

Book Reviews

ANNIE'S COMING OUT, by R. Crosley and A. MacDonald, Penguin Australia, 1981, Pages (ix)-(xiii), 1-251.

Annie's Coming Out is a timely publication in this International Year of the Disabled Person. Its theme is at once disturbing and inspiring. The central characters in this true story are the authors Annie MacDonald and Rosemary Crosley. Annie is savagely handicapped by cerebral palsy: she has difficulty eating, sleeping and sitting up. These physical handicaps convinced the staff of St. Nicholas Hospital in Melbourne, the institution where she lived, that she was also mentally retarded. This book explodes the myth that physical and mental handicaps go hand-in-hand. It does so through the eyes of the principal author, Rosemary Crosley whose patience and devotion to her task as an assistant at St. Nicholas were ultimately rewarded by the discovery that Annie could communicate. Annie herself describes the early stages of this breakthrough: "I rusted away in St. Nicholas until Rosemary showed that some people did know our helpless bodies could contain a mind, even if she did not realize we could be normal. However, just being thought of as animal, not vegetable was reason for hope."

But *Annie's Coming Out* is more than just a meticulous chronicle of the twin development of Annie's communication skills and Rosemary Crosley's awareness. It is sprinkled with warmth and humour and, regrettably, pinches of the authors' bias. Nevertheless, it should be prescribed reading for all persons involved with the handicapped and, indeed, for teachers generally.

To the lawyer, the chief interest will be in the habeas corpus proceedings instituted on Annie's behalf and the subsequent proceedings for a declaration that Annie was no longer an infirm person within the meaning of the Victorian Public Trustee Act. These matters are discussed in chapters 18 and 19. The authors provide an interesting insight into the tactics and emotions these proceedings produced. On the whole, I thought the law emerged from these battles creditably. At least there was no question that the Courts applied the law sensibly and sensitively.

Rosemary Crosley's battles on behalf of her protégée did not end in the courtroom. Her celebrated clashes with the officialdom are reminiscent of Joseph K's frustrations with the Court and the Castle. But unlike Joseph K., Rosemary did not capitulate.

The Talmud advises that we should choose a friend and acquire a teacher. In each other the authors grew both in friendship and personal development. It is the reader's pleasure to share in this richly rewarding experience.

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THE HIGH COURT AND THE CONSTITUTION, by Leslie Zines, Robert Garran Professor of Law, Australian National University; (Sydney, Butterworths, 1981); pages i-xvii, 1-323, Appendix 325-349, Index 351-358. Recommended price: \$35 (hard cover), \$27 (soft cover).

As Professor Zines remarks in his Preface, the Australian High Court is a source of fascination for lawyers and many others besides. This fascination has been heightened by events such as the opening in 1980 of the court's permanent headquarters in Canberra, the retirement in early 1981 of the court's longest-serving Chief Justice (Sir Garfield Barwick), and the recent publication of a biography of Sir Garfield, by David Marr. Thus, Professor Zines' book is a timely addition to the list of works documenting this growing interest in the court and its functioning.

Zines' book is not, as the author freely concedes, an "encyclopaedic examination" of the Commonwealth Constitution's treatment by the High Court. Rather, the book concentrates on certain key areas and decisions that concern "the creation or evolution of general principles and basic policies . . . that illustrate the role and techniques of the High Court". Accordingly, Professor Zines selects for in-depth treatment topics such as the court's techniques of characterisation of federal laws for constitutionality; the federal trade and commerce power; the infamous s. 92 (which is dealt with in not one, but three chapters); the separation of powers and the Commonwealth's judicial power; the Commonwealth Crown and the executive government; Australia as a nation in external and internal affairs; and inter-governmental relations. The book is concluded by a useful commentary on the High Court's methods, techniques and attitudes as related to constitutional interpretation.

This book is certainly not one for the lay reader. Its potential audience, as the author himself notes, will be the legal profession (even then, only the relatively select practitioners who specialise or are interested in constitutional matters), advanced students of the subject, and academics. The subject matter has been well researched, thoroughly presented, and usually penetratingly analysed. The reader who knows something about constitutional law will be enthralled; the layman will be put to sleep in five minutes!

The general style and method of Professor Zines is Common Law Analytical rather than American Realist and Sociological. That is, the author basically concentrates on what the constitutional provisions and the judicial decisions say, rather than on the political, economic, dietary, and religious propensities of the High Court judges, which as any American Realist worth his salt will tell you, are the things that *really* determine the outcome of cases. For example, the author's detailed analysis of sections 51(xxxviii) and 106 are intricately technical, and would delight the heart of any strict (or other) constructionalist. This particular piece of common-lawyer's delight occurs in the chapter on Australia as a nation in external and internal affairs.

