draws. To so baldly dismiss the text of the book in this way would be wrong, as this portion of the work is not just a bare description of the cases, highlighting the circumstances which the author claims makes the final verdicts suspect. Besides doing this he makes excellent use of this section of the book to exemplify the concepts propounded in the introduction and to re-identify and connect those concepts with examples from the cases under discussion and (perhaps more unfortunately) to introduce several more criticisms of the system and the climate in which it operates. Thus, the weight of forensic evidence used in the *Van Beelen* case is used to develop the argument favouring technically qualified jurors and the *Ryan* case is explored against the background of the enormous difficulties created for the defence by the unthinking use of sensational pre-trial publicity.

Finally, it ought to be said that the text of this part of the book is laced with (at least to the lawyer) thought provoking opinions which, whether it is agreed are supported by the material on which the text is based or not, deserve more than a moment's reflection. So the *Ratten* case is used as a vehicle to mention the problems created by counsel seeking to preserve their right of last address to the jury at the expense of calling evidence; as is the *Van Beelen* case to explore (on highly speculative evidence) the possible effects on jurors of knowledge that the accused has prior convictions, the effect of monetary cost weighting the decision of an Appeal Court against the granting of an appeal and the issue of prosecutorial discretion to disclose to the defence, evidence peculiarly within the knowledge of the Crown. Regrettably, it is as difficult to be sympathetic to the author's conclusions on these issues as it is to be with his introductory remarks.

Paul Willee*

Federal Jurisdiction in Australia, by Z. COWEN, A.K., G.C.M.G., K. St J., Q.C., Governor-General of Australia and L. ZINES, LL.B. (Syd.), LL.M. (Harv.), Robert Garran Professor of Law, the Australian National University. (Oxford University Press, Melbourne, 1978, 2nd edition), pp. i-xix, 1-233 with Table of Cases and Index. Cloth recommended retail price $19.95 (ISBN: 0 19 5500547).

In 1959 Professor Zelman Cowen (as he then was) said in the introduction to the first edition of *Federal Jurisdiction in Australia* that if his book failed to persuade those responsible for the ordering of jurisdiction, then "its most satisfying achievement would be its own relegation to the shelves of legal history".[1] The first edition has an important place in the shelves of Australian legal history, not due to any deficiency in its power of persuasion, but because its scholarship and masterful appraisal of one of the most difficult areas of constitutional law rightly placed it there. The second edition—twenty years

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[1] Z. Cowen, *Federal Jurisdiction in Australia* (1959) xv.

later than the first and to a large extent the work of Professor Leslie Zines of the Australian National University—will keep it there. It has many of the same qualities of the first—an analytical approach; highly technical at times, but the subject rather lends itself to this.

The authors have not departed from the form of the earlier edition, being content to revise what are essentially five essays, namely, the Original Jurisdiction of the High Court; Jurisdiction between Residents of Different States; the Federal Courts; the Territorial Courts and Jurisdiction with Respect to the Territories; the Autochthonous Expedient: The Investment of State Courts with Federal Jurisdiction.

Continual comparison is made with the United States Constitution and federal system of courts. Indeed, the continual references are essential to substantiate one of the major themes of the book, namely, the folly of our founding fathers in indiscriminately transposing much of the United States Constitution without reference to the needs of the Australian people at the time of federation.

In the first essay, "The Original Jurisdiction of the High Court", the authors speak of the fervour, at least in judicial circles, for the establishment of a general court of appeal. This contrasted sharply with the pressures that had existed in the United States where "there was a strong suspicion of the new central authority" (page 2). Not surprisingly, the United States Supreme Court was never invested with a general appellate jurisdiction.

Quick and Garran (cited at page 2) had no doubts as to the wisdom of the Australian philosophy: "[W]e are so assured of the independence and integrity of the Bench that the advantages of having one uniform Australian tribunal of final resort outweigh all feelings of localism . . .".[2] Co-existing with a desire to invest the High Court with a general appellate jurisdiction was the willingness of the Australian States to accept the investiture of federal jurisdiction: what has become known as the autochthonous expedient. The United States never indulged in this experiment, preferring to vest federal jurisdiction in inferior courts.

