape consideration. As in the United States, the centralisation of the High Court's work in one place is probably an inevitable development … The new court should, I think, supplement, and eventually probably replace, the High Court in supplying a Commonwealth 'presence' in the less populous State capitals.[149]

On the bench, Barwick CJ set about implementing a static Court with tributary Federal Courts (themselves itinerant) supplanting the former's circuits.[150] The passage of the *Federal Court of Australia Act 1976* (Cth) eased the High Court's appellate workload and removed the burden of first instance work which had plagued the Court since its inception.[151] This, along with *Judiciary Act* reforms in 1976 and 1984, which abolished appeals as of right (and direct from single state Supreme

147 See generally MH Byers and PB Toose, 'The Necessity for a New Federal Court: A Survey of the Federal Court System in Australia' (1963) 36(10) *Australian Law Journal* 308. See also Justice Susan Kenny, 'Federal Courts and Australian National Identity' (2015) 38(3) *Melbourne University Law Review* 996, 1010.

148 Owen Dixon, 'The Law and the Constitution' (1935) 51(4) *Law Quarterly Review* 590, 606.

149 Sir Garfield Barwick, 'The Australian Judicial System: The Proposed New Federal Superior Court' (1964) 1(1) *Federal Law Review* 1, 3, 20 (emphasis in original) ('The Australian Judicial System'). See also at 7–8, 19–21.

150 See ibid 3, 20. See also: *Federal Court of Australia Act 1976* (Cth) s 12; Commonwealth, *Parliamentary Debates*, House of Representatives, 21 October 1976, 2113 (Bob Ellicott, Attorney-General).

151 See: Sir Garfield Barwick, 'The State of the Australian Judicature' (1977) 51(7) *Australian Law Journal* 480, 488; Commonwealth, *Parliamentary Debates*, Senate, 22 August 1906, 3190 (John Keating). See also below Part III(C).

Court justices),[152] reduced the Court's docket considerably — including, not unexpectedly, the kind of work which had frequently occupied the circuit lists in the past.

From around 1968, Barwick CJ would also agitate for the Court's permanent installation in a Canberra edifice.[153] A salient worry for Barwick was that they were 'weekly tenants' at the mercy of the state government or occupiers dependent on Commonwealth financing.[154] These pressures culminated in the above-mentioned construction of the High Court Building, leading some to dub it 'Gar's Mahal'.[155] In anticipation of the monolith's opening, Barwick proposed in 1979 that all the outlying registries be closed and circuits abolished, with justices being obliged to live in Canberra.[156] This was not supported by Bar Associations or the federal Attorney-General.[157] It was also resisted by the puisne justices, led by Stephen J,[158] who jointly protested about the proposals to Prime Minister Malcolm Fraser with Attorney-General Peter Durack as interlocutor.[159] Following this, the Government put the proposals on ice and issued assuaging statements that the Court's practice should remain unchanged.[160] Like Symon, Barwick CJ lost the fight to abolish circuits, and further failed to exercise control over judicial residences;[161] although Stephen J, for one, acceded to Barwick CJ's demands and purchased a Canberra residence.[162] The *HCA Act* put the final nail in the coffin by providing expressly for hearings in the outlying states.[163] Chief Justice Barwick, however, would continue

152 See: *Judiciary Amendment Act* 1976 (Cth) s 6; *Judiciary Amendment Act (No 2) 1984* (Cth) s 3. See generally *Parkin v James* (1905) 2 CLR 315, 332–3 (Griffith CJ for the Court).

153 See Marr (n 121) 240, quoting Sir Garfield Barwick, 'Garfield Barwick Address at the National Press Club on 10 June 1976' (Speech, National Press Club, 10 June 1976) 2.

154 See Marr (n 121) 240, quoting Sir Garfield Barwick, 'Garfield Barwick Address at the National Press Club on 10 June 1976' (Speech, National Press Club, 10 June 1976) 2.

155 See: Mason, 'The High Court of Australia' (n 9) 868; Commonwealth, *Parliamentary Debates*, Senate, 31 May 1979, 2425 (Gareth Evans).

156 See: Antonio Buti, *Sir Ronald Wilson: A Matter of Conscience* (University of Western Australia Press, 2007) 199; Marr (n 121) 298.

157 Current Topics, 'Arrangements for the High Court after Its Principal Seat Is at Canberra' (1980) 54(2) *Australian Law Journal* 55, 55.

158 Buti (n 156) 199. See generally Mason, 'The High Court of Australia' (n 9) 868.

159 See also Brian Galligan, 'The Barwick Court' in Rosalind Dixon and George Williams (eds), *The High Court, the Constitution and Australian Politics* (Cambridge University Press, 2015) 201, 219 ('The Barwick Court').

160 See also Commonwealth, *Parliamentary Debates*, Senate, 14 May 1980, 2178–9 (Peter Durack, Attorney-General).

161 See also Galligan, 'The Barwick Court' (n 161) 219.

162 See Philip Ayres, *Fortunate Voyager: The Worlds of Ninian Stephen* (Miegunyah Press, 2013) 90.

163 See *HCA Act* (n 143) ss 15, 30(3), 31(1).

throughout his tenure to emphasise the disjunction, in his view, between the Court's new premises and its ongoing itinerancy.[164]

Despite these setbacks, the nucleus of Barwick CJ's grand design for the Court had ultimately been achieved. The principal registry had been moved to Canberra as originally envisioned at Federation; the Court had secured for itself a freestanding edifice befitting its status as the apex judicial organ in the Commonwealth; and the Court had finally detached its anchors from the former de facto capitals of Sydney and Melbourne. These changes laid the foundations which would mould the Court's procedure into the form recognised up until the present-day pandemic.

E *Repainting the Arch: Entrenchment and Incremental Change, 1981–2020*

Following this last great challenge, the High Court has continued to practise circuits into the 21st century, albeit with some incremental change. Most significant has been the practical abolition of Full Court business held in Sydney or Melbourne, formerly the great political–commercial centres which had dominated the work of the Court prior to its settlement in Canberra. The last Full Court appeal hearing in Melbourne occurred on 1 April 1980;[165] the last Sydney hearing occurred on 11 March 1980.[166] The Barwick Court thus oversaw the removal of Sydney and Melbourne as fixed destinations on the circuit calendar, supplanted by Canberra as a central hub amalgamating the Full Court work of both registries.

The result of these measures seems to have been a precipitous uptick in legal travelling costs for litigants.[167] In 1981, Gibbs CJ said it would be 'obviously impossible for the Court to attempt to contain' these by returning to the old practice.[168] However, he opined that circuits had 'real advantages' for litigants and the profession, and resolved to have the Court travel to the states for a week every year, the volume of work in the states permitting.[169] In 1984, during parliamentary debates on the Judiciary Amendment Bill (No 2) 1984 (Cth), similar concerns were raised about the onerous burden on litigants from counsel having to travel from Sydney or Melbourne to Canberra merely for special leave hearings.[170] In response, Attorney-General Gareth Evans confirmed an 'agreement in principle' between the Government and the Court to hold regular special leave hearings in Sydney

164 See Sir Garfield Barwick, 'The State of the Australian Judicature' (1980) 6(1) *Commonwealth Law Bulletin* 280, 294–5.

165 *Air Express Ltd v Ansett Transport Industries (Operations) Pty Ltd* (1981) 146 CLR 249.

166 *Pennant Hills Restaurants Pty Ltd v Barrell Insurances Pty Ltd* (1981) 145 CLR 625.

167 See Sir Harry Gibbs, 'The State of the Australian Judicature' (1981) 55(9) *Australian Law Journal* 677, 681.

168 Ibid.

169 See ibid.

170 See Commonwealth, *Parliamentary Debates*, Senate, 2 April 1984, 1063 (Peter Durack).

and Melbourne.[171] The Court then implemented the practice which has persisted to the present-day,[172] thereby banishing once and for all the spectre of a sedentary court no sooner than Barwick CJ's departure. Notably, in a break with this new normal, the Full Court returned to Sydney on 14 June 2017.[173] However, this did not signal a lasting shift in the Court's behaviour, with it continuing to adhere to the special leave sitting format.

