

Introduction

*The Hon Sir Anthony Mason AC KBE GBM**

On 2 December 2016, I welcomed participants to a conference held in honour of Michael Coper,¹ the long-serving Dean of the ANU College of Law and before that a distinguished Professor of Constitutional Law. Many of the papers delivered at that conference are now published in this collection.

I have known Michael for 47 years and in all his capacities over the years. So I shall take this opportunity, as a friend, to say something about him and his achievements, without, I trust, stealing too much of the thunder of John Williams.²

Sir John Latham said: ‘When I die section 92 will be found written on my heart.’³ In Michael’s case, s 92 was written on his T-shirt, a fashion which struck me as quite remarkable, even if it did not feature on the catwalk. Michael sat through the argument in the *North Eastern Dairy Case*,⁴ a s 92 case, wearing that T-shirt under a business shirt and tie, thereby complying with Sir Garfield Barwick’s edict that all males entering the public gallery of the High Court should wear a tie. To that end, Sir Garfield armed the police officer in attendance at the old Courthouse in Taylor Square with a selection of his old discarded ties from which the wearer of an open-necked shirt would be invited to make a choice. It was a difficult choice because Sir Garfield was no fashion plate. Of course, the practice terminated when T-shirts came into fashion – you can’t wear a tie with a T-shirt. I should correct that statement – you can, but if you do, you don’t look like a future Professor of Constitutional Law, even less a Law Dean.

When Michael was at UNSW I asked him from time to time to recommend an Associate which he did on at least three occasions. One of them, Brian Opeskin, chaired a session at the conference. Two of the speakers were my former Associates, Justice Gageler and Andrew Bell SC. In Part I of this book, Justice Gageler, who is an alumnus of the ANU and was counsel in *Betfair*,⁵ explains to us the tortured history of s 92.

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1 *New Ways Forward: Reform and Renewal in Constitutional Interpretation and Legal Education* (University House, Australian National University, Canberra, 2 December 2016).

2 See Prologue.

3 Announcement, ‘The Chief Justice of the High Court: Retirement of Sir John Latham’ (1952) 26 *Australian Law Journal* 2, 2.

4 *North Eastern Dairy Co Ltd v Dairy Industry Authority of New South Wales* (1975) 134 CLR 559.

5 *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418.

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Michael was appointed to the revived but moribund Inter-State Commission. The Commission enjoyed the unusual distinction of dying twice. Michael was in a position to administer the last rites on the occasion of its second death.⁶ Michael was also a member of a Committee of the Constitutional Commission.

The omniscient Andrew Bell spoke at the conference and has a chapter in Part I of this collection about the Inter-State Commission. He tells us what role it was intended to play under the Constitution and why its demise came about. To me the Inter-State Commission remains one of the great mysteries of the Constitution.

I had many contacts with Michael in his role as Dean of the College of Law. I owe to him my appointment as Distinguished Visiting Fellow, even if he rejected my later suggestion that I should be appointed Most Distinguished Visiting Fellow following the appointment of Michael Kirby as another Distinguished Visiting Fellow. I am, of course, even more indebted to Michael's successor Stephen Bottomley, who has appointed me Distinguished Honorary Professor.

Michael Coper was a very popular and successful Dean. Stephen Bottomley throws some light on Michael's Deanship when he addresses in Chapter 11 of this book on the topic 'Being a Law Dean'.

In my mind, however, Michael will be chiefly remembered for his authorship of books about the Constitution. *Freedom of Interstate Trade*,⁷ an exhaustive and scholarly examination of the cases on s 92, advocated a 'discrimination' approach to s 92, an approach which had been favoured by some Justices and was ultimately adopted by the High Court in *Cole v Whitfield*.⁸ *Freedom of Interstate Trade* was followed by *Encounters with the Australian Constitution*⁹ and the four books Michael co-edited with George Williams.¹⁰ In addition he was a co-editor of the highly successful *Oxford Companion to the High Court of Australia*.¹¹ The Companion is a mine of interesting information about the Court, its denizens and their idiosyncrasies.

Without downplaying the importance of his other publications and of the High Court oral history project, another Michael Coper brainchild, I have always regarded *Encounters with the Australian Constitution* as the most entertaining and readable book about the Constitution. I pick it up from time to time and re-read familiar passages. It is a book which only a lawyer with a love of constitutional history, the High Court and an entertaining writing style could create. It is a book which brings to light the vitality of the Court and the ways in which it has viewed the Constitution over the years. It demonstrates the accuracy of Sir Maurice Byers' remark to Bob

6 Michael Coper, 'The Second Coming of the Fourth Arm: The Role and Functions of the Inter-State Commission' (1989) 63 *Australian Law Journal* 731.

