

## Chapter 5

# Between Realism and Legalism: Michael Coper and the Enduring Appeal of *Cole v Whitfield*

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When commenting on judicial process in the context of the scholarly career of Michael Coper it is impossible to go past *Cole v Whitfield*.<sup>1</sup> It is evident to anyone who knows him or his work that Michael's interest in the judicial process arises from his very deep and early engagement with s 92 of the Constitution. So, even though this volume will contain the erudite exposition of *Cole v Whitfield* by Justice Stephen Gageler,<sup>2</sup> I have made the case the centrepiece of this short commentary as well. In doing so, I have had the pleasure of rereading Michael's writing on s 92, most particularly the relevant chapter in *Encounters with the Australian Constitution*,<sup>3</sup> and *Cole v Whitfield* side by side.

My first response to Michael's writing was a renewed appreciation of his writing style. Michael's clarity is much commented upon but I would like to point also to its elegance and wit. Indeed, in this respect I do not think that he has a peer anywhere in the common law world, with the possible exception of John Hart Ely's seminal *Democracy and Distrust*.<sup>4</sup>

The writing also has two other qualities to which I want to draw attention as they illustrate the tension that is the theme of Professor Blackshield's and Justice Kirby's chapters. On one hand, the analysis is bold – Michael's central contribution to Australian constitutional law was his compelling argument for a very dramatic reorientation of the law of freedom of interstate trade. Yet at the same time, Michael takes the law very seriously indeed.

The tale of s 92 is complex and its highlights well known, but in all Michael's work on s 92 he takes the reader carefully through the many curlicues of the story. He tells us about the fiscal burden theory and how it fails to take hold.<sup>5</sup> He traces the confusion and contradiction that arises after *James v Cowan*,<sup>6</sup> and the difficulties of tests that turn on concepts like purpose or effect or subject-matter. He traces the ascendancy of

1 (1988) 165 CLR 360.

2 See above in Chapter 1 of this book.

3 Michael Coper, *Encounters with the Australian Constitution* (CCH Australia, 1987) (*Encounters*).

4 John Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press, 1980).

5 *Encounters*, above n 3, 281-6; Michael Coper, *Freedom of Interstate Trade under the Australian Constitution* (Butterworths, 1983) 272-3 (*Freedom of Interstate Trade*).

6 (1932) 47 CLR 386; *Encounters*, above n 3, 293-4; *Freedom of Interstate Trade*, above n 5, 33-4, 40-7.

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