Another development has been the gradual shift in accommodation from state to federal facilities. In Melbourne, the Court moved to level 17 of the Commonwealth Law Courts Building immediately after its construction, in February 1999, vacating its leased chambers at 200 Queen Street in doing so.[174] The Court had occupied these 'cramped and generally unsatisfactory' premises since the Canberra relocation, having been displaced by the Federal Court's occupation of Little Bourke Street.[175] A similar process occurred in Brisbane, Perth and Adelaide, the Court relocating from their respective Supreme Court Houses to newly completed Commonwealth Law Courts Buildings.[176] The Adelaide move on 9 August 2005 was the most recent of these, finally severing 102 years of history.[177] In Sydney, the Court remained at Darlinghurst until the unveiling of the combined state-federal Law Courts Building at Queens Square on 1 February 1977,[178] where it now sits on level 23. Hobart is therefore the last holdout; the High Court, on the rare occasions it ventures south for Full Court matters, continues to share facilities with the Supreme Court of Tasmania.[179]

171 See ibid 1063 (Gareth Evans, Attorney-General).

172 See High Court of Australia, *Annual Report 1983–84* (Report, 1984) 5.

173 See Matt Grey, 'WEDNESDAY, 14 JUNE 2017: AT 10:15 AM', *High Court of Australia* (Court List, 14 June 2017) <https://www.hcourt.gov.au/assets/registry/court-lists/2017/14-06-17web.pdf>.

174 See High Court of Australia, *Annual Report 1998–99* (Report, 1999) 28.

175 See Parliamentary Standing Committee on Public Works, Parliament of Australia, *Report Relating to the Commonwealth Law Courts Building, Melbourne* (Report No 25, 1995) 4.

176 See High Court of Australia, *Annual Report 2019–20* (Report, 2020) 74. The drive for separate federal architecture was very much driven by Federal Court Chief Justice Michael Black: see generally Chief Justice Michael Black, 'Transcript of Ceremonial Sitting of the Full Court on the Occasion of the Opening of the New Ceremonial Court and Farewell to the Honourable Michael Black AC Chief Justice, Federal Court of Australia' [2010] (1) *Federal Judicial Scholarship* 7.

177 High Court of Australia, *Annual Report 2005–06* (Report, 2006) 13.

178 See '"Humane" Courtrooms Opened by Premier', *The Sydney Morning Herald* (Sydney, 2 February 1977) 2.

179 See, eg: Transcript of Proceedings, *Coverdale v West Coast Council* [2016] HCATrans 43; Transcript of Proceedings, *Ceremonial: Crennan J: Welcome Hobart* [2006] HCATrans 151; Transcript of Proceedings, *Ceremonial: Special Sitting at Hobart: Centenary of High Court of Australia* [2003] HCATrans 446.

As for the circuits themselves, there has been remarkably little change in formal terms. The framework in which the Court is able to dictate its own travels was reinforced with the commencement of the *High Court Rules 2004* (Cth).[180] In 2001, Kirby J observed that the Court had yet to travel to Darwin.[181] This was rectified on 4 September 2018, when the Full Court heard appeals in the premises of the Supreme Court of the Northern Territory.[182] As described above, Sydney and Melbourne continue to do a robust trade in special leave applications, with attendances of justices nearly every month. The outlying staples of Adelaide, Brisbane, Perth and Hobart have all continued to receive visits for Full Court business through the 2010s,[183] and most likely will through the 2020s barring a decisive shift in the attitude of the Court towards circuits.

If there has been an identifiable pattern of change, it has been with the frequency of sittings (and, presumably, business) in Adelaide, Perth and Hobart, which has reduced considerably over the 21st century. A glance at the 2010s business lists shows multiple-year gaps between Full Court sittings[184] — at the time of writing (mid-way through the 2023 court year), Hobart has not had a Full Court for seven years since 2016;[185] Adelaide, six years since 2017;[186] and Perth, five years since 2018.[187] Only Brisbane has maintained frequency of business resembling pre-Canberra practice, but not quite enough to avoid omissions; for example, between 2017 and 2019. It has also become more difficult to determine where and when the Court will sit outside

180 See *High Court Rules 2004* (Cth) r 6.04. See especially at r 6.04.2 which gives power to the Chief Justice to unilaterally appoint sitting places.

181 Kirby, 'Law at Century's End' (n 139) 8. The delay may partly have been because of the death of the first (and only) South Australian Supreme Court circuit judge to Palmerston on the return journey in 1875: see 'Wreck of the Steamship Gothenburg', *The South Australian Register* (Adelaide, 27 March 1875) 1.

182 See: Transcript of Proceedings, *Ceremonial: On the Occasion of the First Sitting of the High Court of Australia at Darwin* [2018] HCATrans 173; Philippa Lynch, 'List of Business for Sittings at Darwin', *High Court of Australia* (Business List, 4 September 2018) <https://cdn.hcourt.gov.au/assets/registry/business-lists/2018/BusinessList_Darwin_Sep2018.pdf>.

183 See, eg: *Chiro v The Queen* (2017) 260 CLR 425; *Thorne v Kennedy* (2017) 263 CLR 85; *Commissioner of State Revenue (WA) v Place Dome Inc* (2018) 265 CLR 585; *Coverdale v West Coast Council* (2016) 259 CLR 164.

184 See 'List of Business for Sittings', *High Court of Australia* (Web Page) <https://www.hcourt.gov.au/registry/list-of-business-for-sittings>.

185 See 'List of Business for Sittings at Hobart', *High Court of Australia* (Business List, 1 March 2016) <https://www.hcourt.gov.au/assets/registry/business-lists/2016/01-03-16HobBL.pdf>.

186 See 'List of Business for Sittings at Adelaide', *High Court of Australia* (Business List, 19 June 2017) <https://www.hcourt.gov.au/assets/registry/business-lists/2017/BusinessList_ADEL_June2017.pdf>.

187 See 'List of Business for Sittings at Perth', *High Court of Australia* (Business List, 18 June 2018) <https://www.hcourt.gov.au/assets/registry/business-lists/2018/BusinessList_PerthJune2018.pdf>.

of Canberra. From 2010, the annual *Rules of Court* which had formerly specified sitting dates and destinations,[188] ceased identifying locations other than Canberra, instead providing for 'other places as required'.[189] This ambiguous language has continued up to and including the latest iteration of the *Rules*.[190] Such a lack of transparency has not been without criticism.[191]

In summary, the result has been an attenuated form of circuits — a middle ground between the Symon or Barwick view of a static court, and the restlessly peripatetic court of Griffith and Deakin. It seems mundane market forces — cheaper airfares, professional harmonisation and diversion of business to Canberra — have managed to do what executive fiat could not, and Depression and wartime could only manage temporarily. Of course, something must be said about the profound changes brought about by the onset of the COVID-19 pandemic in early 2020. The immediate consequence was the suspension of all circuit travel, including an anticipated circuit to Adelaide.[192] It also had an outsize impact on the proliferation of video-link hearings, which will be further considered in Part IV below.

In June 2021, the pandemic (after the outbreak of the Delta variant, no less) forced the Justices of the Court to remain in their home states, and conference by video-link for all matters.[193] As contemporaneously observed by *The Australian Financial Review*:

> The judges are split across three cities: Chief Justice Susan Kiefel, Justice Patrick Keane and Justice James Edelman are based in Brisbane; Justice Stephen Gageler and Justice Jacqueline Gleeson in Sydney; and Justice Michelle Gordon and Justice Simon Steward in Melbourne.[194]

188 See, eg, *High Court of Australia Rule of Court (25/08/2009)* (Cth) r 1.

189 See *High Court of Australia Rule of Court (24/08/2010)* (Cth) r 1.

190 See, eg: *High Court (2016 Sittings) Rules 2015* (Cth) r 4(1); *High Court (2017 Sittings) Rules 2016* (Cth) r 4(1); *High Court (2018 Sittings) Rules 2017* (Cth) r 4(1); *High Court (2019 Sittings) Rules 2018* (Cth) r 4(1); *High Court (2020 Sittings) Rules 2019* (Cth) r 4(1); *High Court (2021 Sittings) Rules 2020* (Cth) r 4(1); *High Court (2022 Sittings) Rules 2021* (Cth) r 4(1); *High Court (2023 Sittings) Rules 2022* (Cth) r 4(1).

191 See Jeremy Gans, 'News: High Court Hears Appeal in…. Sydney??', *Opinions on High* (Blog Post, 14 June 2017) <https://blogs.unimelb.edu.au/opinionsonhigh/2017/06/14/news-high-court-hears-appeal-in-sydney/>.

192 See High Court of Australia, *Annual Report 2019–20* (n 176) 12.

193 See generally 'Recent AV Recordings', *High Court of Australia* (Web Page) <https://www.hcourt.gov.au/cases/recent-av-recordings>. This is despite the ostensible designation of 'Canberra' sitting dates on the Business Lists: see above n 184.

194 Michael Pelly, 'Meet the High Court's Busiest Barrister', *The Australian Financial Review* (online, 13 January 2022) <https://www.afr.com/companies/professional-services/meet-the-high-court-s-busiest-barrister-20211215-p59ht7>.