Section 75 of the Australian Constitution vests the High Court with original jurisdiction in various matters. Section 76 provides the potential for conferring original jurisdiction with respect to other matters upon the High Court.

What the authors especially challenge is the necessity to invest the High Court with such an extensive original jurisdiction. They survey the sections with a detailed analysis, arguing in the main, that courts other than the High Court, would be equally equipped to deal with those matters enumerated in section 75. When one takes into consideration the power to invest state courts with federal jurisdiction; the general appellate jurisdiction of the High Court; and the power conferred by section 71 to create other federal courts, then the argument is not only one of substance but is convincingly put.

It would be incorrect to assume that an analysis of the first essay is

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[2] J. Quick and R. Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) 725.

completed by this description. There are other matters which are considered including the High Court's power to give advisory opinions and the scope of the declaratory judgment (page 17); the authority of decisions of single justices of the High Court (page 20); the liability of the Commonwealth in tort and contract (pages 36-38); severability of constitutional and non-constitutional issues (pages 72-75); and the power of the High Court to decline to exercise jurisdiction conferred on it by section 75 or by Parliament under section 76 (pages 75-81).

Section 75 of the Constitution states:

> In all matters . . .
> (iv) Between States, or between residents of different States, or between a State and a resident of another State . . .
> the High Court shall have original jurisdiction.

This is the subject of discussion in the second essay. The clause was incorporated in the Australian Constitution to allay the fears of those who believed that local prejudices would run high in state courts. The clause followed the American precedent closely. America had incorporated the clause because as Marshall C.J. had stated in *Bank of the United States* v. *Deveaux*[3] (cited by the authors at page 83):

> [T]he constitution itself either entertains apprehensions on this subject, or views with such indulgence the possible fears and apprehensions of suitors, that it has established national tribunals for the decision of controversies . . . between the citizens of different states.

Even if the fears in America were soundly based, it by no means followed that the clause was apposite to Australian experience. The authors emphasise (pages 84-85) the "high character and impartiality" of state courts and the general appellate jurisdiction of the High Court.

There is a comprehensive discussion of the doctrine of "residency", both as to natural persons and corporations. In relation to the former, the authors conclude that "to establish residence for diversity purposes, proof of domicile is not required, at least in the case of persons whose domicile is governed by dependence" (page 96). Corporations, they suggest, are incapable of being residents for the purposes of diversity jurisdiction; a strange result in terms of English and American case law, but nevertheless a desirable feature of the Constitution.

In "The Federal Courts", the subject of the third essay, the authors trace the history of the American experience, whereby inferior federal courts were created as early as 1789 by the Judiciary Act. In contrast, the Australian Parliament has been reluctant to create federal courts, and for many years the only such courts were the Australian Industrial Court and the Federal Court of Bankruptcy.

The authors turn their attention to the Federal Court of Australia created by the Federal Court of Australia Act 1976 (Cth). It is with some dismay that the authors view the creation of this Court and they present the arguments customarily expressed by those who share the same view. Although some of the arguments in favour of the establish-

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[3] (1809) 9 U.S. (5 Cranch) 61, 87.

ment of the Federal Court are referred to, the treatment is rather perfunctory. There is an inadequate recognition of the fact that the Federal Court is, at least as to its original jurisdiction, a specialist court with the benefits that flow therefrom. Although they decry the inconveniences that may bedevil the community and litigants from a two-tier jurisdiction, insufficient emphasis is given to the benefits that may flow from one court, spread throughout the nation, dealing in its original jurisdiction with matters of special Commonwealth interest. Fairly scant treatment is given to arguments in favour of the establishment of the Federal Court to determine appeals on questions of federal law. It remains to be seen whether the problems of jurisdiction will arise from the limited two-tier system of courts that now exists. I, for one, share the view of those who, not only deplore the possibility of jurisdictional conflicts between state and federal courts arising to any significant degree, but regard this as an unlikely event for various reasons including the ultimate good sense of judges, whether they be state or federal.

