

The Political Impact of the High Court: How the High Court has Shaped Australian Politics, from Federation to Today. (1992, Sydney: Allen and Unwin.)

By David Solomon.

Reviewed by Christine Parker.*

Until recently a book describing the political impact of the High Court and aimed at non-lawyers could not have been expected to attract much attention. However the reformist nature of the *Mabo* decision¹, and the widespread public interest in the *Political Advertising Case*² and the *Cleary Case*³ have brought the High Court into clearer public focus than ever before. Indeed while most of the *Mabo* media attention has focused on discussions among politicians and mining industry figures, criticisms have also been made of the High Court itself. Sir Anthony Mason, Chief Justice of the High Court of Australia, has now spoken out about the place of the High Court in this debate.

The atmosphere of controversy generated by these decisions and culminating in the campaign to which I've referred [to legislatively repeal the decision], alongside other events, has convinced me that we live in an era in which what we are doing as judges will be the subject of public attention and debate and that we must accustom ourselves to increasing and closer public scrutiny.⁴

In this context, intelligent and informative commentary on the role and political impact of the High Court is urgently needed. *The Political Impact of the High Court* by David Solomon tells the fascinating story of the High Court and its impact on the political sphere in a way that

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1 *Mabo v Queensland (No. 2)* (1992) 175 CLR 1.

2 *Australian Capital Television Pty Ltd v The Commonwealth (No. 2)* (1992) 66 ALJR 695, and also *Nationwide News v Wills* (1992) 66 ALJR 658.

3 *Sykes v Cleary* (1992) 67 ALJR 59.

4 Reported, 'Preferable meaning, applied to a judge, is game as a pissant', *The Australian*, 14 July 1993, p. 2.

ought to catch people's attention without being over-sensationalist. Judged as a book aimed at the layperson, it is an excellent contribution to Australians' understanding of the political role the High Court has played throughout Australia's history. This sort of explanation and understanding of the court's decisions is rarely found in the media or other popular works. Solomon himself points out that while it was hoped that the opening of the High Court building in Canberra would build public awareness of the court, the media has had little interest in the court's functioning and only one journalist was assigned permanently to cover its activities (p 19). It seems that the decisions of the High Court are rarely startling enough or easy enough to understand to warrant the sort of media coverage a powerful institution in a democracy should have. The *Mabo Case* is beginning to force a better public understanding of the High Court and its role. Solomon's book should be a useful handbook for those wishing to understand the High Court and its political impact in the past. I would make it required reading for all political and legal journalists.

If there has been a media 'blind spot' with regard to the High Court as an institution, it has also not received the treatment it deserves in the academic disciplines of history and political science. And it is only recently that lawyers have become committed to studying the jurisprudence and theory of the High Court in a meaningful way. But this book is neither history, political science nor law. It is written more in the style of intelligent journalism aimed at the layperson.

Chapter One introduces the High Court as a powerful and political institution by way of a simple overview of its legal, constitutional and historical role. Solomon explains the way the Court's decisions on the Constitution can effectively redistribute political power in a federal system, and frustrate or encourage the policies of particular parties, as well as other ways in which decisions can have a 'political impact'. Having set the scene, the book goes on to describe the way the politics of the High Court has been played out in a number of different arenas.

Chapters Two to Ten each focus on a particular policy area where the court has made politically significant decisions and the impact those decisions have made. This topical approach makes the book accessible and easy to read. Each chapter brings together issues which are fused in the political and public scene, although they may be separated in the legal context. For example, Chapter Two, 'Protector of the Environment' discusses the external affairs and corporations powers as well as the

issue of locus standi in relation to the environment. Chapter Five, 'Absent a Bill of Rights' deals with rights and freedoms under the Constitution according to the High Court and particularly the position of Aborigines. Chapter Six, 'Financial (and Political) Dominance' explains the way the High Court's decisions on a number of different sections of the Constitution have given the Commonwealth government the power to collect income tax and use finance to dominate the states. Chapter Ten takes the different doctrines and statements of the Court about the 'Federal Balance' to expound the influence of High Court decisions on the powers of the Commonwealth vis a vis the states.

Chapters Nine and Eleven concern more general issues of constitutional and political history. Chapter Eleven, 'What the People Say' gives an overview of the ways that the Constitution can be changed, the referenda that have occurred and the work of the Constitutional Commission. Chapter Nine, 'Nationhood: slowly an independent nation' deals with the legal separation of Australia from Britain and the development of an 'Australian' common law. Chapter Seven is the only one of these chapters that does not deal with a constitutional issue. It explains the High Court's approach to interpreting Commonwealth legislation on taxation, an issue of great public debate during the 1970's and 1980's.

Solomon's style of writing helps readers become involved with the story of politics and the High Court. In each chapter he introduces a legal and political problem and then shows how the court has dealt with it. For example in Chapter Three, which deals with section 92 of the Constitution, Solomon takes a variety of cases and builds up the tension of conflicting points of view on the interpretation of the section, before explaining the resolution of the issue in *Cole v Whitfield*.⁵ It is this journalistic style that makes the law come alive for the layperson. Providing detailed legal accuracy is not the aim, and the reader is not intended to be able to use the book to decide how the Court would decide particular cases.

Overall these chapters give a fairly comprehensive overview of High Court and Constitutional issues of public and political concern over the last twenty years. Unfortunately the book was published just before the important High Court decisions on indigenous land rights in *Mabo*, and

5 (1988) 165 CLR 360.

freedom of speech in *Nationwide* and *ACTV*.⁶ These decisions make Chapter Five quite out of date. Another recent development worth discussing is the expansion of international law and the way the High Court is becoming willing to look at international law as at least a 'policy' influence in its decision-making (for example see Brennan in *Mabo*). Justice Toohey's 1992 speech on a bill of rights and Chief Justice Mason's increasingly positive attitude towards the issue would also be worthy of mention. It seems that at the moment the High Court is moving so fast it is hard for commentators to keep up. There is a pressing need for more intelligent journalism of this style for the public (and some politicians) to understand what the Court is deciding and why.

The final three chapters deal with the High Court as an institution. Solomon explains what power the government has and does not have over the High Court and the interaction between the High Court and other 'political' institutions. The penultimate chapter focuses on judges and the way they decide cases. The final chapter summarises the political impact of the court, referring to some of the more recent developments. It also highlights the recent willingness of the Court to take a more dynamic role in the Australian polity and legal system.

The only weakness of this book is its failure to do more than nod at underlying themes in High Court decisions and explanations for the behaviour of the Court. The political impact of the High Court is wider than decisions that obviously affect the policies of governments. The political nature of the Court is more profound than Solomon's case by case analysis would suggest. There is much here to explore and analyse.

While this book is an interesting chronicle of High Court decisions and their impact, it is not an academic book. Neither does the book add anything to a political theory of the High Court. Readers who want analysis beyond the editorial style comments at the end of each chapter will have to look further. But a popular book should not be expected to fulfil these tasks. For those with a special interest in the field Solomon's book simply whets the appetite for a deeper more rigorous analysis of the High Court, its theory and its politics.

This is not to denigrate Solomon's work. Most Australians, even well-educated ones, understand little of the High Court and the role it has played in our polity. If this book helps some Australians become aware

6 *Supra* n 2.

of the highest court in this country and reflect on its role, it will have served a worthwhile purpose.