Although the Court resumed its in-person Canberra sittings from March 2022,[195] for a brief interval, it returned to a time prior to its Canberra-centricity. Foregrounded was the relevance of retaining home chambers in the states. The separation of the Court's members and recourse to remote working practices failed to sound the death-knell for such residual presences in the states, as might have been expected had a Canberra 'bubble' been adopted. As a conscious alternative to permanent installation in Canberra, a balance was later struck between the usual state presences for special leave matters and Canberra-located Full Court conferences. This was a relatively smooth transition which could not have come about without the transformative effect of technology in tandem with the residual influence of yesterday's circuits.

III Competing Attitudes to the Court on Circuit

All challenges to the High Court's circuits involved the intersection of financial concerns, judicial independence, the federal compact, and institutional proximity. The Court has always wielded these aspects as a shield in defence of its circuits: (1) that costs should be borne by the Commonwealth instead of litigants; (2) that judicial independence trumps accountability to the executive; (3) that the federal compact necessitates presences in the states as an antidote to a central 'ivory tower'; and (4) that in symbolic and practical terms proximity is preferable to prestige. This Part will consider how this reasoning, as seen in the Court's institutional history from time to time, circumvented opposing arguments enabling circuits to survive, albeit in changed form.

A *Financial Concerns*

The scarlet thread connecting almost every dispute has been the debate on costs, waxing and waning with the decades. Implicit is the question of on whom the financial burden of administration of justice ought to fall — the litigant, or the state. Maintenance of circuits was associated with defraying litigant costs, while abolition was supported by those wishing to generate savings for government. Each successive period of challenge — from Symon in 1905,[196] the executive arm in 1931,[197] and likely Barwick CJ in 1979[198] — adopted financial rationalisation to some degree as a justification. However, as the Commonwealth's financial capabilities expanded and demand for judicial services grew, parsimony alone could no longer make a convincing case for the shuttering of the roving Court. Ultimately,

195 See 'List of Business for Sittings at Canberra', *High Court of Australia* (Business List, 8 March 2022) <https://cdn.hcourt.gov.au/assets/registry/business-lists/2022/Business_list_March_2022.pdf>.

196 See Commonwealth, *Parliamentary Debates*, Senate, 28 November 1905, 5837–9 (Sir Josiah Symon).

197 See Commonwealth, *Parliamentary Debates*, House of Representatives, 3 July 1931, 3407–8 (Ted Theodore).

198 See: Buti (n 156) 199; Marr (n 121) 298.

pressure to cut the cost of judicial administration lessened over time, while the pressure to ensure affordability of justice did not.

A preoccupation with costs is very noticeable in the Federation transcripts. No sooner had the Convention Debates turned to cl 71 did the attendees raise the issue of financing the mooted court. Debates on judicial salaries were followed by discussion of appeals to the Privy Council in light of the new court.[199] Carruthers took this opportunity to skewer the justification that the abolition of Privy Council appeals would 'mak[e] it easier for the poor man to prosecute an appeal', which he thought trite.[200] Prophetically, he observed that

> if the High Court is constituted in the capital city of the Commonwealth the possibilities — nay, the probabilities — are that [it] … will be some inland town selected far away from where the courts are constituted at the present time; and … litigants will have to pay very high fees to get men to leave their practice at Melbourne, Sydney or Adelaide … men cannot expect to be served by the bar before the High Court of Australia for lower fees than those for which they would be served by the bar appearing before the Privy Council at Westminster. Therefore, I think, on the score of economy, there is very little to induce litigants to favour the establishment of a High Court of Australia.[201]

Such pointed criticisms could not have been far from Deakin's mind when drafting the Judiciary Bills. When the first Bill was presented to Parliament, there was vigorous emphasis on the necessity of circuits.[202] It was an immediate response to objections that the poor litigant might be disadvantaged should Supreme Court matters be removed to the distant High Court.[203] In Deakin's view, it was a given that the Commonwealth ought to bear the financial costs of bringing justice 'door-to-door', in light of these contemporaneous concerns about the impecunious litigant.

The counter reaction, of course, was swift and sustained. Symon's acrimonious stance towards the costs of the peripatetic Griffith Court has already been discussed in detail.[204] Vituperative conduct aside, the costs were indeed considerable; as revealed during debates for the Appropriation Bill 1905 (Cth) in 1905, the Chief Justice's travelling expenses from October 1903 to June 1904 amounted to £591 2s 7d, with the puisne Justices drawing £616.[205] This was when the lower range

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199 See *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 31 January 1898, 302, 304–5.

200 See ibid 324–5 (Joseph Carruthers).

201 Ibid 325.

202 Commonwealth, *Parliamentary Debates*, House of Representatives, 18 March 1902, 10984, 10987 (Alfred Deakin, Attorney-General).

203 Commonwealth, *Parliamentary Debates*, House of Representatives, 9 June 1903, 624–5 (Patrick Glynn), 625 (Alfred Deakin).

204 See above Part II(B).

205 Commonwealth, *Parliamentary Debates*, Senate, 28 November 1905, 5837 (Sir Josiah Symon). A total of approximately £1,207.

of the total expected appropriation for the Court was approximately £2,665.[206] These expenses would have been exacerbated by the judicial entourage, customarily including a spouse, tipstaff, associate and secretary.[207] With an even larger travelling bench into the 1930s,[208] it is unsurprising that early austerity measures curtailed the Court's sittings. As JM Bennett notes, travelling expenses dropped from £6,173 in 1930 to £2,843 in 1932.[209] Thus, the case put forward by the fiscal hawks was not without merit.

However, at each interval there was strong support for the Court's presence in the states.[210] The uproar generated by the Governor-General's restriction on sittings during the 1930s, and prior to that, the broad public support commanded by the Court in protest at their treatment in 1905,[211] show that the view outside of federal government was decidedly in favour of cost savings to litigants.[212] This sentiment continued to be strong in 1979.[213] The balance likely shifted even further from the Commonwealth as time went on, with the passing of the penury of Federation Australia and the economic hangovers of Depression and wartime.[214] The persuasiveness per se of an austere approach to judicial expenditure thus diminished. It is also notable that plans to move the Court to Canberra were carried to fruition around the time that appeals to the Privy Council were being restricted,[215] when the Court's circuits had previously been a great cost differentiator for litigants.[216] As noted previously, so much was acknowledged by Gibbs CJ at the beginning of his tenure in support of continuing circuits.[217] In summary, the Court's itinerant mould

206 See ibid 5835 (Sir Josiah Symon).

207 See Marr (n 121) 215.

208 See: *Judiciary Act 1906* (Cth) s 2; *Judiciary Act 1912* (Cth) s 2.

209 Bennett (n 4) 103, citing Memorandum of JG Latham, Attorney-General, 17 July 1933, archived at National Archives of Australia, item 31/1038.

210 See, eg: Commonwealth, *Parliamentary Debates*, Senate, 28 November 1905, 5848 (Thomas Givens); Commonwealth, *Parliamentary Debates*, House of Representatives, 15 September 1944, 884 (Archie Cameron); Commonwealth, *Parliamentary Debates*, Senate, 8 March 1945, 464–5 (Richard Nash); Commonwealth, *Parliamentary Debates*, Senate, 14 May 1980, 2178–9 (John Button). See also Commonwealth, *Parliamentary Debates*, Senate, 28 March 1968, 457 (Reginald Wright).

211 See above n 63 and accompanying text.

212 See above nn 89–93 and accompanying text. Cf above nn 94–95 and accompanying text.

213 See Current Topics (n 157).

214 See generally Commonwealth Treasury of Australia, 'Australia's Century since Federation at a Glance' [2001] (Centenary) *Economic Roundup* 53.

215 See: *Privy Council (Limitation of Appeals) Act 1968* (Cth); *Privy Council (Appeals from the High Court) Act 1975* (Cth).

216 Sir Garfield Barwick, 'Foreword' in JM Bennett, *Keystone of the Federal Arch: A Historical Memoir of the High Court of Australia to 1980* (Australian Government Publishing Service, 1980) v, vi ('Foreword').

217 See Gibbs (n 167) 681–2.

combined with the persistent need for an affordable forum for litigants in the states won out over ephemeral budgetary concerns.

B *Judicial Independence*

Closely tied to the financial friction between the executive and judicature, was the broader issue of judicial accountability versus independence from the other arms of government. Both the challenges of 1905 and 1931 to the Court's sitting practices emerged from the executive branch. In 1979, it occurred at Barwick CJ's instigation, which required executive intercession. Only in the 1930s did circuits actually halt, albeit temporarily and with the Court's consent. The Court's freedom to determine the site and manner of its sittings throughout these conflicts was framed as a fundamental aspect of judicial independence, which was guarded jealously — even if by the 1970s the ironclad assurance of extramural sittings in all states had become honoured more in the breach.