The authors give a useful summary of cases following the decision in *Attorney-General of the Commonwealth of Australia* v. *The Queen; ex parte The Boilermakers' Society of Australia*[4] and concluding with *R.* v. *Joske, ex parte Australian Building Construction Employees and Builders Labourers Federation*[5] in which the principles of *Boilermakers'* were seriously questioned.

Further, there is a brief discussion (pages 130-138) of the power to create federal appellate courts pursuant to sections 71 and 77(i); and whether it is the appeal or the original proceeding that must fall within section 75 or section 76 for a proper grant of appellate jurisdiction to a federal court.

"The Territorial Courts and Jurisdiction with Respect to the Territories" is the subject of the fourth essay. In it the authors comprehensively review (pages 149-152) the decision in *R.* v. *Bernasconi*[6] where it was held that Chapter III of the Constitution was limited, having no application to the territories, and that section 122 of the Constitution was complete in itself being an unqualified grant of power.

There follows consideration of the decision in *In re Judiciary and Navigation Acts*[7] which held that the jurisdiction of the High Court was confined to such jurisdiction as was conferred or authorised by Chapter III (page 152). Considerable discussion ensues in relation to the decision in *Lamshed* v. *Lake*[8] and *Spratt* v. *Hermes*.[9]

The authors conclude by posing three questions (page 158):

(1) whether laws that are made under sec. 122 are 'laws made by the Parliament' within the meaning of sec. 76(ii) so that jurisdiction in relation to matters arising under such laws can

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[4] (1957) 95 C.L.R. 529 (popularly known as *Boilermakers'*).
[5] (1974) 130 C.L.R. 87.
[6] (1915) 19 C.L.R. 629.
[7] (1921) 29 C.L.R. 257.
[8] (1958) 99 C.L.R. 132.
[9] (1965) 114 C.L.R. 226.

be conferred on the High Court or (by virtue of sec. 77(ii) and (iii)) on another federal court or a State Court exercising federal jurisdiction [the answer the authors suggest is "yes"];

(2) if so, whether any of the jurisdiction of a territorial court is outside the scope of sec. 76(ii) [the authors suggest that the answer is "yes"];

(3) if the answer to the previous question is yes, whether original jurisdiction can be conferred under sec. 122 on the High Court or another federal court.

After outlining a number of decisions of the High Court, the authors conclude that the issue is far from resolved.

"The Autochthonous Expedient: The Investment of State Courts with Federal Jurisdiction" concludes the five essays encompassed within the book. As has previously been described, investing state courts with federal jurisdiction involved a departure from the American precedent. In this essay the authors examine the possible confusion which exists when a state court assumes jurisdiction under a Commonwealth enactment: it may not necessarily be exercising federal jurisdiction depending upon the source of the grant of jurisdiction rather than the law being applied.

There is a brief discussion (pages 178-233) of the character of state courts invested with federal jurisdiction; the limits of the power to invest state courts with federal jurisdiction as prescribed by section 77; the power of the Commonwealth Parliament to interfere with the constitutional organisation and jurisdiction of state courts; the conferring of state courts with federal criminal jurisdiction; the application of section 39(1) and (2) of the Judiciary Act 1903 (Cth) in relation to concurrent state and federal jurisdiction; and finally the exercise of Admiralty jurisdiction by the state courts.

The essence of the authors' work is twofold: first, it argues for a reconsideration of the philosophies that in part underlie Chapter III of the Constitution; and secondly, it surveys, in a comprehensive manner, the constitutional law that relates to the topics chosen as the subject-matter of the five essays. In terms of achievement, one must have profound admiration for the quality of argument, which pierces the mystery of an intriguing and complex area of the law.

John Lockhart*

Royal Commission into the Non-Medical Use of Drugs, South Australia, *Final Report* (South Australian Government, Adelaide, 1979), pp. i-xv, 1-440 (ISBN: 0 7243 2911 0).

In January 1977 the Royal Commission into the Non-Medical Use of Drugs was established. The three Commissioners were Professor Ronald Sackville (Chairman), Earle Hackett and Richard Nies. In April 1979, some two years later, the *Final Report* of the Commission

* Judge of the Federal Court of Australia.