REVIEW ARTICLE*

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It seems likely that by the year 2000 the Commonwealth Law Reports will have expanded to 200 volumes showing a rate of publication in excess of that achieved up to 1950. The volume of cases decided and the number of individual judgments reported show no signs of diminution. Such a magnitude of material must be disconcerting to the practitioner faced with the need to advise litigants and probably embarrassing to the judges who may, at times, find the chickens of earlier dicta coming home to an alien roost.

Modern technological aids for recording and retrieving the literal, but not necessarily the literary, content of judgments may give some assistance to those who are obliged to search the recesses of the Commonwealth Law Reports for authorities, propositions, dicta or even phrases in support of or in opposition to an argument, but such aids will seldom or never furnish a basis for advice or judgment. Exposition and analysis in the traditional judicial manner is not likely to be superseded by any technological process yet envisaged in science fiction.

These preliminary comments may provide some justification for the detail and complexity of the several essays comprised in the nine chapters of this volume which have been contributed by a number of leading constitutional writers and ably edited and presented by Professors Lee and Winterton. In the preface they

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comment on the way in constitutional literature has progressed since World War II and point out that a collection of essays by different authors enables issues to be analysed in depth and provides a diversity of perspective not otherwise possible. This diversity is illustrated by the titles and substance of the several chapters which it is convenient to list seriatim as follows:

The Crisis of Constitutional Literalism in Australia by Greg Craven.
Characterisation of Commonwealth Laws by Professor Lesie Zines.
The High Court and the External Affairs Power by Professor HP Lee.
Constitutional Guarantees by Professor Peter Hanks.
Section 92 of the Australian Constitution since Cole v Whitfield by Dr Michael Coper
Locus Standi in Constitutional Litigation by Henry Burmester.
The Justiciability of Political Questions: Recent Developments by Geoffrey Lindell.
Appointing High Court Justices; Some Political Conundrums by Dr James A Thomson
The Constitutional Position of Australian State Governors by Professor George Winterton.

While it would be inappropriate to make comparative evaluations between the chapters it must be conceded that the first and second are critical in the sense that they provide a dictionary or thesaurus to issues of the validity and operation of legislation, especially that passed by the Commonwealth Parliament. But it is open to question whether as an aid to interpretation terms such as literalism, progressivism and intentionalism may not confuse rather than clarify, especially as, in Craven's words "there is a growing acceptance that language is an inexact legal tool". This is emphasised by the conclusion that "the achievement of a reconciliation between these contending interpretative theories and their synthesis into a single cohesive methodology would in fact be an extremely difficult task". In view also of the statement that the High Court's present constitutional methodology is increasingly in a state of disarray, one must question the wisdom and pragmatism of those judges who have sought to characterise the process of interpretation in any of these terms.

Some of the problems of interpretation are illustrated in Leslie Zines' chapter on characterisation which invites attention to the cognate questions of whether terms in the Constitution should be treated as static or, on the other hand, as changing "to take account of new social and technological developments unknown when it was enacted". Again, the discussion of relevant factors -federal, functional, social and those deriving from plain commonsense - reveals a confusion of competing influences which may be no more than a reflection of "the attitude of the judges to legislative discretion and reliance on the good sense (or otherwise) of the

Parliaments". But is it a function of a constitutional court to base conclusions about validity on such considerations? And one might add, interrogatively, why any of the High Court judges felt it necessary to depart from, qualify or embroider the classic statement by Latham CJ in the *First Uniform Tax Case*[1] quoted by Zines on page 52.

The scope of the external affairs power is dealt with in Chapter 3 by Professor Lee who examines the judicial history of the Commonwealth's power over external affairs and concludes that the current picture is fairly fragmented primarily because there are areas which are beyond the reach of the Commonwealth's legislative power. The discussion of this topic refers to constraints on the plenary nature of the power especially so far as its exercise may involve an intrusion into traditional fields of State responsibility.

One reference to ss 106 and 107 of the Constitution begs the difficult issue of what provisions may limit the scope of the Commonwealth's legislative power. Apart from limits derived from the federal nature of the Constitution ss 92 and 99 may involve a conflict with an external affairs law, a not improbable prospect, having regard to the influx of immigrants and their confinement in Australia under international refugee arrangements. The application of s 99 to the external affairs power must be regarded as open since *Morgan v The Commonwealth*[2] although the decision has been the subject of some, in my view, unwarranted criticism.

The operation of constitutional guarantees, other than s 92, is the subject of the ensuing chapter by Peter Hanks who debates the prospect of the High Court developing a category of fundamental individual rights based on what it perceives to be social and political values. Whether such a course would avoid the political problems of enacting a Bill of Rights or enshrining one in the Constitution, it would change dramatically the Court's traditional role of judicial decision-making and usurp the legislative role not only of the Commonwealth but that of the States as well.