Symon's 1905 challenge to circuits classically illustrates the nature of the judicial independence debate which would continue to frame the discourse up to the late 20th century. Symon believed that judicial independence did not extend beyond reasoning and tenure; 'independence' was not 'a shield behind which Judges may seek shelter in respect of their non-judicial acts or excessive expenditure'.[218] By contrast, while the bench was willing 'to give due weight to the views and wishes of the Government, even in matters intrusted to [the Court's] uncontrolled discretion', attempts 'to instruct and censure the Justices of the High Court with respect to the exercise of statutory powers conferred upon them in their judicial capacity' could only be a fetter on independence.[219] As Susan Priest concludes, the actions of Griffith CJ set a foundation for judicial independence, which would be built upon going forward.[220]

The consequence of the animus generated by this initial skirmish was that the next time the executive sought to encroach upon circuits, it came clothed not as fiat but as a cautious request. As emphasised before, these injunctions occurred by consent; the judges agreed for restrictions to be made by the Governor-General in 1931, and from the outbreak of war in 1939, voluntarily tapered their own travel in the national

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218 Letter from JH Symon, Attorney-General to Sir SW Griffith, Chief Justice, 22 February 1905, reproduced in Parliament of Australia, *Correspondence between Attorneys-General and the Justices of the High Court re Sitting Places and Expenses of the Court* (Parliamentary Paper No 26, 24 August 1905) 13, 13.

219 See letter from SW Griffith, Edmund Barton and RE O'Connor, Justices of the High Court to the Attorney-General, 15 February 1905, reproduced in Parliament of Australia, *Correspondence between Attorneys-General and the Justices of the High Court re Sitting Places and Expenses of the Court* (Parliamentary Paper No 26, 24 August 1905) 12, 12.

220 Susan Priest, 'Archives, the Australian High Court, and the "Strike of 1905"' (2013) 32(2) *University of Queensland Law Journal* 253, 262.

interest.[221] In this sense, there was no attack upon judicial independence, but rather members of the Court offered a margin of appreciation to the Commonwealth considering the exigencies of the time.[222] In wartime particularly, the normal rules of engagement between the judiciary and the executive became suspended — a reality illustrated by the multiplicity of extra-judicial public service work undertaken by sitting Court judges, despite prior (and continuing) judicial reticence.[223] Although some concessions had been made, the Court emerged from wartime, as far as administrative freedom went, no worse for wear.

Although the salient role of Barwick CJ in the 1979 challenge to circuits is detailed above, it was to the Fraser Government that he looked to intercede to cement the administrative powers of the Court in the Chief Justice and in so doing permanently install the judges in Canberra.[224] This prompted dissent from the puisne justices which influenced the executive to to push back against the Chief Justice's proposals, maintaining the current system.[225] The executive ended up acknowledging the Court's administrative independence from both the government and Chief Justice. Accordingly, the *HCA Act* provided that the powers of the Court 'may be exercised by the Justices or by a majority of them',[226] while ensuring executive non-interference with staffing or application of monies.[227] These measures were intended to ensure a judiciary 'free from any practical constraints or pressures imposed by other branches so that it can fulfil its functions without fear of reprisal'.[228] There was no mention of any mandatory residence in Canberra.[229] Thus, the 1979 challenge

221 There being no Order-in-Council in force since 1933. See above Part II(C).

222 Noting also that Justices Rich, Dixon and McTiernan, while refusing to accept a diminution in emoluments in view of s 72(iii) of the *Australian Constitution*, voluntarily repaid part of their salaries until the end of the Great Depression in circumstances where remuneration had remained fixed at £3,000 since 1903 (until 1947, when it would rise to £4,000): see George Winterton, *Judicial Remuneration in Australia* (Australian Institute of Judicial Administration, 1995) 22 n 188, 37.

223 See: JD Holmes, 'Royal Commissions' (1955) 29(4) *Australian Law Journal* 253, 272 (Sir Owen Dixon); Graham Fricke, 'The Knox Court: Exposition Unnecessary' (1999) 27(1) *Federal Law Review* 121, 127–8. See also: Chief Justice Murray Gleeson, 'The Right to an Independent Judiciary' (2006) 16(4) *Commonwealth Judicial Journal* 6, 14; *Wainohu v New South Wales* (2011) 243 CLR 181, 199 [24] (French CJ and Kiefel J).

224 See also Galligan, 'The Barwick Court' (n 161) 219.

225 Buti (n 156) 199. See also Martin Clark, 'The Chief Justice of Australia? The Role of the Chief Justice of the High Court' (2009) 11(4) *Constitutional Law and Policy Review* 161, 162–3.

226 *HCA Act* (n 143) s 46(1).

227 Ibid pts III, V.

228 See Commonwealth, *Parliamentary Debates*, House of Representatives, 13 November 1979, 2917–8 (Philip Ruddock).

229 Cf *Supreme Court Act*, RSC 1985, c S-26, s 8, a measure historically unpopular with Canadian judges: see Edward G Hudon, 'Growing Pains and Other Things: The Supreme Court of Canada and the Supreme Court of the United States' (1986) 17(4) *Revue Générale de Droit* 753, 765–6.

served, ironically, to crystallise and entrench a broader view of judicial independence setting it administratively and operationally apart from the executive and legislative arms.[230]

In one sense, this was in accordance with the Griffith Court's (and its successors') juristic independence.[231] But, crucially, this conception of judicial independence was secured in the absence of any express constitutional protections on the operational independence of courts.[232] Insistence by the Justices on the right to commute from their states and conduct circuits was therefore a significant incident of the Court's judicial independence from the other branches of government. The Justices believed that administrative freedom should be coterminous with the deference given to adjudicatory functions; and this attitude was embodied in the maintenance of circuits, which exercised both forms of independence against executive encroachment. As Gageler J observed (as the Chief Justice was then), the Court's view has been subsequently borne out in the consensus that adjudicatory independence must pair with administrative freedom, with the latter as 'a functional extension' of the former.[233] It has also been suggested that 'allow[ing] Justices to maintain a principal place of residence away from Canberra' (itself a facilitator to circuits) has helped the Court avoid being 'influenced by the prevailing pro-government sentiments in Canberra'.[234]

C *Federal Compact*

The Court's role as 'keystone of the federal arch'[235] imported with it a three-pronged relationship with the colonies-turned-states. The first was, at least prior to the *Engineers' Case*,[236] the Court's role as an independent arbiter of Commonwealth–state disputes in the federalist mould. The second was the Court's political role in bringing together a unified Commonwealth (to the extent possible within a federal

230 See generally: Justice RE McGarvie, 'Judicial Responsibility for the Operation of the Court System' (1989) 63(2) *Australian Law Journal* 79, 94; TF Bathurst, 'Separation of Powers: Reality or Desirable Fiction?' (Conference Paper, JCA Colloquium, 11 October 2013) 6 [16].

231 See especially: *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 685 (Toohey J); *Harris v Caladine* (1991) 172 CLR 84, 159 (McHugh J). See generally: *New South Wales v Commonwealth* (1915) 20 CLR 54; *The Waterside Workers' Federation of Australia v JW Alexander Ltd* (1918) 25 CLR 434; *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254; *Kable v DPP (NSW)* (1996) 189 CLR 51.

232 See Rebecca Ananian-Welsh and George Williams, 'Judicial Independence from the Executive: A First-Principles Review of the Australian Cases' (2014) 40(3) *Monash University Law Review* 593, 612.

233 Gageler (n 52) 1130–1.

234 See Mason, 'The High Court of Australia' (n 9) 868.

235 Commonwealth, *Parliamentary Debates*, House of Representatives, 18 March 1902, 10967 (Alfred Deakin, Attorney-General).

236 *The Amalgamated Society of Engineers v The Adelaide Steamship Co Ltd* (1920) 28 CLR 129 ('*Engineers' Case*').

compact) through discharge of its judicial functions in the states. The third was the maintenance of a unified legal system,[237] operating on state and federal law in an appellate (and primary) capacity. These factors were crucial justifications towards the continuance of the Court's footprint in the outlying states.

