printing errors have been detected: 'statuts' for 'status' on page 53; 'absence' for 'absences' on page 86, line 17; and, the omission of the definite article before 'Commonwealth' where it last appears on page 140.

Michael Tilbury*

FOOTNOTES

1. Outlined in the White Paper 'British Nationality Law' Cmnd. 7987 (1980), summarised by Dr Pryles on pp. ix-x.
2. Principally the British Nationality Act, 1948 (U.K.).
3. Principally the Australian Citizenship Act, 1948 (Cth).
4. When the favourable terms on which British subjects could obtain Australian citizenship by registration or notification were repealed: see Pryles pp. 74-76.
5. Consider the Canadian Citizenship Act, S.C. 1976, c.108, Part VIII (ss.31-34).
6. See the White Paper, note 1 *supra* at para. 106.
7. Australian Citizenship Act, 1948 (Cth), ss.26-30.
8. See the Green Paper 'British Nationality Law', Cmnd. 6795 (1977), para. 7.
9. The retention of this status is envisaged in the White Paper, note 1 *supra* at para. 107.
10. Dicey and Morris, *The Conflict of Laws* (10th ed., London, Stevens, 1980), Vol. 1, p. 28.
11. Commonwealth Constitution, s.51 (xxvii).
12. See P. H. Lane *The Australian Federal System* (2nd ed., Sydney, Law Book Co. Ltd., 1979), pp 223, "perhaps".
13. The U.K. situation is different *inter alia* because Citizenship of the U.K. and Colonies was granted to certain groups of people as part of the decolonization process. *Cf.* the provisions relating to Australian citizenship upon the attainment of independence by Papua New Guinea: Pryles pp. 218-221.
14. See Immigration Act 1971 (U.K.), s.2.
15. As envisaged in the U.K. White Paper, note 1 *supra* paras. 14 & 22, by the creation of the status of 'British citizen'.
16. Note that the Bland Committee proposed the introduction of a review process for certain sections of both the Citizenship Act and the Passports Act : *Final Report of the Committee on Administrative Discretions* (A.G.P.S., Canberra, 1973), App. H. pp. 112, 119.
17. Note 5 *supra,* s.5, and Pt. V.

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The High Court and the Constitution, by LESLIE ZINES, Robert Garran Professor of Law Australian National University (Butterworths, Sydney, 1981) ppi-xvii, 1-358, with Table of Cases, Constitution and Index. Cloth recommended retail price $35.00. Paperback recommended retail price $27.50 (ISBN 0 409 300195, 0 409 30019 5).

Professor Zines' book "The High Court and the Constitution" evidently results from a long period of co-ordination, analysis and evaluation of the decisions of the High Court and of the reasons given by participating Justices in relation to the interpretation and application of a number of the provisions of the Constitution of the Commonwealth of Australia. It provides in these aggregations and analyses a useful overview of the decisions of the Court and, to some extent, of the expressed tendencies in opinion of some of the individual Justices in relation to some of those provisions. It is not really a book to be read continuously as a whole (though for the purpose of this review I have done so), unless as an element in historical research,

but rather to be resorted to in case of some specific need to review the course of decision in a particular area of the Constitution.

Professor Zines has structured his commentary in chapters, each dealing with a particular feature of constitutional interpretation or application or with a major provision of the Constitution itself. As an arrangement, I think this is conducive to the utility of the volume and helpful to those working on some specific project in constitutional interpretation or application. The aggregation of decision or of reasons for judgment relevant to particular aspects or provisions of the Constitution should prove of advantage to students, practitioners and judges alike. Whether one agrees or not with Professor Zines' conclusions and criticisms they also provide a useful stimulus to discussion and are provocative of thought, though my inclination is to think that that stimulus is likely to prove more useful to the graduate student than to the fledgling who has yet to master the fundamentals and equip himself or herself with the knowledge necessary to a useful evaluation of those conclusions and criticisms.

Of course, resort to the volume, or to any particular chapter of it, should not take the place of personal study of relevant decisions or reasons for judgment. Nothing to my mind takes the place of first-hand acquaintance with the relevant source material which needs in the course of time to become part of the warp and woof of the trained lawyer's inherent knowledge. The book can properly be used as a starting point for individual work in the formation of individual opinion or in the generation of argument to be used in conference or in court.

