BOOK REVIEWS

Freedom of Interstate Trade Under the Australian Constitution, by MICHAEL COPER, B.A., LL.B. (Hons) (Syd.), Ph.D. (N.S.W.), Barrister-at-Law, Associate Professor, Faculty of Law, University of New South Wales. (Butterworths Pty Limited, 1983), pp i-xiii, 1-394 with Table of Cases, Bibliography, Chronological Table of Decisions of the High Court and the Privy Council relating to Section 92 and Index.Cloth. Recommended retail price $39.50. (ISBN 0 409 49180 2).

"Freedom of Interstate Trade under the Australian Constitution" is a splendid book. It will breathe new life into the old rumour that its author's favourite garment is a section 92 T-shirt. The book establishes both Dr Coper's dedication to the subject of section 92 and his command of it. His scholarship is matched by the enterprise of the publisher in shouldering the costs of production of a work which deals with but a single section of the Commonwealth Constitution. The publication of this monograph on the Constitution marks yet another advance in the rapid development which has taken place in Australian law publishing in recent years. It is a development which will do much for the progressive evolution of the law in this country.

The value of this book to academic lawyers and members of the practising profession who have the misfortune to grapple with section 92 is considerable. It discusses all the cases in detail and with perception. It canvasses the various interpretations put forward in the judgments and seeks to evaluate them, taking care to place each interpretation in its appropriate context of history and circumstance. It enables the reader to make his own informed judgment as to the interpretation which should now be adopted.

The book illustrates the role of the constitutional commentator at a high level of achievement — objective critical analysis of the judgments leading to a constructive case for a new interpretation. Dr Coper has made an adequate response to my criticism that Australian academic lawyers have been too negative in their approach and have neglected their true roles as pathfinders in the law, a role which has been left too often to the judges who are by no means the best equipped to undertake it.

Essentially, the author adopts a chronological approach to the subject, seeking to explain the course of judicial interpretation by reference to development and shifts in judicial thinking, at the same time relating them to functional considerations and judicial techniques. His evaluation of the High Court's interpretation of section 92 over the span of 75 years, though fundamentally critical, is always understanding. Occasionally, there is a tendency to draw too much from the cases. Commentators, like counsel in argument, are prone to see more in the words of a judgment than the writer intended to convey. *J. Bernard & Co. Pty. Ltd*

v. *Langley*[1] is a case in point. Whether it is indicative of the future in the way suggested by Dr Coper is much open to question. However, in this, as in other, instances he makes it plain that there is a speculative element in what he is saying, thus enabling the practising lawyer to distinguish immediately conjecture from legitimate argument.

Inherent in the approach adopted by the author is the risk that discussion of judicial techniques will divert attention away from the main thrust of the historical narrative, the critical analysis of the judgments, the examination of the competing interpretations and the presentation of the case for the preferred interpretation — a broad version of the discrimination theory, one which is designed to eliminate State protection. On the whole, the result vindicates the decision to run the risk. The discussion of judicial techniques is valuable and does not detract unduly from the main thrust of the book. However, the references to the style, as well as the technique, of individual justices may tend to create the impression in the mind of the reader that their contributions are idiosyncratic at the expense of the point made elsewhere in the book that the justices have been responding in a historical framework of continuous development to the array of problems by attempting to interpret the section in the light of the needs of the community and the patterns of thought current in the community. As Dr Coper correctly observes, it is impossible, as well as illegitimate, to construe the section by reference to its text alone. My impression is that greater condensation and less elaboration of style would have sharpened the cutting edge of the criticism and fortified the constructive case for the adoption of his preferred interpretation. To say this is to offer a subjective and minor qualification to my overall assessment of the work.

The book emerges at an opportune moment. There has been an unusual lull in section 92 litigation — perhaps it is the calm before the storm. The Court has not heard a section 92 case since the ill-fated and unsatisfactory decision in *Uebergang* v. *Australian Wheat Board*.[2] The task which the Court imposed on itself by the form of the questions which it stated — an essay assignment on the section — did not produce a model answer. Instead, it resulted on one count in four, and on another count in five, conflicting interpretations of the section. *Uebergang* revealed the existence of more widespread division within the Court on the topic than at any stage in its previous history. For this reason alone, as the author points out, the Court has arrived at the cross-roads and it is to be hoped that it will now make a decisive choice as to the route to be taken. The making of this choice can be made with relative freedom because it seems that there is now no compelling authority which weights the scale so strongly in favour of one interpretation as against others. Also, there is the new advantage that with the changes in the composition of the Court three fresh gladiators will enter the arena.