The initial challenge for the Court was securing state acceptance. That it might be accused of being an agent of centralism was a serious concern at the Convention Debates,[238] and contributed to the maintenance of Privy Council appeals.[239] During the Judiciary Bill 1903 debates it was feared that the Court's discretion to decide applications to remit matters back to the capital would lead to the 'centralization of justice'; the circuit system was expressly included to overcome this concern.[240] The Court's early practice reflected this aversion to centralism. Until 1920, the tenor of the Court's decisions was predominantly federalist, preserving the ambit of state regulation,[241] even if Symon believed the circuits themselves were tantamount to 'an instrument of Federal propaganda'.[242] In any event, members of the legal profession in all states continued to regard circuits as an extension of such federalist sympathies towards the states, where '[t]hose who feared for the future of State powers were appeased' by them.[243] By the time of Griffith CJ's death in 1920, the Court was held in high esteem[244] and regarded as generally receptive to state concerns.[245] However, the ascendancy of constitutional textualism following the

237 See generally Commonwealth, *Parliamentary Debates*, House of Representatives, 18 March 1902, 10965 (Alfred Deakin, Attorney-General).

238 See *Official Report of the National Australasian Convention Debates*, Adelaide, 30 March 1897, 307 (Andrew Inglis Clark).

239 See *Official Report of the National Australasian Convention Debates*, Adelaide, 26 March 1897, 201 (Henry Dobson). Cf *Australian Constitution* s 74.

240 See Commonwealth, *Parliamentary Debates*, House of Representatives, 9 June 1903, 624–5 (Patrick Glynn).

241 See Angus J O'Brien, 'Wither Federalism: The Consequences and Sustainability of the High Court's Interpretation of Commonwealth Powers' (2008) 23(2) *Australasian Parliamentary Review* 166, 169–70.

242 Letter from JH Symon, Attorney-General to Sir SW Griffith, Chief Justice, 22 February 1905, reproduced in Parliament of Australia, *Correspondence between Attorneys-General and the Justices of the High Court re Sitting Places and Expenses of the Court* (Parliamentary Paper No 26, 24 August 1905) 13, 15.

243 Bennett (n 4) 102.

244 See: Commonwealth, *Parliamentary Debates*, House of Representatives, 11 August 1920, 3423 (Henry Gregory); Commonwealth, *Parliamentary Debates*, House of Representatives, 12 October 1920, 5510 (Sir Robert Best).

245 See 'More Centralisation', *The Mercury* (Hobart, 30 August 1915) 4. See generally: 'High Court Judges', *The Examiner* (Launceston, 27 December 1912) 4; 'Legislative Powers of the Commonwealth & States by the Hon Sir John Quick', *The Geelong Advertiser* (Geelong, 6 December 1919) 9.

Engineers' Case meant the rejection of a federalist approach to the resolution of Commonwealth–state disputes.[246]

Even after the *Engineers' Case*, however, the Court's constitutional role as a unifying organ of the Commonwealth continued undiminished. It was a mechanism directed towards a practical concern with state secessionism. As Edmund Barton commented:

> One of the strongest guarantees for the continuance and indestructibility of the Federation is that there should be some body of this kind constituted which, instead of allowing the States to fly to secession because they cannot get justice in any other way, will enable them to settle their differences in a calm judicial atmosphere.[247]

As late as 1933, John Latham would opine: 'I think it is unfortunate, particularly at the present time when separatist movements are developing, that four of the capitals of Australia should have no sittings of the High Court'.[248] The federal 'footprint' remained a critical aspect of the itinerant Court's raison d'être until the devolution of that function to the Federal Court.

The Court in its appellate capacity also provided a travelling, corrective influence on the states. In contrast to the US Supreme Court, it had untrammelled jurisdiction to hear appeals on both federal and state matters.[249] As the state jurisdictional cross-vesting scheme shows,[250] the Court was intended to slot into the system of state adjudication.[251] Following *Parkin v James*,[252] the Court held that appeals lay as of right to the High Court from a decision of even a single Supreme Court justice.[253] The Court's jurisdiction thus encompassed state Courts of Appeal, which was reflected in its circuits. *Tait v The Queen* illustrates the Court's overt usage of mobility to intervene in state law.[254] In 1961, Mr Tait was sentenced to hang

246 See generally Greg Craven, 'Cracks in the Façade of Literalism: Is There an Engineer in the House?' (1992) 18(3) *Melbourne University Law Review* 540.

247 *Official Report of the National Australasian Convention Debates*, Adelaide, 23 March 1897, 25 (Edmund Barton).

248 Bennett (n 4) 103, quoting Memorandum of JG Latham, Attorney-General, 17 July 1933, archived at National Archives of Australia, item 31/1038.

249 See *Judiciary Act 1903* (Cth) s 35. See generally Eugene Gressman, 'The Jurisdiction of the Court: The United States Supreme Court' (1980) 3(1) *Canada–United States Law Journal* 29.

250 See *Judiciary Act 1903* (Cth) ss 38–9.

251 See: Commonwealth, *Parliamentary Debates*, House of Representatives, 9 June 1903, 608–9 (Alfred Deakin, Attorney-General); Kenny (n 147) 1001.

252 *Parkin v James* (n 152).

253 Ibid 329–30 (Griffith CJ for the Court). This would change with reforms to the *Judiciary Act* from the 1970s: see above n 152 and accompanying text.

254 (1962) 108 CLR 620.

for murder, which was unsuccessfully challenged in the Victorian Supreme Court. An appeal lay to the High Court, prompting three justices to fly down to Melbourne to assemble an ad hoc full bench, less than 24 hours before Tait's hanging. The Court stayed the execution and adjourned the case. The special leave hearing was then listed for Sydney, on a day which (likely deliberately) happened to be Melbourne Cup Day. Tait's sentence was commuted on the eve of the hearing.[255]

Importantly, since the enactment of the *Judiciary Act 1903*, the Court had jurisdiction to hear first instance federal matters. A majority came to include taxation and intellectual property.[256] As Griffith CJ explained, the Court was 'not merely an Appellate Court, but a Court of original jurisdiction, and the Justices are called upon to discharge duties in every respect analogous to those of the State Judges'.[257] This meant a '"dual" system' where 'a litigant could start proceedings either in the High Court or a State court'.[258] Consequently, first instance trials became interspersed amongst manifold Full Court, interlocutory and special leave commitments. This required the Court to travel through necessity, due to the need to take evidence,[259] and on the rare occasion, conduct jury trials.[260] Such work directly led to smaller Full Court benches for outlying states, as some justices were usually left behind in Sydney and Melbourne to provide original jurisdiction coverage.[261] Thus, the Federal Court, as Barwick prophesied,[262] singlehandedly liberated the High Court of a vast trough of matters which had come to exert a gravitational pull of their own away from constitutional and apex appeals, not only in terms of workload but also geographical availability. The abolition of appeals as of right,[263] and relegation

255 See Keith Mason, *Old Law, New Law: A Second Australian Legal Miscellany* (Federation Press, 2014) 139–41.

256 See, eg: *Hayes v Federal Commissioner of Taxation* (1956) 96 CLR 47 (taxation, before Fullagar J); *Federal Commissioner of Taxation v McPhail* (1968) 117 CLR 111 (taxation, before Owen J); *F Hoffman-La Roche & Co AG v Commissioner of Patents* (1971) 123 CLR 529 (intellectual property, before Gibbs J); *Meyers Taylor Pty Ltd v Vicarr Industries Ltd* (1977) 137 CLR 228 (intellectual property, before Aickin J). See also *Suehle v Commonwealth* (1967) 116 CLR 353 (tort, before Windeyer J).

257 Letter from SW Griffith, Chief Justice to the Attorney-General, 22 June 1905, reproduced in Parliament of Australia, *Correspondence between Attorneys-General and the Justices of the High Court re Sitting Places and Expenses of the Court* (Parliamentary Paper No 26, 24 August 1905) 34, 34.

258 Sir Nigel Bowen, 'Federal and State Court Relationships' (1979) 53(12) *Australian Law Journal* 806, 806.

259 See Law Reform Commission, *Reform of Evidence Law 1980* (Discussion Paper No 16, 19 July 1980) 2–3.

260 See Mark Lunney, 'The Limits of Political Libel: Conscription and the *Ryan v The Argus* Libel Trial' (2017) 41(2) *Melbourne University Law Review* 758, 773. See also *Cunningham v Ryan* (1919) 27 CLR 294, 295.

261 See Sawer (n 145) 39.

262 See Barwick, 'The Australian Judicial System' (n 149) 19.

263 See *Judiciary Amendment Act 1976* (Cth) ss 5–6.

of first instance matters to the Federal Court,[264] must also be considered as salient reasons for the decline in circuits, and not just the Canberra shift.

