Federal Jurisdiction in Australia by SIR ZELMAN COWEN, Q.C., B.A., LL.B., LL.M. (Melb.); B.C.L., M.A. (Oxon); LL.D. (Hong Kong, Qld, Melb.); D.C.L. (Oxon); Governor-General of Australia, and LESLIE ZINES, LL.B. (Syd.), LL.M. (Harv.); Professor of Law, Law School, Australian National University. (Oxford University Press, 1978), pp. i-xix, 1-233. Cloth, recommended retail price $19.95 (ISBN: 0 19 550054 7).

This second edition comes almost 20 years after the original publication in 1959 of Sir Zelman Cowen's justly praised work on Federal jurisdiction. The new writing, we are told, is very much the work of Professor Leslie Zines of the Australian National University. He has deftly incorporated the new materials into the scheme of the original text, most of which has been preserved. The arrival of this second edition is most welcome, given the substantial body of decisions and legislation since 1959.

It begins by noting the active debate that has arisen on the propriety of maintaining the very notions of State and Federal jurisdiction. Support is expressed for the idea of a national judiciary whose role would be to apply and administer the law from whatever source it may emanate, and the following observations of Mr Justice Else-Mitchell, which appeared in an earlier number of this Review, are quoted:

> This duty (to apply the law) can be performed so as to do complete justice between the parties only if the court is able to apply all relevant law, whether it arise from a Commonwealth, State, or local enactment, regulation, or ordinance, or has its origin in the common law or the rules of equity.[1]

In the same vein the introduction to the first edition ended with the words that "its most satisfying achievement would be its own relegation to the shelves of legal history".

The hope remains unfulfilled and the major problems of Federal jurisdiction remain. There is a story that, when at a transcendentalist meeting a certain Miss Fuller rose in a moment of enthusiasm and cried "I accept the Universe", Thomas Carlyle growled: "By God she'd better!". For the time being Australian lawyers—and their clients—must perforce accept the mysteries and intricacies of Federal jurisdiction, and as a consequence the continued need for a guide through the jurisdictional labyrinth.

In default of the constitutional change that would be necessary to establish a national judiciary, another debate has developed that has focused on the proposal for a Federal Court with authority over the whole range of Federal jurisdiction. More latterly, Sir Garfield Barwick has advocated a Federal Court of plenary appellate jurisdiction, conferred as to State jurisdiction by State legislation.[2] Cowen and Zines refer to using State Courts "subject to some exceptions" in all matters of Federal and State jurisdiction with an appeal, rigidly regulated, to

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[1] "Burying the Autochthonous Expedient?" (1969) 3 F.L. Rev. 187, 190.

[2] "The State of the Australian Judicature" (1977) 51 A.L.J. 480, 491.

the High Court as the final court of appeal. This latter proposal comes closest, we are told, to the notion of a national system within the present framework of the Constitution. The important Federal legislation introduced since 1976 is regarded as something of a compromise. The Federal jurisdiction of State Courts has been strengthened. The notion of a Federal court of general jurisdiction has not been accepted. The two main Federal Courts—the Federal Court of Australia and the Family Court of Australia—are courts of limited and specialised jurisdiction. In certain areas, such as industrial property and taxation, a new approach has been adopted of conferring jurisdiction on the State Supreme Courts, from whose orders there is an appeal to the Federal Court. The Jurisdiction of Courts (Miscellaneous Amendments) Act 1979 has since been passed, carrying the compromise solution to a further stage of development.

Vigorous debate has continued, and it is from that point of view unfortunate that the present edition was completed before some of the more vigorous recent exchanges took place, such as the address by the Chief Justice of the Supreme Court of New South Wales attacking "duality"[3] and the view expressed by Sir Garfield Barwick at the 20th Australian Legal Convention that the creation and development of the Federal Court does not pose the threat of "unbearable duality" in the Court system of Australia that "some seem to see and fear".[4] Another recent development of significance has been the practice announced by the Commonwealth Attorney-General Senator Peter Durack that State Governments will be consulted on High Court appointments. Such consultation occurred on the recent appointment of Mr Justice Wilson. The practice is now to have a statutory basis in section 6 of the High Court of Australia Act 1979.