7 Michael Coper, *Freedom of Interstate Trade under the Australian Constitution* (Butterworths, 1983) (*Freedom of Interstate Trade*); reviewed by me at (1983) 6 *University of New South Wales Law Journal* 234.

8 (1988) 165 CLR 360.

9 Michael Coper, *Encounters with the Australian Constitution* (CCH, 1987).

10 Michael Coper and George Williams (eds), *Parliament, Power and the People* (Federation Press, 1997); Michael Coper and George Williams (eds), *How Many Cheers for Engineers?* (Federation Press, 1997); Michael Coper and George Williams, *The Cauldron of Constitutional Change* (Centre for International and Public Law, Australian National University, 1997).

11 Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (Oxford University Press, 2001). See further Chapter 8 of this book.

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French in speaking of the then members of the Court: ‘They are just chaps, Bob, just chaps’.¹²

Because Michael Coper’s reputation as a constitutional lawyer has been so closely associated with s 92, there has been a tendency to overlook his illuminating survey of the cases on s 90 in his essay ‘The High Court and Section 90 of the Constitution’ published in 1976 in volume 7 of the *Federal Law Review*.¹³ There he devastatingly criticised the ‘criterion of liability’ test adopted in *Bolton v Madsen*¹⁴ and the confusing way in which it was applied in subsequent cases, leading to a reasoned argument for a different approach. Ultimately the High Court jettisoned the ‘criterion of liability’, just as it had discarded the ‘criterion of operation’ test in s 92.¹⁵ In this essay Michael advocated recourse to extrinsic materials which were then forbidden fruit but not now.

The conference program was, and this collection of essays is, designed with Michael’s career and interests very much in mind. ‘The Intractable Dilemma of the Judicial Process’, considered in Part II of this book, was a topic discussed in a paper he presented in Melbourne in 2005.¹⁶ In that paper he canvassed various approaches to the judicial function, including formalism and realism, concluding that in the end it was a matter of judicial choice, without concealing his own preference for realism.

The contributors to this topic consist of one judge, the ubiquitous human dynamo, Michael Kirby, and two academics, Tony Blackshield and Adrienne Stone. One against two seems an unequal contest. But not when the one is Michael Kirby.

Then, after various ways of seeing the law through different lenses are canvassed in Part III of the book, we have ‘Lawyering and Leadership’ in Part IV. I have always understood Michael Coper to have been critical of law teaching in his days as a student, a view I shared based on my own experience at Sydney Law School. Advances have since been made. But how many Australian law schools engage in inter-active teaching? UNSW and UTS do but Sydney does not. And how many Australian academic lawyers have the capacity and experience to engage in successful inter-active teaching? Why is statutory interpretation not taught in LLB courses in many Australian law schools? And why is it that law schools have difficulty in finding professional academics to teach such core subjects as contracts and torts? These are just some of the many questions that confront exponents of modern legal education.

Before I leave this topic, I should say something about the role of the ANU College of Law. The ANU has a proud history of participation in constitutional law. To the giants of the past, Geoffrey Sawer and Leslie Zines, we can add Michael Coper, Geoffrey Lindell and now James Stellios. The ANU’s privileged position in the national capital

12 A remark made during preparation for the hearing in *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168. See Chief Justice Robert French, ‘Legal Change – The Role of Advocates’ (Speech delivered for the Sir Maurice Byers Lecture, Sydney, 22 June 2016).

13 Michael Coper, ‘The High Court and Section 90 of the Constitution’ (1976) 7 *Federal Law Review* 1.

14 (1963) 110 CLR 264.

15 Cf *Phillip Morris Ltd v Commissioner of Business Franchises (Vic)* (1989) 167 CLR 399, 433-4 (Mason CJ and Deane J), 446-51 (Brennan J), 491-2 (McHugh J); *Ha v New South Wales* (1997) 189 CLR 465, 497-8 (Brennan CJ, McHugh, Gummow and Kirby JJ), 510 (Dawson, Toohey and Gaudron JJ).

16 Published as Michael Coper, ‘Concern About Judicial Method’ (2006) 30 *Melbourne University Law Review* 554.

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gives it access to government and its agencies with advantages that should flow on, not only to the study of constitutional law and public law generally, but also to international law and other legal disciplines. I use the word 'study' advisedly because a primary goal of a law faculty, as with a university, is to promote hard-edged scholarship.

This comment enables me to conclude by saying that *Freedom of Interstate Trade* and the essay on s 90 are instances of such scholarship, linking penetrating analysis of judicial decisions with a close eye to a solution of what were thought to be intractable problems. Incidentally, *Freedom of Interstate Trade* and the essay on s 90 expose the fallibility of the High Court and, in the case of s 92, the Privy Council as well. But I say that by way of aside – it is not a message to be proclaimed from the rooftops, at least in association with my name.

So, let the entertainment begin!