D *Institutional Proximity*

What the foregoing adverts to is the philosophy that the Court ought to be made available to litigants in all locations. The financial clashes between the executive and judicature revolved around whether the Commonwealth or litigants should bear the burden of travel. Judicial independence was at stake in whether the Court ought to dispense justice 'door-to-door' on its own dictates, or at the seat of government. As an apex court for both federal and state law, the Court aimed to supply comprehensive authority in its jurisprudence for all matters. However, the Court's ability to maintain state presences had an additional symbolic effect of considerable power in enhancing the Court's perceived proximity to and efficacy on provincial matters. Conversely, installation in Canberra may have lent institutional prestige to the Court at the expense of this symbolism.

The conventional value of circuits is that '[t]hey provide an essential link between the serving Justices and the legal profession and litigants in the outlying States'.[265] Chief Justice Griffith stressed that justices 'should not be a mere abstract body, a figment of the brain, but real live human beings, not only willing to be looked at, but desirous of making ourselves acquainted with the different parts of Australia'.[266] These opinions were best encapsulated by the remarks of Sir Victor Windeyer while in Canada:

> It certainly produces some inconveniences and perhaps some loss of speed and efficiency in adjudication. But it has done much to make the court recognised and accepted as a part of the legal system of Australia and to promote among members of the legal profession and the judges and the public in the several States a sense of the unity of the nation through the basic unity of its law. And my own view, based upon my own experience, is that it has been useful too for us members of the High Court. We were able to meet regularly and associate with the Judges of the Supreme Courts and to know the leading practitioners in each State, and to understand affairs in far flung places.[267]

Thus, the benefits of a travelling court accrued not only to litigants, but also the state legal professions. Kirby, reflecting on his time on the Court, recalled the regularity and institutional benefits of traditional events coinciding with court sittings, including

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264 *Federal Court of Australia Act 1976* (Cth) s 19; *Judiciary Act 1903* (Cth) s 39B.

265 Kirby, 'Law at Century's End' (n 139) 8.

266 'The Commonwealth High Court', *The Adelaide Observer* (Adelaide, 28 November 1903) 21.

267 Sir Victor Windeyer, 'Some Aspects of Australian Constitutional Law' (JA Weir Memorial Lecture, University of Alberta, 13–14 March 1972) 65–6, quoted in Bennett (n 4) 104.

dinners with local judges, Bar and Law Society events, and university functions.[268] It was said that Wilson J's chancellorship of Murdoch University during his tenure was to impress upon those agitating for the removal of the justices to Canberra 'that there were important reasons' for members to continue residing in their home states.[269] Certainly, Gibbs considered it possible that qualified persons for appointment to the Court might be deterred if forced to sever ties from their home states.[270]

Undoubtedly, proximity was a critical feature of the value conferred by circuits. Deakin said, '[l]aw is only the reflection of the community from which it springs … The laws which we pass possess an Australian atmosphere, and require to be interpreted with a knowledge of the circumstances under which they are passed and applied'.[271] In response, however, Sir Joseph Abbott raised a countervailing issue: 'I ask those who contend that local knowledge is a great advantage, what benefit would local knowledge be if they had to retain counsel in Sydney to advocate their interests in an appeal to the High Court … [or if] Western Australians had to, come to Victoria to appeal to the High Court?'[272] Circuits reconciled these two viewpoints. For litigants, itinerancy was essential as they 'should have the advantage of the services of their own counsel, and the advantage of seeing for themselves how their cases fare'.[273] For the bench, circuits enabled a better understanding of local conditions, especially in state law issues where matters of property, contract, tort or crime might 'have a more significant local element'.[274]

Of course, opinion was never uniform on the institutional benefit of circuits. Justice Starke was a prominent dissenter. He considered '[t]he movements of the court mean nothing to the public anywhere'.[275] Instead, the advantages were outweighed by inconvenience, disruption and inefficiency.[276] The judges often highlighted

268 See Kirby, 'Remembrance of Times Past' (n 137) 32.

269 See Robert Nicholson, 'Sir Ronald Wilson: An Appreciation' (2007) 31(2) *Melbourne University Law Review* 499, 513.

270 See Gibbs (n 167) 682.

271 Commonwealth, *Parliamentary Debate*s, House of Representatives, 9 June 1903, 594 (Alfred Deakin, Attorney-General).

272 *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 11 March 1898, 2290 (Sir Joseph Abbott).

273 Dixon, 'Address upon the Occasion of First Presiding' (n 120) 252. See also above Part III(A).

274 See Bowen (n 258) 813.

275 Memorandum of Justice Starke, 'Sittings of the High Court in the Capitals of the States', October 1933, archived at High Court Registry, Melbourne, quoted in Bennett (n 4) 103.

276 Memorandum of Justice Starke, 'Sittings of the High Court in the Capitals of the States', October 1933, archived at High Court Registry, Melbourne, discussed in Bennett (n 4) 103.

the arduous hardships of incessant travel[277] — as Clem Lloyd observed, '[e]ven the congenial McTiernan raised an occasional objection to Latham's scheduling', thinking the pace '"too revolutionary"'.[278] There is also the question of whether there truly was a federal 'ivory tower' which circuits needed to keep in abeyance. As remarked upon the eve of the Court's removal to Canberra:

> many public servants resident in Canberra were amused or bemused, whichever be the correct word, by the underlying idea that residence in Canberra necessarily isolates one from the problems of State capital cities. The majority of the top echelons of the Canberra bureaucracy do constantly visit all State capitals, and have, in most instances, a closer acquaintance of the general practical problems affecting all of these as a whole than a person who is merely resident in one State capital.[279]

Further, the Court's travels troubled both Barwick CJ and Starke J from a reputational standpoint. Justice Starke claimed a lack of independent accommodation depreciated the Court's prestige,[280] while Barwick CJ thought it was beneath the Court's dignity to travel.[281]

The bulk of opinion post-relocation to the Court's Canberra premises suggests an appreciation in prestige. Contemporaries suggested that the move 'enhanced the public status of the Court and its ability to devote its attention to the most significant matters',[282] and that 'public interest in and awareness of the Court and its activities are likely to be changed. It is likely hereafter to bulk larger in public consciousness'.[283] The High Court building has spawned an outpouring of architectural analysis foregrounding the importance of its construction and design as a means of advancing the symbolic importance, institutional independence and unity

277 See, eg: Letter from SW Griffith, Edmund Barton and RE O'Connor, Justices of the High Court to the Attorney-General, 14 February 1905, reproduced in Parliament of Australia, *Correspondence between Attorneys-General and the Justices of the High Court re Sitting Places and Expenses of the Court* (Parliamentary Paper No 26, 24 August 1905) 10, 11; Memorandum of Justice Starke, October 1933, archived at High Court Registry, Melbourne, discussed in Bennett (n 4) 103; Letter from Justice Rich to Chief Justice Latham, 15 January 1937, archived at National Library of Australia, Papers of Sir John Latham, ref 1009/62. See generally Justice JB Thomas, 'Epistle from a Judge on Circuit' (1987) 10(1) *University of New South Wales Law Journal* 173.

278 Lloyd (n 101) 180.

279 Current Topics (n 157) 56.

280 Memorandum of Justice Starke, October 1933, archived at High Court Registry, Melbourne.

281 See Barwick, 'The State of the Australian Judicature (1980)' (n 164) 295.

282 Brian Galligan, *Politics of the High Court: A Study of the Judicial Branch of Government in Australia* (University of Queensland Press, 1987) 261.

283 Barwick, 'Foreword' (n 216) v. Cf Ingrid Nielsen and Russell Smyth, 'What the Australian Public Knows about the High Court' (2019) 47(1) *Federal Law Review* 31.

of purpose reflective of the Court's status.[284] While this article's focus remains on the historical perspective, the architectural dimension to judicial institutions should not be ignored, and is a subject which has merited substantial scholarly attention.[285]

In a retrospective, Kirby J notes that '[t]he creation of the Court's permanent building in Canberra undoubtedly had an effect which went beyond the more efficient operations that it permits', impressing upon those who work in it the significance of the institution.[286] Chiefly, this was because

> [w]hilst the High Court, and the mostly elderly gentlemen who made it up, moved around Australia in regular contact with the judiciary and the Bar in the scattered communities of the Commonwealth, their self-image was, I think, very

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284 See generally: 'Part 3: The Artistry', *Oral History Podcast of the 40th Anniversary of the High Court Building* (History at Work, Sound Environment, LookEar and Line of Sight Heritage, 19 May 2021) <https://www.hcourt.gov.au/about/podcast-3>; 'Part 4: The Vibe', *Oral History Podcast of the 40th Anniversary of the High Court Building* (History at Work, Sound Environment, LookEar and Line of Sight Heritage, 19 May 2021) <https://www.hcourt.gov.au/about/podcast-4>; Philip Goad, 'Architecture of Court Building: An Analysis' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (Oxford University Press, 2001) 29; Georgie Juszczyk, 'Power on a Pedestal: How Architecture Creates, Reinforces, and Reflects Power Structures in the Legal System' (2021) 11(1) *ANU Undergraduate Research Journal* 39; Gaia Ewing, 'Law, Art, and Time in the Architecture of the High Court: A Chronotopic Analysis' (2021) 11(1) *ANU Undergraduate Research Journal* 58. For a sustained exploration of the historical design process, see Simon Kringas, 'Design of the High Court of Australia' (PhD Thesis, University of Sydney, 2017).