One of the aims of the recent legislation has been to reduce the original jurisdiction of the High Court in order to enable it better to fulfil its role as the final Court on major constitutional and other matters. There are limits as to how far the legislature may go in this area having regard to the original jurisdiction vested directly in the High Court by section 75 of the Constitution. The present edition enlarges upon the interesting discussion contained in the first edition of whether the High Court may indeed decline to exercise jurisdiction conferred on it by section 75 on the ground of the *forum non conveniens* or some analogous doctrine. The pressure to do so is perhaps greatest in the case of plaintiffs who invoke the diversity jurisdiction of the High Court for causes that clearly ought to be dealt with at a lower level. In such decisions as *Faussett* v. *Carroll*[5] the High Court has indicated that it may refuse or reduce costs to plaintiffs in such actions. The present edition refers to the observation of Sir Garfield Barwick at the 19th Legal Convention that the High Court had begun the practice

[3] "The Consequences of a Dual System of State and Federal Courts" (1978) 52 A.L.J. 434.

[4] "The State of the Australian Judicature" (1979) 53 A.L.J. 487, 489.

[5] (1917) 15 W.N. (N.S.W.) No. 12 Cover Note (14 August 1917).

of remitting accident cases arising in the diversity jurisdiction of the Court to State Courts for disposal.[6]

In this connexion, however, the present edition repeats the view that section 44 of the Judiciary Act which, like its predecessor (section 45, which was in the Judiciary Act when it was first enacted in 1903), permits the High Court to remit cases to other courts, goes beyond the powers of the legislature, and that neither the Court nor the Parliament has the authority to tamper with the jurisdiction conferred by section 75 of the Constitution. This seems a hard view and it is not likely to gain favour with the High Court.

The second edition usefully elaborates on the earlier discussion of the difficult diversity jurisdiction case of *R.* v. *Langdon; ex parte Langdon*,[7] in which Taylor J. appeared to decline jurisdiction on the ground that the Supreme Court of Tasmania was the more appropriate forum in the circumstances. The reviewer agrees with the footnote comment on page 81 of the present edition that in that case it would have been preferable for the Judge to have regarded the High Court as subject to the statutory fetters imposed by State legislation on the Supreme Court. Such a view had been expressed earlier by Sir Zelman Cowen.[8] The availability of the diversity jurisdiction, even if there is a judicial discretion as to its exercise, should not depend on such factors as discouraged the Court exercising it in that case.

One area in which the law to be applied in the Australian Federation has from the beginning exhibited an interesting degree of homogeneity is often overlooked. This is the law relating to the procedure for such matters as summary conviction, committal, trial and conviction on indictment and appeal therefrom. From the beginning the laws applied in this regard to Commonwealth offences have been the laws of an appropriate State or Territory administered by State and Territory Courts, and this is duly noted in both editions. No reference is made to the Commonwealth Places (Application of Laws) Act 1970, which takes the matter a step further by applying, *inter alia*, substantive State criminal laws, as Federal law, to Commonwealth places, and in the course of doing so makes provision for an even more extensive application of State laws in relation to resulting proceedings. The development has now been taken a step further again by the Commonwealth Crimes at Sea Act 1979, which applies the criminal laws of an appropriate State or Territory in relation to offences at sea coming within Federal jurisdiction.

The discussion of criminal jurisdiction in Cowen and Zines, to its credit, does, however, open up this subject. The key provision is section 68 of the Judiciary Act, and reference is made on page 220 to the view of Dixon J. in *Williams* v. *The King (No. 2)*[9] favouring an

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[6] (1977) 51 A.L.J. 480, 489.

[7] (1953) 88 C.L.R. 158.

[8] "Diversity Jurisdiction: The Australian Experience" (1955) 7 Res Judicatae 1, 27.