Yet, it would be erroneous to convey the impression that

Professor Zines solely sticks to the analytical straight-and-narrow, and never ventures onto the primrose path of politico-economic explanation. He does, and these departures make the book even more interesting and valuable than it otherwise is. Thus, his extended treatment of s. 92 comprises, inter alia, a very useful examination of the economic theories of free trade and common market, as well as the theory of "individual right to trade", as these have influenced the various interpretations of s. 92.

The author has weaved such basically economic discussions into his admirable treatment of such differing approaches to s. 92 as those of Dixon C.J. and Barwick C.J. Incidentally, the three chapters on s. 92 are among the most illuminating accounts of that unhappy section that this reviewer has yet come across. Unavoidable but necessary comments on the basically political debate of centralists v. states' righters also are included in the author's discussion of the High Court's treatment of inter-governmental relations as manifested through such cases as *State Banking*, *First Uniform Tax*, and *Payroll Tax*.

Professor Zines is not slow to debunk some constitutional myths and throw doubts on sacred constitutional cows where he thinks this is necessary or useful. Thus, in his final chapter (on High Court techniques and attitudes), the author effectively queries the characterisation (or, in these days of preoccupation with socio-economic realism, stigmatisation) of Latham C.J. as a narrow legalist. Also, notwithstanding Dixon C.J.'s famous hymn of praise to "strict and complete legalism" (85 C.L.R. xiv), the author has no hesitation in rejecting the same appellation in respect of this former Chief Justice — His Honour in reality usually did not make a sharp division between legal and political factors (p. 287). Indeed, in his treatment of overall High Court attitudes to the constitution (chapter 15) and of the court's approach to the constitutional characterisation of Commonwealth laws (chapters 2 & 3) — the latter two being one of the few detailed and systematic treatments (and hence of very great value) of the court's characterisation doctrine in the available literature — the author demonstrates that the court has more often given emphasis to extra-legal factors in its constitutional work, than its "realist" critics may be willing to concede.

One or two faults of physical presentation mar what is otherwise an excellent book. The typeface is a little too small for easy reading, and (at least in this reviewer's copy) sometimes too faint for real comfort. Butterworths have continued (see their *General Principles of Administrative Law* by Sykes, Lanham & Tracey, published in 1979) the sloppy and sometimes confusing practice of putting case, article, and book references partially in the main body of the text, and partially in footnote form at the bottom of the relevant page. One is not sure whether to blame publisher fault or author fault for this latter execration: either way, the practice should be stopped — references belong either at page's bottom or at chapter's end. Also, one may doubt the purely aesthetic wisdom of (at least on the soft-cover edition) displaying the neo-Stalinesque features of the High Court's Canberra building on the front cover:

the building's architectural charms do *not* translate well into grey-blue and dark grey-blue monotonous on a paperback cover. Why not some nice, grainy, sepia-toned portrait-photos of present and past Chief Justices, arranged in a pleasant and interesting montage on the front and back covers?

Nevertheless, these criticisms are few and relatively minor. Overall, Professor Zines has written a high-quality, carefully thought-out book on the nation's most important court and the nation's most important document. It is not a book for fledgling constitutional neophytes, but it is not intended to be. It is directed at the specialist constitutional lawyer, and it is, in truth, an indispensable item in the latter's library.

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CASES AND MATERIALS ON EVIDENCE by P.K. WAIGHT AND C.R. WILLIAMS, *The Law Book Company Limited, 1980 Pages (v)-(liii); 1-846; and index 847-859*

The compilation of a casebook is largely an exercise in selection and arrangement, and that does not call for an abundance of imagination. However, the authors of this work have injected some welcome originality in the form of the text introducing the case extracts on each topic. Their object has not only been the introduction of the subjects in a manner designed to stimulate further thought, but as well, "to identify potential areas of change in the law and to indicate the likely nature of such change". We find, for example, an interesting discussion of the rule against hearsay with proposals for its reform.

It is not surprising that the book should be generally successful: it is based on the evidence courses developed by the authors at the Australian National University and the Monash University over the last several years. The book is primarily directed to the student and in its present form would be only marginally useful to a practitioner. It would be more useful to the latter if it stated the principle established by each case extracted, headnote style, or included in the text a collection of principles established by the following cases, rather in the fashion of *Bowstead*. Another alternative would be to highlight the important sentences or phrases in bold type in the body of the extracts. It may not be fair to criticise the book with reference to its appeal to practitioners who would rarely have recourse to a "casebook" of any description. But it seems to me that students themselves would probably gain more from the work if the principles established by the case extracts were more clearly stated in a convenient position. I think it unlikely that this would dissuade students from reading the extracts, or generally stifle independent enquiry on their part.