285 See generally: Rosemary Annable, *A Setting for Justice: Building for the Supreme Court of New South Wales* (UNSW Press, 2007); Graham Brawn, 'The Changing Face of Justice: The Architecture of the Australian Courthouse' (2009) 98(5) *Architecture Australia* 39; Julian R Murphy, 'Architecting Aboriginal Access to Justice: The Courts as Doors to the Law' (2016) 18(2) *Flinders Law Journal* 269; Peter D Rush, 'The Forensic Precinct: Notes on the Public Address of Law' (2016) 20(1) *Law Text Culture* 216; Justice Melissa Perry, 'Introductory Remarks' (Speech, Sherman Centre for Culture and Ideas Architecture Hub, 14 October 2019). As to international perspectives, see generally: Julienne Hanson, 'The Architecture of Justice: Iconography and Space Configuration in the English Law Court Building' (1996) 1(4) *arq: Architectural Research Quarterly* 50; Linda Mulcahy, *Legal Architecture: Justice, Due Process and the Place of Law* (Routledge, 2011); Wessel le Roux, 'The Right to a Fair Trial and the Architectural Design of Court Buildings' (2005) 122(2) *South African Law Journal* 308; Judith Resnik, Dennis Curtis and Allison Tait, 'Constructing Courts: Architecture, the Ideology of Judging, and the Public Sphere' in Anne Wagner and Richard K Sherwin (eds), *Law, Culture and Visual Studies* (Springer, 2013) 515; Jonathan Simon, Nicholas Temple and Renée Tobe (eds), *Architecture and Justice: Judicial Meanings in the Public Realm* (Routledge, 2016); Keith J Bybee, 'Judging in Place: Architecture, Design, and the Operation of Courts' (2012) 37(4) *Law & Social Inquiry* 1014. The above is not intended to be exhaustive, and is only intended to give a snapshot of the wide analysis this topic has attracted.

286 Kirby, 'Law at Century's End' (n 139) 8–9.

> largely that of circuit judges after the traditions of the working courts whom they supervised. But when the Court moved to its permanent home in Canberra and was placed squarely in the constitutional triangle, with its clear physical relationship to the Parliament and to the offices of the Executive Government, a new and powerful symbolism was established.[287]

This comparison sheds light on how there was, for a time, a conscious trade-off made by the Court in its circuits by favouring accessibility over prestige — hewing to the principle that 'a Court is a Court even if it be held under a gum-tree'.[288]

IV Waning Relevance of Circuit Sittings?

As the High Court nears its 120th anniversary, the question arises whether there is continuing utility to circuits. It is uncontroversial to say that conditions have changed since 1903. The efficiency of transportation and telecommunications has improved; judicial exploitation of which has been enabled by a mature Commonwealth with considerable resources at its disposal. This has benefited the accessibility of justice, which might be said to offset any detriment flowing from a decline in circuits. However, to focus on the practicalities alone would have shut down the circuits from the very outset.[289] This Part acknowledges the altered conditions of the Court's present-day, but posits there remains a residual benefit from circuits.

The most notable change has been the conquest of the tyranny of distance. 'Australia is a large place', Deakin commented, 'and travelling is very expensive'.[290] The most daring circuit leg, Sydney to Perth, is over 3,000 kilometres by air. From Griffith CJ to Gavan Duffy CJ, the Court travelled by steamer and train, with all the attendant difficulties.[291] Considering the Convention and *Judiciary Act* debates, the Court in fact probably travelled because of such distances; to make justice less remote when the only alternative was over 16,000 kilometres away on Downing Street. Travelling also reduced the early Court's reliance on mail for the transfer of documents between registries. As Alex Castles observed, '[t]yranny of distance tells you something fundamental about law in Australia … The tyranny in distance was a fundamental thing that changed the various structures of our law'.[292] However, by the time of the Latham Court, interstate air travel had become a frequent occurrence.[293] In the

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287 Justice Michael Kirby, 'Sir Anthony Mason Lecture 1996: A F Mason — From *Trigwell* to *Teoh*' (1996) 20(4) *Melbourne University Law Review* 1087, 1093.

288 *Comyn v Willshire* (1875) 9 SALR 161, 168 (Stow J).

289 See above Part II(A).

290 Commonwealth, *Parliamentary Debate*s, House of Representatives, 16 December 1912, 7152 (Alfred Deakin).

291 See Lloyd (n 101) 179.

292 Annesley Athaide, 'Alex Castles on the Recognition of Australian Legal History 1955–1963' (2003) 7(1) *Australian Journal of Legal History* 107, 147. See generally Geoffrey Blainey, *The Tyranny of Distance* (Pan Macmillan, 2001).

293 Ayres, *Owen Dixon* (n 112) 97.

1960–70s, air travel was a ubiquitous experience of the circuits, leading to increased frequency of state appeals.[294] Barwick noted that for all practical purposes, Perth had become closer to Melbourne than parts of Victoria not served by intrastate airlines.[295] Related was the 'paradox' that cheap international air travel had dramatically increased recourse by Australian litigants to the Privy Council when the facility for doing so was being dismembered.[296] These developments illustrate the practical necessity of an itinerant Court prior to air travel, and its subsequent decline in movement.

Courtroom technology has been a prominent development following the Court's relocation to Canberra. While the contemporaneous effect of the COVID-19 pandemic on hearings has merited much attention, technological integration has in fact been underway for some time. As early as 1986, the usage of video-link for special leave hearings was proposed, consistent with foreign practice.[297] This was formally adopted by Mason CJ in 1987, subject to ongoing 'acceptance by the legal profession'.[298] Such acceptance was very much forthcoming.[299] Through the 1990s, the Court was hearing special leave applications for Brisbane, Adelaide, Perth and Hobart by video-link prior to in-person appeals.[300] By the 2000s, the hearing of video-link applications from the capital was cemented practice.[301] This early adoption left the present-day Court well-placed to persist with state special leave applications throughout the pandemic lockdowns.[302] After suspending circuits and Canberra sittings from April to June 2020,[303] the Court held its first ever remote Full Court hearing on 15 April 2020.[304] There is now a videoconferencing protocol for practitioners,[305] while Full Court hearings over video-link occurred with

294 See Barwick, 'Foreword' (n 216) vi.

295 Barwick, 'The Australian Judicial System' (n 149) 20.

296 Bennett (n 4) 96. See also Marr (n 121) 124.

297 See GC Shannon, 'Report on Visit to Supreme Courts of Canada and the United States by the Clerk of the High Court' (Report, High Court of Australia, September–October 1986).

298 See Daryl R Williams, 'Use of Video Recordings and Video Links by Courts and Tribunals' (1987) 17(2) *University of Western Australia Law Review* 257, 262.

299 See Michael Kirby, 'The Future of Courts — Do They Have One?' (1999) 41(3–4) *Journal of the Indian Law Institute* 383, 385.

300 See Sir Anthony Mason, 'The Regulation of Appeals to the High Court of Australia: The Jurisdiction to Grant Special Leave to Appeal' (1996) 15(1) *University of Tasmania Law Review* 1, 5.

301 See, eg, High Court of Australia, *Annual Report 2006–07* (Report, 2007) 4, 17–18.

302 High Court of Australia, 'HCA Response to COVID-19' (Notice, March 2020): This source is no longer publicly accessible on the High Court's website.

303 Ibid.

304 Transcript of Proceedings, *Cumberland v The Queen* [2020] HCATrans 49.

305 High Court of Australia, 'HCA Video Connection Hearings: Protocol', *High Court of Australia* (Protocol, August 2021).

regularity throughout 2021,[306] particularly where, as discussed before, the Justices were confined at home from June 2021 to March 2022 due to successive COVID-19 variant outbreaks.[307] The sum result has been nearly two years in which the Court has had no occasion to resume its circuits — and seemingly little reason even after resumption of in-person hearings. While advocates might bemoan the shortcomings of online advocacy,[308] there may be little practical inducement for the Court to resume circuits which have had less robust business in recent years.

