

LAUNCH OF ZINES'S THE HIGH COURT AND THE CONSTITUTION
6th edition by James Stellios

by

The Hon Sir Anthony Mason AC KBE GBM

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1. It is a very great pleasure to launch the 6th edition of *The High Court and the Constitution* and to congratulate James Stellios on his success in maintaining, and perhaps enhancing, the very high quality of Leslie Zines' previous editions. James is, of course, the author of the highly regarded work on Ch III, 'The Federal Judicature'. Chapter III is virtually a constitution within a constitution. It has been a prolific source of implications, as Professor Sawer remarked many decades ago. And since then new implications keep on coming, including *Kable (No 1)* and *Kirk*.
2. My pleasure in launching the new edition is marred only by the loss of Leslie Zines who was a close personal friend over many years. He was, without any doubt, an outstanding scholar and commentator on the Australian Constitution, to be compared only with the giants of the past, such as Professor Harrison Moore and Professor Geoffrey Sawer. Justice Gummow, before he was elevated to the rank of Professor, said:

the developments in the *method* of constitutional interpretation over the last 30 years has been influenced, in significant measure, by the work of Professor Zines. (my emphasis).

I shall refer later to the importance of this comment.
3. I have followed the book through its six editions. It has continued to grow in reputation and – unfortunately – in weight, in the sense of poundage. For that, that is the weight – we must thank the High Court. Not only does it continue to deliver a plenitude of judgments on constitutional issues; it delivers very

lengthy judgments. What is more, it delivers judgments that are necessarily to some extent, at least, controversial and therefore subject to close scrutiny and criticism. All this is grist to the mill of an author. In days gone by I thought that Leslie Zines should share his royalties with the Justices of the Court. He did not take kindly to the suggestion. And I don't think James Stellios would be any more accommodating.

4. To make my point about the importance to an author of controversial decisions I take two examples. The first is the implied freedom of political communication. The second is the *Kable (No 1)* principle. Each was regarded as controversial, though now accepted, with varying degrees of enthusiasm or reluctance and each has spawned a swarm of decided cases, through which the constitutional commentator must navigate his way. Discussion of the freedom of political communication spans over 50 pages in the book, while the *Kable (No 1)* principle, together with its offspring, some would say its illegitimate offspring, *Kirk*, occupies over 30 pages.
5. James Stellios has made a notable contribution to the discussion in the book of both these contentious areas of constitutional law, as well as the scope and incidents of the executive power in s 61 which, after the *Pape* and *Williams* cases, is bound to become a growth area in Constitutional Law. In relation to the cases on the implied freedom of political communication, James Stellios has subjected them to searching scrutiny and has identified a number of uncertainties that require resolution by the Court.
6. At one time, in their younger days, when they were officers of the Federal Attorney-General's Department, Sir William Deane and Professor Zines planned to co-author a book on the Australian Constitution. It did not come to

pass, probably because Sir William went to the Bar. Professor Zines many years later asked the question 'Who would have written the Chapter on implied rights?' My guess is it would have been Sir William Deane.

7. As is often the case, James Stellios as the new author, has preserved much of the Zines text as it was in the 5th edition. For this he is to be commended. No doubt, when it comes to later editions, it will be necessary to amend the Zines text. Although the text of the Constitution itself seems to be set in stone, constitutional law is dynamic, as Alfred Deakin predicted that it would be. As it is, apart from the areas I have already mentioned, James Stellios has contributed a fresh commentary on the Marriage Equality case, the *Betfair* decision on s 92, the Plain Packaging Case, judicial power and on *Clarke v Commissioner of Taxation* which deals with the *Melbourne Corporation* implication.
8. *The High Court and the Constitution* is a unique work. It is not a textbook, certainly not a student's textbook. It is a comprehensive commentary on how the High Court has elucidated and elaborated the text of the Constitution by analysing and evaluating the decisions and judgments of the High Court. It cannot be said that Leslie Zines offered a ringing endorsement of the High Court's work. He did not hesitate to criticise the Court when he considered that it had fallen into error or confusion. His trenchant criticism of *Austin v Commonwealth* is a striking example. The office of Chief Justice provided no immunity against his criticism. He even had the temerity to criticise Sir Owen Dixon and his conception of s 92 and his assertion that the judicial function does not involve an element of choice. At the same time, Leslie Zines

acknowledged the complexities involved in the work of the High Court and the difficulty of some of the choices to be made.

9. I have always thought that the most interesting chapter in *The High Court and the Constitution* is the final chapter, 'The High Court: Methods, Techniques and Attitudes'. Professor Gummow's comment, which I quoted earlier, was obviously a reference to what Professor Zines had to say on this subject, as well as to other sections of the book which deal with methods of interpretation. Central to the Zines perspective on constitutional interpretation was the relevance of policy, values and consequences, a view which would not commend itself to all High Court Justices, including Chief Justices Latham and Dixon. Likewise, the existence of judicial choices, a legacy of Professor Julius Stone's lectures, at the University of Sydney, was a core element in his view of the judicial function. His discussion of the First and Second Territories Representation Cases is a classic illustration of a choice which confronted the Court, in which the arguments were closely, if not evenly, balanced.
10. It remains for me to make three final comments. First, to note that the Stellios literary style – direct, economical and incisive – matches the Zines style. Secondly, I congratulate The Federation Press on publishing this edition, as well as the 5th edition of the book. In doing so, I should pay a tribute to The Federation Press for their foresight and courage in publishing a wide range of legal publications which have enriched Australian law. In paying this tribute, I am conscious of the fact that the role of The Federation Press in publishing Australian legal texts has never been sufficiently recognised by the Australian legal community. In my earlier days in the law, we survived on the thin gruel of English textbooks. Since then, there has been a revolution in Australian legal

publications led by The Federation Press. The Federation Press took up publication of *The High Court and the Constitution* when Butterworths was reluctant to continue as the publisher. Despite Leslie Zines's affection for Cambridge University, I am sure that he thought that it was appropriate to have an Australian publisher.

11. In conclusion, it remains for me to state expressly what has been implied in every sentence of this speech. This is a great book. It is truly an Australian classic which is of value to both sophisticated lawyers, students and those who are interested in the Australian Constitution and the High Court and how each of them works.

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