FOREWORD

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Emeritus Professor Zines has reminded me that we first met in 1978 in the common room of Clare Hall, Cambridge, where he was Visiting Fellow. What then was unknown to me was that Professor Zines was using his time at Cambridge to begin work upon *The High Court and the Constitution*. This was first published in 1981 and is now in its fifth edition. This was the other standard text for which he was to be responsible. The second edition of *Federal Jurisdiction in Australia* in which he joined Sir Zelman Cowen was published in 1978. This is now in its third edition, published in 2002.

I had first encountered the work of Professor Zines not in the field of federal constitutional law, but by reading, as they had appeared, the articles 'Revision of Copyright Law',[1] and 'Equitable Assignments: When will Equity Assist a Volunteer?'.[2] The first reflects the work of the author in 1958–59 as Secretary to the Spicer Committee, whose report led eventually to the *Copyright Act 1968* (Cth). Professor Zines is of such longevity as to be one of the few lawyers with a firsthand knowledge of the work leading to the 1968 statute. The second article was written shortly after the decision in *Norman v Federal Commissioner of Taxation*.[3] Subsequently, it was cited with approval by Mason CJ and McHugh J in *Corin v Patton*.[4]

I do not idly mention these matters. Much of the disputation in constitutional litigation turns in the first instance upon the construction of the federal or State law or regulation the validity of which is challenged. Such legislation is apt to displace existing common law or statute and to create new rights and liabilities. Many heads of federal legislative power are identified by terms such as 'bankruptcy', 'insurance',

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1 Leslie Zines, 'Revision of Copyright Law' (1963) 37 *Australian Law Journal* 247.

2 Leslie Zines, 'Equitable Assignments: When will Equity Assist a Volunteer?' (1965) 38 *Australian Law Journal* 337.

3 (1963) 109 CLR 9.

4 (1990) 169 CLR 540, 558–9

'copyright', 'aliens', and 'marriage' which call for an understanding of their provenance in the general law. And, what is the 'property' spoken of in s 51(xxxi)?

There is, I fear, too much writing in constitutional law which is inward looking and self-obsessed, whereas if there is one subject which spans the whole of our Australian legal universe, and requires the application of well furnished lawyers, this is it. One of the reasons, I suggest, for the pre-eminent position which the work of Professor Zines continues to occupy in the field of federal constitutional law, is that readers of discernment appreciate that he writes as one who has retained his grip upon the fundamentals of a wide range of private law. Thus, he will have a ready response to the issues canvassed by Professor Stapleton in her contribution to this collection of essays, 'Factual Causation', and by Dr John Griffith SC in his essay 'Apprehended Bias in Australian Administrative Law'.

The five editions of *The High Court and the Constitution* span a period of what now can be seen to be significant development in the course of High Court decisions. For example, when Professor Zines sat down to write in 1978, it was yet to be decided, contrary to the apparent views of Sir Owen Dixon, that the acquisition of which s 51(xxxi) spoke might be not just by the Commonwealth but also by an individual or corporation: *Trade Practices Commission v Tooth & Co Ltd*.[5] Further, a school of constitutional interpretation which was a species of literalism, and certainly not of what now would be called originalism, then placed something of an embargo upon inspection of contemporary materials which informed the drafting of the Constitution.

The significance of *Cole v Whitfield* [6] for the interpretation of s 92 of the *Constitution* and also of s 90 is well appreciated, but goes beyond that. One may compare the treatment of the corporations power in *Strickland v Rocla Concrete Pipes Ltd*[7] with the *Work Choices Case*,[8] and that of s 51(xxxi) and s 122 in *Teori Tau v Commonwealth*[9] with *Wurridjal v Commonwealth*.[10] With this trend of authority I surmise Professor Zines rests more or less content. As early as 1966, that is to say before *Teori Tau*, he wrote critically of the theory of disjunction between s 122 and other provisions of the Constitution.[11] He appears[12] to be less happy with the outcome in *Capital Duplicators Pty Ltd v Australian Capital Territory*[13] which treated the power of the Parliament to impose duties of customs and excise as exclusive of the legislative power of the Territory conferred by a law of the Parliament supported by s 122.