Otherwise I have only praise for a worthwhile casebook which is

more interesting and useful than most such works. It covers most of the important aspects of the law of evidence and contains lengthy extracts from about 300 leading cases. The format of the book is certainly designed to stimulate thought. The sections contain texts, case extracts and extracts from statutes and other texts, with suggested further reading, and some interesting segments entitled "notes and questions" designed to encourage analysis of what has gone before. The book has obviously been prepared with care in the sense that, for example, differences in statutory provisions from State to State are indicated, and the cases extracted are not only Australian.

I feel that the casebook does achieve its stated objectives. Its origins of course give it a particular appeal to students. To describe it as a casebook is perhaps inaccurate because of the valuable other materials and text included in it. Those other materials and the text would be valuable to a student using the book as an adjunct to lectures. For the busy practitioner it would I think be of some use but it does not profess to be a practitioner's book.

I have no hesitation in recommending this as an excellent and useful compilation.

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SYKES and YERBURY, *Labour Law in Australia Volume 1 Individual Aspects*. By E.I. Sykes, Butterworths, Sydney 1980 Pages i to l, 1 to 394 and index 395 to 413.

The publication in 1972 of the first edition of "Labour Law in Australia" by Professor Sykes and Dr. Glasbeek was an important development for employment lawyers. The authors referred in the preface to their "ambitious and somewhat frightening task" of producing the first complete text of labour law in Australia. They referred to their consciousness of the difficulties of combining a discussion of the contractual basis of the employment relationship with the "very different thrust" of the Australian industrial arbitration system. Their solution was to divide the volume into Book 1, dealing with individual aspects of labour law, and Book 2, dealing with collective aspects of Federal and State labour law, Professor Sykes being responsible for Book 1 and Dr. Glasbeek for Book 2. Although the preface referred to an intention to publish supplements from time to time no such supplements have, to this reviewer's knowledge, appeared.

There have of course in the last 10 years been many important decided cases and many statutory changes, and a new edition has become necessary. As Dr. Glasbeek has been appointed to a Chair in Canada, Professor D. Yerbury of the Australian Graduate School of Management has agreed to prepare the material on collective aspects, which will be published later.

The volume under review is an updated and slightly expanded

version of Book 1 of the 1972 publication. The topics covered range from the nature of the employer-employee relationship through the application of basic principles of contract law to the employment relationship to restrictions on contractual freedom. New chapters have been included on criminal or other governmental restraints and the various senses in which the expression "the right to work" is used. This is followed by 2 very lengthy chapters on workers' compensation, comprising approximately half the book, and the final chapter is entitled "Strikes and other concerted pressures — the controls of the general law". To the discussion in this chapter of tort liability and penal liability for picketing the author has added material on the Crimes Act and Section 45D of the Trade Practices Act.

The materials in the first chapter relating to the principles for determining whether or not the relationship of employer and employee has arisen would repay careful reading by many who do not necessarily practice as employment lawyers. It seems apparent that in the last 10 years the proportion of the work force engaged in relationships the legal nature of which may be somewhat difficult to determine or which may be misunderstood by the parties has increased significantly. It is important for practicing lawyers to bring to their client's attention the need to consider the legal nature of relationships which have been entered into in respect of the supply of labour or services. Obligations under workers' compensation legislation, taxation statutes and provisions entitling persons providing labour services to various forms of leave will turn on the answer to that question but the issue is often not considered by the parties to those relationships. In the preface to the second edition Professor Sykes has referred to criticism that he relied too much in the first edition on the control test and he has sought to deal with this criticism in the substantially extended discussion on this topic.

The difficulties facing the author of such a text in the treatment of workers' compensation have been discussed in the preface to the first edition and in the preface to the volume under review. The alternative approaches to this topic are discussed by Professor Sykes in the preface and in the writer's view the approach adopted is the correct one for such a publication, namely an attempt to encompass the main principles of all of the various systems in an endeavour to find the common pattern, and an indication of important differences in specific jurisdictions. In the writer's view the lengthy treatment of workers' compensation is a most valuable source of reference for those researching particular problems but would constitute a rather formidable introduction to the topic.

This volume, in this reviewer's opinion, is an essential text for both students and practitioners of employment law, particularly in view of the comprehensive and detailed treatment, the numerous case references and the extent to which matters of principle and historical development are adverted to throughout the text. Professor Sykes' deep study of the topic, and indeed his enthusiasm, are apparent throughout. For the practitioner, the

volume makes an ideal companion to such loose-leaf services as the CCH Labour Law Reporter.

In conclusion it should be mentioned that Butterworths also published in 1980 a successor to the 1973 publication "Cases and Materials on Industrial Law in Australia".

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