[9] (1934) 50 C.L.R. 551, 560.

interpretation of its provisions that ensures that Federal criminal law is administered in each State upon the same footing as State law and avoids the establishment of two independent systems of criminal justice. We should be grateful too for the attention drawn to the development of this theme by Mason J. in *R.* v. *Loewenthal; ex parte Blacklock*:

> Although the distinction between federal and State jurisdiction has created problems, they were largely foreseen by the authors of the Judiciary Act. Pt X of the Act provided a solution to the difficulties arising from a duality of jurisdiction by applying to criminal cases heard by State courts in federal jurisdiction the laws and procedure applicable in the State (s. 68). The purpose of the section was, so far as possible, to enable State courts in the exercise of federal jurisdiction to apply federal laws according to a common procedure in one judicial system.[10]

On the same theme there is the treatment of *Pearce* v. *Cocchiaro*,[11] which held that section 68(2)(b) is valid in imposing the non-judicial function of committal hearings on State magistrates. A doubt, however, is raised in the discussion as to whether the Constitution permits such action, at least where there is no State legislation authorising it, but it may be observed that this suggested requirement of State consent has never been fully received into Australian constitutional doctrine. The doubt was raised possibly with such decisions as *Kotsis* v. *Kotsis*[12] in mind, but the discussion of that case (p. 188) makes the valid point that, whatever might be said of the analytical and historical arguments supporting that decision against vesting power to make orders in matrimonial causes upon State Supreme Court registrars, the decision itself was unfortunate from a practical point of view.

One of the virtues of the first edition was that its clear exposition of complex problems pointed the way to reform. The second edition honours that precedent, and perhaps does so most effectively in the discussion of the admiralty jurisdiction of State Supreme Courts. The subject is unusually intricate, and it is possible here only to note the searching questions raised or suggested. Does the admiralty jurisdiction of State Supreme Courts rest upon an investment of federal jurisdiction under section 77 of the Constitution by way of section 39 of the Judiciary Act, and not, as has been widely assumed, on the Colonial Courts of Admiralty Act (Imp.)? If section 39(2) of the former Act applies, what body of law determines the content of that jurisdiction? (If the Imperial Act applies, it is the British admiralty law frozen as at 1890.) If on the other hand the jurisdiction rests on the Imperial Act, are decisions of the High Court on appeal from State Courts still subject to appeal under section 6 of the Colonial Courts of Admiralty Act to the Privy Council, notwithstanding the Privy Council (Appeals from the High Court) Act 1975? The presence of this latter issue might be thought to help ensure that the first question will be answered in the affirmative. Certainly, Professor Zines presents the case for the affir-

[10] (1974) 131 C.L.R. 338, 345.
[11] (1977) 137 C.L.R. 600.
[12] (1970) 122 C.L.R. 69.

mative very persuasively, though it appears to have been recently rejected by Stephen and Aickin JJ. in *China Ocean Shipping Co.* v. *South Australia.*[13] Gibbs J. regarded the matter as completely open and Murphy J. in effect accepted the view developed in Cowen and Zines. The second edition's final comment on the topic is to point to the desirability of clarifying legislation.

Special mention should be made of the discussion of the judicial decisions on Territory courts and their jurisdiction given since the publication of the first edition. Such matters as the constitutional status of the Supreme Court of the Australian Capital Territory have been clarified,[14] but some awkward problems are said to remain, such as the basis of jurisdiction in the case of a general Commonwealth law operating throughout Australia and beyond.

It has already been noted that the present edition generally follows the scheme of the original. Looking to the future, it may be wondered whether the stage may soon be reached for more specialised studies of various aspects of federal jurisdiction, with a more practical approach than is appropriate to the nature of the present work. The task would be a daunting one, but the analytical work of Cowen and Zines constitutes a solid basis for such an enterprise.

It remains to note the happy circumstance that the publication of this book coincides with the 500th anniversary of the Oxford University Press, a fact neatly noted on the cloth cover.

P. BRAZIL*

[13] (1979) 27 A.L.R. 1.

[14] *Capital T.V. and Appliances Pty Ltd* v. *Falconer* (1971) 125 C.L.R. 591.

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