

## Chapter 3

# The Federal Court of Australia and Extra-Judicial Work

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### Introduction

The judges of the Federal Court of Australia have engaged in more extra-judicial work for Australian governments than members of any other federal court. From an historical perspective, this is not surprising. In the 1970s, when the Court was established, Australian governments made liberal use of judges for off-court tasks. These included sitting on administrative tribunals, conducting inquiries and even, in some instances, occupying substantive executive posts. As a large federal court with an expansive jurisdiction, the Federal Court of Australia has been a natural place for the Commonwealth to seek judicial personnel for quasi-legislative and executive work.

From the perspective of the Australian *Constitution*, however, the significant involvement of individual federal judges in such work is surprising. Two decades before the Federal Court's creation, the High Court in the *Boilermakers' Case* interpreted the *Constitution* as mandating a strong separation of federal judicial power.<sup>1</sup> This separation doctrine gives courts a monopoly over federal judicial power and prohibits federal courts from exercising non-judicial power.<sup>2</sup> While the *Boilermakers' Case* had clear consequences for federal courts – the Commonwealth Court of Conciliation and Arbitration, for example, could no longer exercise both judicial and arbitral functions<sup>3</sup> – the majority opinion did not address the situation of federal judges undertaking legislative or executive tasks in their personal capacity. It was not until a series of cases focusing on the extra-judicial activities of members of the Federal Court that a body of law emerged endeavouring to reconcile this practice with the *Constitution*.

This chapter examines the engagement by members of the Federal Court in extra-judicial work over the last 40 years. Part II begins with an analysis of the historical, statutory and public policy factors which shaped the early Federal Court's approach to off-court work. Part III considers the substantial involvement by Federal Court judges in extra-judicial work in the 1970s and 1980s and the constitutional justifications offered for this. Conversely, Part IV considers the contraction in off-court work

1 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 ('*Boilermakers' Case*').

2 For a detailed analysis, see Fiona Wheeler, 'The Boilermakers Case' in H P Lee and George Winterton (eds), *Australian Constitutional Landmarks* (Cambridge University Press, 2003) 160.

3 *Ibid* 166-71.

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