BOOK REVIEWS

ZELMAN COWEN AND LESLIE ZINES

Federal Jurisdiction in Australia

(2nd ed.), Oxford University Press, 1978, $19.95

In this excellent book, Prof. Sir Zelman Cowen (as he then was) and Prof. Leslie Zines set out clearly and succinctly the legal maze to which the establishment of separate federal and state jurisdictions has led. After reading the book, I can only agree with their desire to see an integrated national system of courts replace the existing federal and state courts. Although such a change is desirable, it is highly unlikely because, since no-one knows why we have the present system, everyone will be afraid to change it. Australians have adopted the conservative doctrine that institutions which survive must serve a purpose, no matter how irrational they appear, with a gusto which would have even puzzled Edmund Burke.

The authors point out with great clarity and force the absurdities which arise from establishing separate federal and state jurisdictions and combining those jurisdictions in the same courts. If it had been suspected that State courts would be so hostile to the federal government that they could not be entrusted with enforcing federal laws or with interpreting the Constitution or if it had been intended to establish courts specialising in constitutional cases, there would have been some reason for separating federal and State jurisdictions into two court systems. None of these reasons existed. Our Constitution makers had no distrust of State courts. They provided that State courts could be invested with federal jurisdiction. At the same time, they had so little desire to create a court to specialise in constitutional cases that even the High Court, which is the ultimate repository of federal judicial power and the final arbiter of the Constitution, was set up as a general court of appeal from State courts. Given the merging of institutions, it was ridiculous not to merge jurisdictions. The draftsmen of our Constitution behaved as if they were entranced by the idea that as judicial power is one of the fundamental powers of government, each Australian government had to have its own judicial power whether or not that power was enforced by its own courts.

Although there were no good political reasons, at the time of federation, for establishing separate federal and State jurisdictions in the same courts, it would be wrong to think that all of the problems surrounding this area of the law are merely the result of bad constitutional draftsmanship. Many of them are the result of conflict over the distribution of power within the Australian governmental systems. Two major

differences distinguish the disputes about Australian federal jurisdiction from those in the United States. First, the disputes are not so much between federal and State courts as between the High Court and the Privy Council. Second, the disputes not only involve federal questions, but also arose from Commonwealth attempts, often opposed by the States, to gain independence for the Australian legal system by ending appeals to the Privy Council.

I think the authors err in neglecting the political aspects of these problems. Their analysis of the legal difficulties and absurdities which have arisen are excellent but they neglect the fact that many of these absurdities are the result of attempts to exclude the jurisdiction of the Privy Council.

Disputes over attempts to prevent appeals to the Privy Council at first tended to involve the British government itself. More recently, they have been between Commonwealth and State governments. The States have wished to retain appeals to the Privy Council, which they see as offering some counter-balance to the centralising tendencies of the judicial arm of the Commonwealth government, the High Court. The Commonwealth government wants to end these appeals to a foreign court which are inconsistent with Australian independence. The High Court's position has been determined by its desire to become the ultimate court of appeal for the Australian legal system. After *Viro's Case*[1] in which the High Court decided that it would no longer consider itself bound by Privy Council decisions, and the *T. & G. Case*[2] which upheld the *Privy Council (Appeals from the High Court) Act* 1975 abolishing all appeals to the Privy Council from decisions of the High Court, it is clear that the High Court is quickly becoming the court of last resort for the whole of the Australian legal system. However, some of the States have refused to surrender to the inevitable. The Premiers of Western Australia and Queensland themselves went to London to oppose Mr. Whitlam's attempt to have the U.K. Parliament abolish all appeals to the Privy Council from Australia. In Queensland, the *Appeals and Special Reference Act* 1973 attempted to ensure that the Privy Council would remain as a counter-balance to the High Court, whether or not it was possible to take appeals to it, by empowering the Queensland government to seek its advisory opinion on all legal matters, including constitutional questions, involving the Queensland government. Not surprisingly, this attempt to embarrass the High Court by being able to present it with Privy Council advisory opinions on matters before it, failed.[3]

The authors' excellent analysis of the technicalities surrounding the investing of State courts with federal jurisdiction needs to be understood against the background of disputes over the right to appeal to the Privy

1 *Viro* v. *R.* (1977) 18 A.L.R. 257.
2 *A.-G. for the Commonwealth* v. *T. & G. Mutual Life Soc. Ltd.* (1978) 19 A.L.R. 385.
3 *Commonwealth* v. *Queensland* (1975) 7 A.L.R. 351.

Council. Most of the problems arise not from the fact that the power to invest State courts with federal jurisdiction exists, but from the way in which that power has been used to take away the right of appeal from State courts to the Privy Council in constitutional cases.