The desire of some judges to expand existing guarantees and to create new ones represents a departure from the logical proposition adverted to by Dixon CJ on many occasions that an expansion of a legislative power may be a legitimate step in construing a constitution but is quite unjustified in construing a limitation on power. Moreover, there are dangers in pursuing the expansionist course proposed by some members of the High Court which do not seem to be fully appreciated by its advocates.

Apart from the discussion of this issue which lies at the opening as well as the conclusion of this Chapter, Peter Hanks addresses also the constitutional

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1 *State of South Australia v The Commonwealth* (1942) 65 CLR 373 at 424 (*First Uniform Tax Case*).

2 (1947) 74 CL:R 421.

provisions relating to trial by jury, the right to religious freedom, discrimination against residents of other States, compulsory acquisition of property and preference and discrimination under ss 51(ii) and 99. Much of this chapter was published in Professor Hanks' *Constitutional Law in Australia* but a good deal of relevant literature has flowed under the constitutional bridge since then.

A long involvement in practice at the Bar with s 92 in the 1950s convinced me that most of the earlier decisions before *Cole v Whitfield*,[3] and especially those of the Privy Council, cast all governments in an inflexible straitjacket from which it would be possible to escape only by constitutional amendment or an abandonment of the philosophical tenets adopted in most decisions after *McArthur v Queensland*.[4]

Although the latter option ensued in *Cole v Whitfield*, that decision has not solved the many dilemmas and problems manifested in earlier decisions and these are canvassed by Dr Coper who is without doubt a leading authority on this vexed section. The "revolution" achieved in that case by the High Court he has described as "justified by a subtle blend of plausible hypothetical history and institutional goods sense" and one which has substituted a proposition of protectionist discrimination for the previous confusing tests of absolute freedom. However, as Dr Coper points out, there are several new and residual problems: what is discrimination in a protectionist sense; what is the effect of burdens imposed under Commonwealth law: what is the position of the Territories; what is the import of "intercourse"; and some others.

It seems clear that the new interpretation of s 92 will give rise to questions such as the role of administrative determinations, the effect to be given to local laws and regulations like those made by statutory bodies marketing primary products, pasture and land boards as well as Local Government Councils which are usually eager to give preference to local industry and commerce.

The final topic dealt with by Dr Coper seeks an answer to the question "how should the facts be ascertained in section 92 cases". While one may agree with his observations about the Inter-State Commission, a matter ventilated by Latham CJ in the *Riverina Transport Case*[5] and used in argument in the *Hughes and Vale*[6] litigation, there are practical difficulties in its application in the absence of some principle - not likely to be adopted - which would deny access to the High Court in matters which might be brought before the Inter-State Commission. And in any

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3 (1988) 165 CLR 360.

4 (1920) 28 CLR 530.

5 (1937) 57 CLR 327.

6 *Hughes and Vale Pty Ltd v New South Wales* (1953) 87 CLR 49; *Hughes and Value Pty Ltd v New South (No 2)* (1955) 93 CLR 127.

case the Government had closed the door on this prospect by dismantling the Commission.

The chapters on Locus Standi and Justicability have something in common because they focus on the right to challenge legislation and the duty of the judicial arm of government to determine a challenge which may have political implications. Each of these chapters probes questions which are important to minority groups and that new category of citizens called "whistle blowers". It may be unnecessary to point out that the introduction of declaratory processes in the courts has widened the scope to seek judicial relief and possibly the duty of a court to pronounce on issues which do not entail an infringement of private rights.

In Chapter 6 Henry Burmester is critical of the "relatively haphazard state of the law" on standing and argues for a fundamental re-examination of the "relaxed and ready willingness to accord standing" on questions of the validity of laws. It is to be hoped that this appeal does not fall on deaf ears as there seems more than a remote prospect of courts, particularly the High Court or the Federal Court, becoming besieged by a myriad of cases involving trivial or imaginary issues dredged up by lobby groups or disgruntled citizens who might be better advised to seek or activate political redress or change.

This exposition of locus standi naturally leads to questions of justiciability which are embraced in Chapter 7 by Geoffrey Lindell, the longest and perhaps the most detailed of the chapters in this collection. The main thrust of this chapter concerns the justiciability of political questions but is substance intrudes into the subject matter of other chapters, especially those of Hanks and Burmester.