However, the continuance of circuits presents more diffuse benefits. While many issues intended for circuits to solve have been mitigated with the passage of time, Gleeson CJ directly addressed this tension between tradition and modernity in 2005:

> Throughout the 20th century, and even after the establishment in 1980 of the Court's own building and permanent headquarters in Canberra, the practice of circuit sittings continued and it continues up to the present. Some people ask the question, 'Why does the High Court sit on circuit in State capitals?' They might also ask the question, 'Why does the High Court sit at all?' For years technology has existed that would permit us all to work from home, but it is part of the function of a court to sit to conduct its business in public and to expose itself and its reasoning to the public gaze and that is why the High Court sits on circuit.[309]

Such an assessment is prescient where recent empirical research suggests hearings by video-link may make it more difficult for a judge to maintain the authority of the court, or to engage with the community at large.[310]

Comments on the 'public gaze' represent a remarkable continuity of opinion from the sentiments of Griffith in 1903.[311] The words of Kiefel CJ in 2018 reflect the current view of the Court in much the same, if slightly qualified, terms:

> The Justices of the Court appreciate the importance of circuits not only to the profession but to the public more generally. It is sometimes suggested that we should undertake them more often, but it needs to be understood that the considerable cost associated with circuits must be weighed against the matters

306 See, eg: *Chetcuti v Commonwealth* (2021) 272 CLR 609; *Palmer v Western Australia* (2021) 274 CLR 286; *Mineralogy Pty Ltd v Western Australia* (2021) 274 CLR 219. See 'Court Lists', *High Court of Australia* (Web Page) <https://www.hcourt.gov.au/registry/court-lists>.

307 See above nn 192–5 and accompanying text.

308 See Michael Legg and Anthony Song, 'The Courts, the Remote Hearing and the Pandemic: From Action to Reflection' (2021) 44(1) *University of New South Wales Law Journal* 126, 152–3.

309 Transcript of Proceedings, *Ceremonial: Final Sitting of the High Court in Supreme Court of South Australia* [2005] HCATrans 571.

310 See Emma Rowden and Anne Wallace, 'Remote Judging: The Impact of Video Links on the Image and the Role of the Judge' (2018) 14(4) *International Journal of Law in Context* 504, 515–20.

311 See above n 266 and accompanying text.

> available to be heard at a given time. That said, any opportunity to undertake a circuit is given careful consideration.[312]

Ultimately, this may just be the ineluctable force of history. As Kirby has observed, the Court's circuits are very much in character with the Australian legal system's English inheritance, concluding, '[t]he value of sending judges around the country was recognised in England from the reign of Henry II. … As Queen Elizabeth II has said of her own office: "One has to be seen to be believed".'[313]

While COVID-19 might have obviated once and for all the issue of travelling costs, the other historical justifications of federal unity, judicial independence and, above all, the administration of tangible justice in the public eye, have maintained their resonance. The travelling Court services these aims in a way that remote conferencing could not. So long as this remains the case, circuits will likely continue.

Revisiting the introductory comparisons to the US and Canada, debate around circuits remains live even in jurisdictions which have not retained itinerancy. In the US, calls have been made for the reintroduction of circuit riding to the Supreme Court,[314] including a recent submission to the Biden Presidential Commission on Supreme Court reform pointing to the need to ensure 'justices are in regular contact with a broad set of Americans and their legal concerns'.[315] In Canada, the Supreme Court in 2019 sat outside of Ottawa for the first time in Winnipeg,[316] 90 years after a Manitoban advocate had suggested sitting in provincial capitals.[317] The Privy Council has recently begun travelling to jurisdictions including the Caribbean, in response to concerns of proximity and accessibility.[318] The possibility had been

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312 Transcript of Proceedings (n 182). See also High Court of Australia, *Annual Report 2018–19* (Report, 2019) 6. Perhaps it was no coincidence that these remarks were issued on the occasion of the Court's unprecedented sitting in Darwin: Transcript of Proceedings (n 182).

313 Kirby, 'Remembrance of Times Past' (n 137) 32.

314 See, eg, Steven G Calabresi and David C Presser, 'Reintroducing Circuit Riding: A Timely Proposal' (2006) 90(5) *Minnesota Law Review* 1386.

315 Center for American Progress, Written Testimony to the Presidential Commission on the Supreme Court of the United States (2021) 5.

316 Supreme Court of Canada, 'News Release' (News Release, 13 May 2019).

317 Topics of the Month, 'Supreme Court Appeals' (1930) 8(9) *Canadian Bar Review* 675, 676. This move was not without controversy: see Paul Warchuk and Bruno Gélinas-Faucher, 'Travelling Court' (16 September 2019) *Canadian Bar Association National Magazine* <https://www.nationalmagazine.ca/en-ca/articles/law/judiciary/2019/travelling-court>.

318 See Stephen Vasciannie, 'The Appellate Jurisdiction of the Caribbean Court of Justice' in Richard Albert, Derek O'Brien and Se-shauna Wheatle (eds), *The Oxford Handbook of Caribbean Constitutions* (Oxford University Press, 2020) 503, 50–12 [18.2.2]. Note that the Caribbean Court of Justice, created as a response to the Privy Council, is fully itinerant: see *Agreement Establishing the Caribbean Court of Justice*, opened for signature 14 February 2001, 2255 UNTS 319 (entered into force 23 July 2002) art III(3).

mooted as early as 1943,[319] and it is telling that it has been resurrected as many members of the Commonwealth have abolished Privy Council appeals.[320] Quite unexpectedly, considering the London-centricity of the antecedent House of Lords, even the Supreme Court of the United Kingdom has begun sitting in places such as Edinburgh, Cardiff and Belfast such that '[t]ravelling to other parts of the UK has now become an established part of the court's calendar'.[321] The revival of this custom elsewhere bears major significance for Australia's own adherence to circuits.

V Conclusion

This article concludes that itinerancy was an integral aspect of the High Court's role as 'keystone of the federal arch'.[322] Far from merely being a curious artefact of early Federation, the practice's survival throughout the last century despite numerous challenges suggests an enduring value proposition. As Bennett concludes, '[t]he presence of the court in State capitals did advance Australian unity, limit the expense of litigation in the court and serve the public interest well'.[323] Litigants were spared the cost of commuting across the country or briefing coastal counsel; procedural flexibility afforded a shield to judicial independence; centrifugal tendencies in the states were mollified while propagating the federal footprint; and the Court's reputation was markedly enhanced by its proximity to the people.

Of course, it must be acknowledged that modernity, while making circuit riding less inconvenient, has also seemingly reduced the marginal benefits. In particular, a significant development in the Canberra phase of the Court's history has been the advent of remote hearing technology. This raises the question of why the Court needs to maintain regular interstate sittings where, post-COVID-19, the same facility could be obtained through now-ubiquitous audio/video-link facilities in all of its registries. But it must be said that since 1980 it has never been mere incapacity to work remotely prompting the undertaking of circuits. As many of the Court's members have commented, a court is not just a workspace — it is a forum in which justice is shown to be administered. It seems the general view, at least among the judiciary, is that physical proximity is best-positioned to achieve this aim. Thus, the value in maintaining the tradition far exceeds any practical gain from wholesale abolition. In this respect, the position remains principally the same as in 1905, 1931

319 Rohit De, '"A Peripatetic World Court" Cosmopolitan Courts, Nationalist Judges and the Indian Appeal to the Privy Council' (2014) 32(4) *Law and History Review* 821, 821.

320 See also Daniel Clarry, 'Institutional Judicial Independence and the Judicial Committee of the Privy Council' (2012–13) 4(1) *UK Supreme Court Yearbook* 44, 55–7.

321 Lord Reed, 'The Supreme Court Ten Years On' (Bentham Association Lecture, University College London, 6 March 2019) 16.

322 Commonwealth, *Parliamentary Debates*, House of Representatives, 18 March 1902, 10967 (Alfred Deakin, Attorney-General).

323 Bennett (n 4) 105.

or 1979. While the commitment to circuits may be honoured more in the breach, the fact that they are undertaken at all in a time of technological reliance and fiscal rationalisation is significant in and of itself. Of course, it is readily conceded that there may be a time when circuits pass from the tangibly practical into the purely ceremonial. Nevertheless, much like that brutalist edifice sitting on the banks of Lake Burley Griffin, their significance for the functioning of the High Court, and by extension the administration of justice in the Commonwealth, cannot be minimised. As described before, itinerancy has already touched the recent practice of other apex courts. It would not be surprising if such courts turned to the Australian experience of circuit sittings for guidance. Should they do so, they will no doubt find much that is instructive in the Court's century-long history of itinerancy.