However well founded my surmises may be, the point of immediate importance is that the development in the methods of constitutional interpretation over the last thirty years has been influenced, in significant measure, by the work of Professor Zines. By

5 (1979) 142 CLR 397.
6 (1988) 165 CLR 360.
7 (1971) 124 CLR 468.
8 *New South Wales v Commonwealth* (2006) 229 CLR 1, 90–98 [96]–[124] ('*Work Choices Case*').
9 (1969) 119 CLR 564 ('*Teori Tau*').
10 (2009) 237 CLR 309, 353-357 [73]–[81], 383–88 [175]–[189], 418–19 [283]–[287].
11 Leslie Zines, 'Laws for the Government of any Territory: Section 122 of the Constitution' (1966) 2 *Federal Law Review* 72.
12 Leslie Zines, *The High Court and the Constitution* (5th ed, 2008) 615.
13 (1992) 177 CLR 248.

way of one from many examples, I should mention the adoption, in the *Industrial Relations Act Case*,[14] of his writing on the limits of the external affairs power.

A young graduate from the University of Sydney, Leslie Zines arrived in Canberra in 1952 to join the Department of the Attorney-General, over which presided Sir Kenneth Bailey who since 1946 had been Solicitor-General and Secretary to the Department. The ten years (with an interruption for studies at Harvard) spent in the Department left Professor Zines with invaluable first-hand experience of the operation of the machinery of government. It appears also to have left him with a distaste for judicially created restrictions upon federal legislative power which are not based upon specific provisions of the *Constitution*. In 1991 he wrote that while 'not totally distrustful of judges when it comes to the protection of the individual or of minorities', he suggested that the judges 'should not be given, nor should they grab, a blank cheque'.[15] Shortly thereafter, on 18 March 1992, the Commonwealth Solicitor-General (Gavan Griffith QC) read this passage to a somewhat frosty High Court. This was done in an (unsuccessful) attempt to counter the blandishments of Sir Maurice Byers QC that provisions of Pt IIID of the *Broadcasting Act 1942* (Cth) were invalid for infringing the right to freedom of communication on matters relevant to political discussion; this right was implied in the system of representative government provided by the *Constitution*.[16] Thereafter, Professor Zines expressed some scepticism of the recent decisions in this field with his article 'A Judicially Created Bill of Rights?'.[17]

Justice Paul Finn writes in his essay 'Public Trusts, Public Fiduciaries' that he has not set out to look again at his subject — circumscribing the exercise of public power by the employment of trust and fiduciary ideas — simply to satisfy the earlier scepticism of Professor Zines on the subject. There had been, I suspect, the apprehension on his part of the delivery to the judges of another blank cheque. But the High Court was not acting upon such a cheque when it held in *Bathurst City Council v PWC Properties Pty Ltd*,[18] to which Justice Finn refers, that the special provision in a New South Wales statute which spoke of 'community land' imposed governmental responsibilities which bound the land and controlled freedom of disposition. The High Court[19] pointed to the history of such notions in legislation beginning with the *Australian Colonies Waste Lands Act* 1842 (Imp).[20] Thereafter, in *Federal Commissioner of Taxation v Day*,[21] the High Court drew upon the decision of Finn J in *McManus v Scott-Charlton*,[22] to emphasise the constitutional and legislative obligations of government, in particular of public servants, to act in the public interest. Justice Finn's essay may be expected to stimulate further interest in his subject.

Professor Zines lectured undergraduates for 30 years. Many of the contributors to this collection of essays were his colleagues or students. The classroom of the era in which Professor Zines perfected his teaching methods differed markedly from that of

14 *Victoria v Commonwealth* (1996) 187 CLR 416, 486 ('*Industrial Relations Act Case*').
15 Leslie Zines, *Constitutional Change in the Commonwealth* (1991) 52.
16 *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106.
17 Leslie Zines, 'A Judicially Created Bill of Rights' (1994) 16 *Sydney Law Review* 166.
18 (1998) 195 CLR 566.
19 (1998) 195 CLR 566, 589–92 [58]–[65].
20 5 & 6 Vict. c 36.
21 (2008) 236 CLR 163, 180–82 [34]–[36].
22 (1996) 70 FCR 16.

today. When he retired from teaching in 1992, the students presented a ditty, one verse of which was:

> And it seems to us you've taught class for over thirty years
> (That's at least a generation you've reduced to tears)
> When you'd call their name in class they'd quake in fear:
> 'Mr Smith, what is the ratio of *Engineers*?'

Perhaps himself, as an undergraduate at Sydney, the young Zines had been inspired more by the jovial brutality with which Mr F C Hutley for years taught Succession, than by the astringent hauteur with which Professor W L Morison lectured in Torts (and Mr A F Mason later was to lecture in Equity). Whatever the method, all the above were great teachers. Indifferent students were made to apply themselves sufficiently to pass (Honours were then a rarity) and the better students were taught to think about the law and to continue throughout their careers asking 'why?'.