A cardinal question debated in detail in this chapter is whether there are questions which the High Court should not entertain as a matter of propriety, comity or commonsense. In spite of decisions such as *Cormack v Cope*[7] allowing the court to inquire into the due observance of prerequisites to the enactment of legislation, there are powerful arguments in favour of the High Court having discretionary authority to decline to adjudicate upon issues it regards as political. Decisions of the Supreme Court of the United States have categorised in a manner not adopted in Australia the areas of non-justiciability. The treatment of these decisions by Geoffrey Lindell gives a clear message for closer examination of the circumstances in which issues broadly described as "political: should not be the subject of judicial determination. It should not simply be a case of *boni judici est ampliare jurisdictionem.*

Central to the several topics treated in this collection of essays is the High Court itself and, of course, the personal attributes, backgrounds and philosophies of the members of the Court. Since the abolition of appeals to the Privy Council the

7 (1974) 131 CLR 432.

authority of the Judges en banc is enormous, and, as appointments are made to the Court by the Governor-General, disquiet has been expressed on occasions by some States about the method of appointment and the qualification and experience which a prospective member of the Court should possess.

The process of appointment of High Court judges is the subject of detailed analysis by James Thomson in Chapter 8 which canvasses the history of section 72 of the Constitution and contains plentiful references to controversial appointments from that of Piddington to more recent ones such as Murphy; it also includes a discussion of various options to modify the method of appointment, some of which were the subject of official reports including that of the Australian Constitutional Commission.

Although, as Thomson points out, there has not been any instability in the Court as a result of appointments which have been questioned in the public domain, a view prevails in some State circles that the Court has lost a fair measure of its objectivity as an arbiter of the limits of Commonwealth and State powers and even that it has become a passive captive of the Commonwealth Government and its centralist policies which, it should be remembered, are not exclusive to the Labor Party.

One would not wish to support such a view publicly but it cannot be said that a stable balance has been achieved when regard is had to the important cases in which Commonwealth power has been upheld by a slender majority. It could be argued, contrary to some proposals, that members of the Court should not be promoted from other courts or offices where they have demonstrated attitudes which may appear favourable to the government making the current appointment.

Whatever may be said about the Court and current appointment practices, it seems unlikely that constitutional amendment will resolve any disquiet emanating from State circles. And in spite of the poor record of constitutional referendums to amend the Constitution it was possible in 1977 to introduce a retiring age for High Court and Federal Judges - a step which in the light of current policies against age discrimination was most short-sighted.

The final chapter in this collection of essays invites attention to the role of Governors of the Australian States, a subject which has been overshadowed by debate on the role of the Governor-General largely because of the events of 1975.

In this chapter Professor Winterton examines the position of State Governors both before the Australia Acts and since their passage in 1986. He points out that the full implications of these Acts are not generally appreciated and that, by reason of their provisions, the discretionary powers of Governors in some States may be capable of control through directions in Letters Patent without parliamentary sanction. How far any of the State Governors still have discretions independent of the advice of the Premier is a matter on which learned jurists are not agreed.

The chapter passes from such questions to an exposition of the events ensuing in Tasmania from the 1989 State election which resulted in a "hung parliament". In addition to the detailed chronology of events following the election this chapter outlines the responsibilities and powers of a "caretaker government" which appear to have derived in the main from RG Menzies in 1951.

A final matter of comment on this chapter is that it should be required reading for anyone interested in the current debate on a republic and especially those who vociferously claim that Australia is tied to the Queen by colonial bonds and has no independence from decisions made in the United Kingdom. The prospect of change to some form of "republican government", whether of the Commonwealth alone, or for some of all States, entails complex questions many of which have not been the subject of comment in the media, and the role of State Governors in relation to the Senate is on which should not be overlooked.

In concluding this review of Australian Constitutional Perspectives it may be apposite to point out that, in contrast to the United States, Australians have not been brought up to understand and respect the Constitution and, in consequence, a majority of citizens will be puzzles about most of the matters dealt with in this essays and probably about the concepts of limited sovereignty and ultra vires. Perhaps society has become so democratised that these concepts no longer strike a responsive chord in the mind of the average citizen, that is if there is such a thing. In the result it is strange to the general populace, and even to some members of Parliament who should know better that the High Court could disqualify Philip Clearly from taking his seat in the House of Representatives. To anyone who has read the Constitution and understood something of the way it came into being, the decision is logically correct, even if one disagrees with it. Does this carry a message to the High Court that it should do more to promote its decisions either by some method of public announcement with explanations or by a precis or abstract which would enable the unsophisticated reader to appreciate the significance as well as the legal and constitutional reasons for its decisions? That is a matter for the Court and the Parliament both of which should have some concern at the need to reinforce public perception of the constitution and the judicial process which lies at its roots.

This volume of essays deals with issues of constitutional importance and complexity and accordingly is not addressed to the lay reader. However, to the student of the Constitution, the political scientist, the lawyer and perhaps even to the politician it should prove a valuable source of practical and academic material.