The draftsmen of the Constitution had intended to ensure that all constitutional cases would go to the High Court, with a limited right of appeal from it to the Privy Council. However, by mistake, the final draft of the Constitution contained no provisions preventing appeals direct from State courts to the Privy Council in these cases.[4] A simple way to have avoided the problem would have been to have established a federal system of courts to hear all cases involving Commonwealth law. If such a system had been established, it would not have been possible to bypass the High Court by appealing direct to the Privy Council, because neither the Constitution nor any later Imperial legislation gives a right to appeal to the Privy Council or to ask Her Majesty in Council for special leave to appeal from federal courts. However, once it was decided that State courts should be allowed to decide federal issues, a way had to be found round the Orders in Council based on the *Imperial Judicial Committee Act* 1844, giving a right of appeal direct to the Privy Council from State Supreme Courts.

The solution adopted was to invest courts with federal jurisdiction under s. 77 (iii) of the Constitution, subject to the condition that all appeals from their federal jurisdiction had to go to the High Court.[5] By itself, this provision did not exclude the possibility of appeals to the Privy Council because it did not take away the State jurisdiction of the State courts to hear matters arising under both Commonwealth law and the Constitution. To overcome this problem, s. 39 (1) of the Judiciary Act, takes away the State jurisdiction of State courts in many matters arising under Commonwealth law, including all constitutional matters.

The validity of the scheme was arguable, especially before the *Statute of Westminster Adoption Act*, 1942 (Com.). It may well have been invalidated except for the manifest need to prevent appeals from State courts to the Privy Council in constitutional cases.[6]

Cowen and Zines analyse the legal issues to which the scheme gave rise excellently. Their grasp of the legal complexities involved is master-

4 Earlier drafts had completely abolished appeals to the Privy Council from State courts: The Constitution as finally adopted made no mention of the issue, but it was accepted by all parties that the right to appeal to the Privy Council from State courts had been left untouched. Quick and Garran point out that this had the unfortunate, and probably unforeseen result of defeating the intention of the draftsmen to make the High Court the sole and final court of appeal in constitutional cases.

5 S. 39 (2) of the *Judiciary Act* (Cth).

6 In the early years of federation, *Webb* v. *Outrim* [1907] A.C. 81 highlighted this need. In that case, an appeal was taken direct to the Privy Council from the Supreme Court of Victoria. The Privy Council's judgment was one of the worst that has ever been given by a court of last resort. The High Court was fully justified in refusing to be bound by it. In *Baxter's* Case (1907) 4 C.L.R. 1087 the High Court refused to follow it partly on the basis that the Privy Council had shown itself to be incompetent to decide constitutional questions.

ful. However, they fail to emphasise that, at stake in cases such as *Lorenzo* v. *Carey*,[7] *Kidman's Case*[8] and the *Skin Wool Cases*,[9] was the High Court's control over the interpretation of the Constitution. If there had been no need to prevent appeals on constitutional matters from State courts to the Privy Council it is doubtful that the power to confer federal jurisdiction on State courts would ever have been used, other than in those few areas where State courts do not possess State jurisdiction. The legal technicalities and extra expenses which are the result of conferring federal jurisdiction on State courts are the price we have to pay in order to prevent the Privy Council sharing appeals in constitutional matters with the High Court.

In the other areas of federal jurisdiction with which the book deals, major political issues do not lie behind the legal technicalities. Here, the claim in the introduction to the first edition that a study of the subject offers no insight into more fundamental aspects of our federal system of government is justified. For example, no issue about the distribution of power in our federal system is affected by the High Court's possessing original jurisdiction to decide cases between residents of two or more States. That jurisdiction is just a nuisance and should be abolished. In these areas, once the absurdities are pointed out, the need for reform becomes obvious. However, the absurdities which have arisen as a result of the grant of federal jurisdiction to State courts mark, as do so many other legal absurdities, a struggle for power, in this case by the High Court. Before we can remove these absurdities, we need to face the fact that they are the means by which the High Court achieved its rightful position as the ultimate interpreter of our Constitution. Unless we accept the need to put an end to all possibility of appealing to the Privy Council, at least in constitutional cases, the High Court will develop another set of absurdities to protect its jurisdiction. The book would have been better if it had analysed this area of the law in the context of the efforts of the High Court, and of some Commonwealth governments, to end appeals to the Privy Council.

Apart from this criticism, the book is excellent. Its analysis of the law is clear, accurate and thorough, and considering the difficult and technical nature of the subject, it is surprisingly readable. We are indebted to its authors for what undoubtedly will remain the standard work on the subject.