Professor Zines has given great service on many public bodies and inquiries. Particular mention should be made of his work with Sir Maurice Byers and Professor Enid Campbell on the Constitutional Commission, which reported in the aftermath of the *Australia Act 1986* (Cth). Its Final Report, published in 1988, remains a valuable compendium of constitutional law and theory. There are canvassed in that Report issues of the character ventilated by Professor Cane in his essay 'Participation and Constitutionalism' and by Professor McMillan in 'Re-thinking the Separation of Powers'. The growth since 1900 of what has been called the administrative state has led some to doubt the exclusion from Ch III courts of the exercise of non-judicial 'administrative' powers. It was the difficulty in treating as a sufficient and exhaustive division of the authority of government between legislative, executive and judicial powers, that influenced the dissenting Justices (Williams, Webb and Taylor JJ) in the *Boilermakers' Case*.[23] But, even though Professor McMillan falls short of suggesting otherwise, I should think that, assisted by the development of the 'chameleon' doctrine, *Boilermakers'* is here to stay.

Professor HP Lee writes in his essay 'Judiciaries in Crisis' of the comparative study by Professor Zines in 1991 of the rule of the courts in various members of the Commonwealth, and he goes on to bring matters up to date by comparing and contrasting the travails of the judiciaries in Fiji, Malaysia and Pakistan with the position now enjoyed by the Supreme Court of India at the apex of the judicial system of the world's largest federal democracy. We need more comparative writing in constitutional law, particularly upon that of Canada and India.

To the *Oxford Companion to the High Court of Australia*, published in 2001, Professor Zines' contributions included the title on the years of the Great Depression. He analysed the judicial work of Dr H V Evatt, whose High Court judgments continue to read well as a counterpoint to those of Sir Owen Dixon in that period.[24] Professor Zines also reviewed the treatment by the High Court of cases involving the social conflicts during the Bruce, Scullin and Lyons governments.[25] To the pre-war years of

23 *The Queen v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.
24 Leslie Zines, 'Mr Justice Evatt and the Constitution' (1969) 3 *Federal Law Review* 153.
25 Leslie Zines, 'Social Conflict and Constitutional Interpretation' (1996) 22 *Monash University Law Review* 195.

the 1930s, the essay by Professor Wheeler, written with archival research, on the extra-judicial appointments during World War II of Sir John Latham, Sir Owen Dixon and Sir Edward McTiernan, provides a fascinating postscript.

One of my judicial colleagues, presented with an application for removal into the High Court of what seemed a fairly plain question respecting the operation of s 109 of the *Constitution*, described s 109 disputes as the running-down jurisdiction of the High Court. There was some truth in that observation, but difficult questions of principle do remain. Several are considered in the paper by Dr Rumble. One question concerns the validity of a federal law to 'clear the field' of State law without making positive provision on any particular subject-matter dealt with by State laws. Another concerns the validity of a federal law which 'clears the field' by denying any operation to State laws which would modify the common law of Australia. In that latter respect Dr Rumble is critical of the holding in the *Native Title Act Case*[26] that s 12 of the *Native Title Act 1993* (Cth) was invalid.

Consideration of the modification by State law of the common law of Australia poses the question, what is the consequence of such modification by two or more States but in inconsistent terms? There is no counterpart in the *Constitution* of s 109 to provide an answer, but the question reminds us that the federal structure has a horizontal as well as a vertical component. This is a matter that sooner or later will reach the High Court. When that happens, the essay by Professor Lindell and Sir Anthony Mason on the resolution of inconsistency between State laws will be a first point of reference for counsel in the preparation of submissions.

One of the characteristics of the many essays and papers which Professor Zines has written is that, rather than looking backward to the unremarkable discovery that already decided cases could fairly have been decided differently, they look to presently vexing issues and forward to their preferred resolution.

At the age of 36 Leslie Zines was appointed Professor of Law at the Australian National University. That was in 1967. Ten years later he was appointed to the Chair named for Sir Robert Garran. Since his retirement from teaching in 1992 he has been University Fellow at the Australian National University, first at the Research School of Social Sciences and latterly at the ANU College of Law. He also has kept up his links with Cambridge, particularly with Wolfson College where he ponders, among other things, the operation of the European Union. The writing continues. Long may this be so.

26 *Western Australia v Commonwealth* (1995) 183 CLR 373 ('*Native Title Act Case*').