The Professor's work is not in the nature of a text book but rather is a commentary in which in several of its parts it is used as a vehicle for the conveyance of the author's own theory of constitutional interpretation and of his preferred manner of the writing of reasons for judgment. Thus, if regard is to be had to the conclusions and criticisms expressed by the author, resort to any of its sections ought to be prefaced or accompanied by a reading of Chapter 15 which is largely devoted to a discussion of the methods, techniques and attitudes of the High Court and in which the author expresses clearly his view of the place to be occupied by current socio-economic facts and tendencies in the judicial consideration of the interpretation of the Constitution and in the application of legislation. Such socio-economic facts and tendencies and the effect upon them one way or another by the judicial decisions to be reached are, as I understand his text, to be dominant factors in those decisions. Thus, whilst the author's analysis of particular decisions of the Court or of individual reasons for judgment are objective, the ensuing critique or comment, particularly in the light of what is written in Chapter 15, frequently can be seen to conform to the overall interpretative attitudes of the author. Such a course is understandable. I do not call attention to it in any derogatory sense or endeavour. But any evaluation of the author's conclusions or of the manner of their expression and of the substance of his criticisms must be made by minds conscious of his predominant attitudes.

I am too recently retired to feel able to enter into any controversial comment on the validity of those attitudes, or indeed of any of the conclusions or criticisms expressed by the author at various points in the volume. Doubtless, much of what I might say may be deduced from my own judicial writing of the past. To some extent I regret the restraint — self-imposed as some might say — for over a long period of time I have thought about and come to a conclusion upon each and every of the various matters canvassed by the author. I have not been given to dissertation upon them in writing reasons for judgment, certainly not in any manner which would

satisfy the author. The judge needs to write as a judge, expressing his relevant conclusions and where appropriate his reasons therefor, and not as an academic commenting upon the possibilities of the law and dilating on possible but presently unacceptable and irrelevant situations.

In Chapter 2, the Professor says that the Court should articulate its real reason for deciding in favour of the validity of Commonwealth legislation, namely, the advantage the Court perceives of the legislative matter being under federal control. This seems to me to say that, in the Professor's view, the Court, so far from deciding the case for its expressed reasons, really decided the case because it thought the matter with which the legislation under challenge dealt would be better placed in federal hands for, I suppose, socio-economic reasons. This assertion should not go unchallenged. I do not think that members of the Court would accept that the expressed reasons for judgment were not the reasons actually leading to the result or that any case was decided on any undisclosed ground, and particularly on any undisclosed socio-economic ground of the kind adumbrated by the Professor.

The Professor further says that there should, in any case, be greater elaboration of reasons for judgment. Indeed, so far from encouraging such a course, there is more to be said for an opposing view — reasons for judgment, whether of the Court or of a majority of participating Justices or of an individual Justice, might quite reasonably contain less rather than more dissertation and elaboration than has at times occurred in the past. More discursive reasons for judgment, with the likely addition of obiter dicta, so far from aiding what the author calls "open government", could well be thought to be obfuscating and more productive of uncertainty in the administration of the law even than is the case at present, however much such dissertation might provide material for academic discussion and analysis. Lack of unanimity or of common ground in reasons for judgment, whether of the whole Court or of a majority of the participating Justices, is conducive of uncertainty in the administration of the law. The wider the field over which Justices travel in expressing their individual views, the less likely common ground and certainty will result.

I have long — which includes my practising days — been conscious of the comparative rarity of a decision of the Court either grounded on a course of reasoning unanimously expressed or on a course of reasoning common to a majority of participating Justices, but individually expressed. Consequently, there is in the Commonwealth Law Reports a paucity of precedent, strictly so-called, precedent which is likely to be acepted by successive benches as representing an entrenched view. Whilst the Court has not regarded itself as compelled by any prior decision, it has endeavoured to secure continuity in decision. But so often a numerical majority lacks a common ground. Reading Professor Zines' volume, this aspect of the Court's work is apparent. So much of his text is necessarily devoted to analysis, criticism and extrapolation of the reasons for judgment of individual Justices, reasons which have not necessarily received the commendation of a majority of the participating Justices or of a majority of the Court at any time. From the time Isaac Isaacs, later Sir Isaac Isaacs, took his seat on the bench, the writing of separate reasons for judgment, expressed often at great length and decorated with case references, became a common feature of the Court's work. The habit of consultation which the first Justices had developed came to an end: it never returned in its original form, i.e. as a discussion before judgment of the issues arising in the case with a view, if at all possible, to the adoption of a consensus. Of course, discussion amongst three Justices at or near the conclusion of argument is much

easier to contrive than would be the case with a bench of five or seven Justices. That Justices live and work in widely separated places is a potent factor against the possibility of consensus on a common ground of reasoning. There is, of course, merit in each Justice working at the problem. But there is little virtue in joinder in a common conclusion for individually expressed reasons often only subtly different from each other: there is even less virtue in such reasons espousing disparate grounds for decision.