Of more enduring interest than the outcome of the next major case and the light that it will throw on the future operation of the section, is the discussion throughout the book, especially in Chapter 34, of the judicial techniques which have been employed. The point is made that the Court has moved away from a legalistic approach based on analysis involving precedent and juridical concepts distilled from the vague and general language of the section to a more realistic approach which treats the section as having a dynamic operation, adjusting itself to changing times

and circumstances — an approach which enables the Court to take into account and balance factors and policies relevant to the public interest. This change in approach is not confined to section 92. It has been applied to other parts of the Constitution and to the general law. However, section 92 with its non-specific concept of freedom continues to provide the most telling example.

In part, this new attitude reflects a reaction against the formalism of the earlier approach which seemed to imply that the meaning of the section could be reduced to a rigid formula capable, on application, of yielding certain and acceptable results. Unfortunately, the certain results were not always acceptable. It was for this reason that Sir Owen Dixon enunciated his second layer criterion, "the circuitous device" test, which lay in wait to rise up and strike down legislation which withstood the primary criterion, the "direct legal operation" test. And, in part, the new approach reflects a dissatisfaction with an attitude to constitutional construction which places so much emphasis on the width of the expression "with respect to" in section 51(i) and concludes that it is this expression with its conferment of legislative power over what is "incidental" to inter-state trade that takes the power beyond the area of the prohibition contained in section 92 which is restricted to what is "essential". And finally, I suppose, there is the feeling that too much has been built upon the notion that the section protects or guarantees the rights of individual traders, a notion which hearkens back to the values of a by-gone age.

The point might well be made that the new approach adopted by the Court, that of examining the underlying reality of policy issues, is one which calls for qualities different from those expected of lawyers according to past Australian training and experience. For us, this presents a problem which immediately distinguishes us from the Supreme Court of the United States. The Supreme Court has been pursuing an open approach for a long time in accordance with American legal tradition. But the change in our approach may not produce much difference in results. It would be a grave mistake to think that Sir Owen Dixon paid no attention to issues of policy. However, he did not emphasise them, preferring to base himself in the main on strict legal reasoning. Overt attention to policy considerations calls for reasoning of a different order and at times it leads to an uneasy amalgam or compromise between that mode of reasoning to a conclusion and the more traditional analytical method which proceeds to a conclusion from precedent and accepted concept. A striking illustration is provided by *Commonwealth* v. *Tasmania*[3] (the *Tasmanian Dams* case). There the majority did not hesitate to base themselves on policy considerations in giving a wide interpretation to the external affairs power. At the same time, they accepted the construction placed on section 100 of the Constitution in *Morgan* v. *Commonwealth*,[4] a decision described by Professor Sawer as one which proceeded from the strictest legalism, without offering other additional reasons to sustain it. The difference in reasoning on section 51(xxxi) — the acquisition power-between Deane J. and the other members of the majority perhaps provides another example.

I am not to be taken as saying that we should now desert the language of the Constitution. The quest is always to ascertain its meaning and we are more likely to achieve success if we pay close attention to the scope and object of the provision in the framework in which it is to be found in the Constitution, instead of

concentrating our attention on primary meanings to the relative exclusion of other considerations. In the ultimate analysis we can only give to the words a meaning which they are inherently capable of sustaining. We have not yet arrived at the American position which is best illustrated by the comment of the American professor to the student who interpreted a statutory provision according to the natural and ordinary meaning of the words: "That is an interesting and novel approach".

The comprehensive examination of the competing views of section 92 identifies the merits and the shortcomings of each view. For example, the objection to Murphy J.'s fiscal burden theory, that it does nothing to prevent more extreme forms of protectionism, such as outright exclusion of goods, is stated, as is his Honour's response, namely, that it is for the Commonwealth to exercise its legislative power to rectify such an interference with inter-state trade. The author then suggests that it is unrealistic to expect the Commonwealth Parliament to remedy interferences of this kind and points out that the Supreme Court of the United States has refused to leave this task to Congress.