M. D. Stokes

---

7 (1921) 29 C.L.R. 243.
8 *Commonwealth* v. *Kidman* (1924) 35 C.L.R. 69.
9 *Commonwealth v. Kreglinger & Fernau Ltd.* and *Commonwealth* v. *Bardsley* (1926) 37 C.L.R. 393.

GORDON HAWKINS

Beyond Reasonable Doubt

A.B.C., 1977, $2.50

This book questions the correctness of the verdicts in four Australian criminal cases heard within the last fifteen years. In Britain and America many cases in which convictions were allegedly doubtful have been described and the collection of four such cases from Australia is welcomed. *Beyond Reasonable Doubt* illustrates that such a discussion is not subversive of justice but is warranted by the important issues raised which can have important indications for changes to reduce the chance of future errors.

The cases of Ronald Ryan, Leith Ratten, Frits Van-Beelen and Alexander McLeod-Lindsay are discussed in a concise manner and with admirable clarity,[1] which never approaches the tedium so often encountered in the courtroom. At the same time sensationalism is also avoided. The result is an extremely readable book of wide general interest.

The primary concern of the book concerns, not the innocence of the four accused, but the question whether they were properly found guilty beyond reasonable doubt. The distinction between innocence and not guilty is clearly made. In each case, Hawkins clearly demonstrates the difficulty in accepting that the prosecution case was so cogent so as to exclude a reasonable doubt in the prisoner's favour. The discussion which permeates the book of the exact *quantum* of proof in criminal cases is enlightening for those unfamiliar with the criminal law. However, the following statement may be misleading: 'It is important to note that when it is said that the burden of proof rests on the prosecution in criminal cases this means the weight of evidence adduced by the prosecution must be greater than that of evidence adduced by the defence'.[2] This could be read as suggesting that the prosecution cannot rely on evidence adduced by the defence and *vice versa*. But perhaps such an interpretation would be unintelligently literal.

Many important issues clearly emerge from the discussion of the four cases.

First, the protracted nature of the proceedings in criminal cases, exemplified in the *Van Beelen* case in particular, must give cause for concern. The *Van Beelen* case involved two trials, five appeals and an estimated cost to the South Australian Government of $75,000. The time taken to reach a final conclusion in such cases involves such prolonged agony to the accused, the victim and their families as well as

---

1 Perhaps one exception to this is the failure to explain why a key prosecution witness in the *McLeod-Lindsay* case, a Mrs. McLachlan, testified that at 9.30 p.m. she saw a man walking *away* from the McLeod-Lindsay house. The Crown case seemed to depend heavily upon the crime occurring after 9.30, but Mrs. McLachlan's evidence does not support this. At p. 110.

2 At p. 127.

enormous costs in financial terms and dislocation to court timetables, that attention should clearly be devoted to expediting the process. Each case also exemplifies the difficulties caused by complex forensic evidence which after consuming considerable time, many days and even weeks in one case, proved equivocal in the final analysis, and was certainly extremely confusing. The task of concentrating, absorbing and assessing all the evidence in such cases must be an enormously difficult task for the jury, and the Mitchell Committee's recommendations for special juries with scientific knowledge to be empanelled in appropriate cases may go some of the way to alleviate the problem.

Another striking issue is the problem of the jury prejudicing the accused. The continuous newspaper, radio and television coverage given to the *Ryan* case prior to the trial, depicting Ryan as a dangerous and violent criminal, could well have obscured any gaps in the Crown case. The problem of prejudging the accused appears to have arisen in the *Van Beelen* trial, and in *Ratten's* case. One of the jurors empanelled in the second *Van Beelen* trial suggested afterwards that some of the jurors had prejudged Frits Van Beelen, and Hawkins suggests that small town gossip may well have been prejudicial to Leith Ratten.

An important issue which emerges from three of the cases is the extent of the duty to disclose, to the defence at the trial, material suggesting innocence which the police have discovered in the course of their enquiries. In the case of Ratten the police knew, but did not disclose, that Constable Bickerton could not identify the voice on the telephone as a man or a woman. In *Van Beelen's* case the police suppressed the confession of the limping man and McLeod-Lindsay did not know that the police had been told of a woman's screams being heard at a time much earlier than the prosecution relied upon as the time of death. These pieces of evidence may well have helped reduce the cogency of the cases against the accused to a point where the jury failed to be satisfied beyond reasonable doubt. In the interests of justice there should be a general rule requiring disclosure of material facts to the defence rather than a discretion to do so. The right of appeal is demonstrably inadequate to redress such omissions. Perhaps too, the rules should be reviewed relating to admissibility of confessions made by persons other than the accused.

Quite clearly this is a very worthwhile book offering far more than interesting historical sketches of four famous Australian trials, for it is a work which also highlights some currently important issues well deserving of further consideration.

C. A. Warner