Professor Zines spends some time in discussion and criticism of the *Engineers' Case.*[1] It may be that the doctrine of that case — which is fundamental to the interpretation of the Constitution — does not provide room for the interpretative attitude propounded by Professor Zines, unless in any given case the economic or social facts or consequences are properly to be regarded in the employment of the ordinary rules of legal interpretation. Certainly, the economic or social consequences for the constituent States of a proposed interpretation of a Commonwealth power can scarcely, consistently with the *Engineers' Case,*[2] bear upon the adoption or rejection of that interpretation. The legislative and executive powers of the States are residual and none the less so because they are subject to the Constitution, i.e., for example, section 92. It would indeed be odd to determine the extent of the principal grant by first determining the content of the residue: or to determine that extent by having regard to what effect the adoption of one or the other of the possible meanings of the words of the grant may have on the residue. Whilst the extent and general content of State power is to be ascertained by reference to the extent and content of the former colonial legislative and executive powers, the grant of and authority for the exercise of State power is by and derived from the Constitution itself. Perhaps the consequences of that basic truth have never been fully explored. Thus, it is the Constitution itself which has decided the extent and content of State power. That is not a question left to the decision of the Court, though of necessity the Court's decision on the extent of a Commonwealth power may result in the States having more or less power than had theretofore been thought. Once remove the fallacy that the interpretation of an exclusive power does not give rise to an inter se question,[3] and the full force of the residual nature of the States' power is perceived. Thus, the only relevant judicial question is the meaning and operation of the language by which the grant of Commonwealth power is made.

Professor Zines has not devoted any attention in his book to the contribution which the Court by its decisions has made to the operation of the Australian federal system and, even more importantly, to the sense of unity of the Australian people. It might well be felt that the Court by its decisions has done both, not consciously, not by bending any legally applicable principle, or by doing what Professor Zines suggests, namely, deciding the extent of Commonwealth power upon the Court's view of the desirability or expediency of the power being exercisable by the Commonwealth, but by interpreting the Commonwealth's powers generously according to their terms, and since the *Engineers' Case,*[4] in general, without regard to the consequence for State power of that interpretation. The substance of Bryce's view was that a federation either progressed towards a unitary state or dismembered and returned to separate identities without any or only tenuous cohesive ties. This is the consequence of the concept of centrifugal and centripetal forces in a federation. The pre-*Engineers'* doctrine was a prescription towards a centrifugal result.

"The High Court and The Constitution" as a commentary is stimulating and should find a place in what I suppose must remain an unending discussion.

Sir Garfield Barwick*

FOOTNOTES

1. *Amalgamated Society of Engineers* v. *Adelaide Steamship Co. Ltd* (1920) 28 C.L.R. 129.
2. *Ibid.*
3. *Australian National Airways Pty Ltd* v. *The Commonwealth (No. 2)* (1945) 71 C.L.R. 115; *Nelungaloo Pty Ltd* v. *The Commonwealth* (1951) 85 C.L.R. 545; *Dennis Hotels Pty Ltd* v. *The State of Victoria* (1961) 104 C.L.R. 621 (P.C.)
4. Note 1 *supra.*
5. *Ibid.*

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Malpractice: The Administration of the Murphy Trade Practices Act, by V. G. VENTURINI. (Non Mollare, Sydney, 1980), pp. i-ix, 1-464, with Index. Paperback recommended retail price $14.95 (ISBN 0 9594629 0 2).

Do the short history of the Trade Practices Act 1974 and the administrative record of the Trade Practices Commission under that Act merit the hyper-critical onslaught delivered against them by the former Commissioner, Dr Venturo Venturini, in this refreshingly extraordinary book published under the imprint "Non Mollare" or "Do not yield"? The book is a full bloodied and passionate account of episodes in that history, fleshed out with geo-political allusions and frequent pleas for what seems best described as a "Jeffersonian-Marxist" political philosophy. The evils of a plotting power elite are the same to Dr Venturini whether that elite is the Nixonian Watergate group of henchmen or members of the Trade Practices Commission (hereinafter referred to as T.P.C.) and staff deciding how to handle the application for authorization of standard form contracts by the Motion Picture Distributors' Association (hereinafter referred to as M.P.D.A.). The nobility of the free market and its inevitable exploitation at the hands of organised international oligopolists is as distressing a phenomenon to Dr Venturini as it has always been to those who have espoused the dignity of individual autonomy; the perceived soullessness of institutional conformism, whether of the governmental or corporate variety, are further evidence of the social loss deriving from oligopolistic "competition". The concluding chapter of the book is an extensive comparison of the ultimate in personal abuse of power; the abuses which took place in the United States under Richard Nixon are compared with the alleged complete breakdown of due administration of law in Australia as evidenced by the case of the Trade Practices Act.

This is heady stuff. Does Dr Venturini make out his case or does the book in the end seem to be a general rave by a dismissed public servant? (Dr Venturini was effectively dismissed from the T.P.C. by the complicated device of having the whole T.P.C. abolished upon amendment of the Trade Practices Act in 1977 and then reappointing all Commissioners except him.) My unfortunate conclusion is that, while the early chapters make good reading, the book falters in its analysis of the *M.P.D.A.* case[1] (pages 129-186) rallies in the section reviewing the T.P.C. investigation of advertising claims by soap-suds makers (pages 213-242) and then finally stumbles, bogging down in the comparison made between Canberra