The recent cases on the wheat acquisition scheme — *Clark King & Co. Proprietary Limited* v. *Australian Wheat Board*[5] and *Uebergang* v. *Australian Wheat Board*[6] — which illustrate the problems encountered by the "public interest" approach when applied to marketing legislation involving prohibition against sale, are examined. At first I thought that this examination might perhaps have made more of the point that, if the concept of reasonable regulation favoured by Stephen J. and me were to gain acceptance, then the Court would find it necessary to engage in a wide-ranging inquiry into the wheat industry or at least into the inter-state trade in wheat. However, it is evident that to some extent the same point can be made in relation to the author's own theory. His theory incorporates the "public interest" approach, subject to some modification. This is because the theory operates at two levels. First, it asks whether the law operates "substantially" to give a State "a significant economic advantage". Then, if this question be answered in the affirmative, it asks whether that advantage is outweighed by a "legitimate local interest". The difference between this interpretation and the approach adopted by Stephen J. and me is that the author would not enter upon the "public interest" question until it was found that the economic advantage to a State was significant. This statement of the difference may perhaps tend to exaggerate it because my conception of the public interest in the freedom of interstate trade derives from a recognition of the detriments of State protectionism.

The author's approach would probably diminish the need in all cases to decide a wide-ranging "public interest" issue. His broad discrimination approach, as distinct from the narrow one which merely looks to, and not behind, the face of the statute, raises the question of whether the statute operates in a practical way to protect the trade or industry of a State. No doubt in some instances this factual issue will be difficult to determine, but it should be less onerous in its length (of time) and breadth (of relevance) than the issue which the "public interest" concept of regulation presents in its application to acquisition schemes. Dr Coper suggests that in accordance with *Bernard*[7] in the absence of factual evidence it will be proper to proceed on the basis of a presumption of validity. This presumption should not be

confused with the presumption of statutory validity espoused and applied by Murphy J. (see the *Tasmanian Dams* case) which has not been applied by any other member of the Court.

However, as we have seen, a finding that the legislation is protective of State trade, is not conclusive. The legislation will not infringe section 92 if the protection is theoretical or remote or insignificant "because it is outweighed by the vindication of some legitimate local interest" (page 304). In this respect Dr Coper says that the "public interest" concept of regulation balances the recognition of a legitimate local interest against the right of an individual to trade interstate, whereas with the proposed test the legitimate local interest is balanced against protectionism. The consequence is, so he suggests, that under the present law the absence of protection may not avoid infringement of section 92, whereas under the new test it would be conclusive of non-infringement. It would perhaps be more correct to say that the "public interest" concept of regulation balances the legitimate local interest against the public interest in freedom of inter-state trade, the right of the individual to trade inter-state being derived from and incidental to this public interest.

The Honourable Sir Anthony Mason, K.B.E. (C.B.E. 1969)*

*Justice of the High Court of Australia.

FOOTNOTES

1 (1980) 54 A.L.J.R. 568.
2 (1980) 145 C.L.R. 266.
3 (1983) 46 A.L.R. 625.
4 (1947) 74 C.L.R. 421.
5 (1978) 140 C.L.R. 120.
6 Note 2 *supra*.
7 Note 1 *supra*.

Marxism and Law, by HUGH COLLINS (Oxford University Press, Oxford, 1982), pp.v-viii, 1-159 with Select Bibliography and Index. Recommended retail price $27.50 (ISBN 0 198760930)

The writings of Karl Marx are among the few profound and monumental contributions which social theory has received. Marx's influence pervades the thought, not simply of those who consider themselves Marxists, but of everyone who thinks seriously about the nature of societies, social change, the role of economy and social classes in society, the nature and dynamics of modernity, and much besides. His contributions to history, economics, political studies, anthropology and to many other humanistic disciplines are no less profound. And though *we* might detach Marx's "scientific" contributions from his philosophical, moral and political commitments, Marx himself did not. His social theory was harnessed to a diagnosis of present evil and a prophecy of future deliverance which