

Legislative, Executive and Judicial Powers in Australia, by W. A. WYNES, LL.D. (The Law Book Company Ltd, Sydney, 1976 5th ed. published posthumously), pp. i-xiv, 1-590. Cloth recommended retail price \$34.50, P/B recommended retail price \$24.50. (ISBN 0 455 19389 4, ISBN 0 455 19388 6 P/B).

Dr Wynes' treatise on Australian constitutional law was first published in 1936 and came to be regarded, in each of its successive editions,¹ as the leading text in the area. An important ingredient in its reputation was undoubtedly its comprehensive coverage of the case law, but other factors perhaps included the absence of any serious competitors, the close resemblance of the style of the book to that of the High Court itself, and occasional reference to the book in judgments of the Court. Today it has a number of serious competitors, each of which is useful for different reasons and for different purposes, and it is hard to judge whether Wynes' text continues to hold pride of place.

Of course, the reputation of a book, as indeed of a person or an institution, is generally an unscientific phenomenon, and rarely the product of any analysis which would make explicit the criteria on which the assessment of the book is based. Over the years, however, the critics have been remarkably consistent in their appraisal of the virtues and vices of Wynes' book,² and there seems to be a consensus among the initiated about its value and its limitations. Its value is plain enough: as an exposition and analysis of the judicial decisions on the Constitution, it is painstaking, exhaustive and scholarly. As with any textbook, it offers an organized, summary account of the primary material, and provides a guide to what the law of the Constitution is.

This positive virtue at once suggests the major limitation of the work: it is excessively legalistic. W. P. M. Kennedy observed in relation to the first edition that

There is little here of jurisprudence—social or otherwise . . . we miss discussion of the forces at work in the processes of interpretation, of the possibilities, demands, or necessity for reform, of how far the constitutional law adequately serves Australian society.³

Most of the other reviewers expressed the same regrets, and stressed the incompleteness of any work which ignored the role of extra-legal factors in the judicial process.⁴ They conceded that the book had to be judged within its own self-imposed limits, but even then the style was found to be

¹ 2nd ed., 1956; 3rd ed., 1962; 4th ed., 1970.

² In relation to the 1st ed., see W. K. Fullagar, (1936) 9 A.L.J. 454; W. P. M. Kennedy, (1937) 2 U. of Toronto L.J. 170; W. P. M. Kennedy, (1936) 50 Harv. L.R. 147; E. C. S. Wade, (1938) 6 Camb. L.J. 477; R. T. E. Latham, (1937) 53 L.Q.R. 579; C. I. Menhennitt, (1936) 1 Res Judicata 180; O. R. McGuire, (1937) 25 Geo. L.J. 801. In relation to the 2nd ed., see R. W. Baker, (1958) 1 Tas. U.L.R. 150; Sir John Latham, (1957) 1 Melb. U.L.R. 266; F. R. Beasley, (1957) 4 U.W.A.L. Rev. 177; S. A. De Smith, (1957) 20 Mod. L.R. 681; C. Carr, (1957) 73 L.Q.R. 420; E. McWhinney, (1958) 7 Am. J. of Comp. L. 426; G. V. La Forest, (1959) 37 Can. B. Rev. 244. In relation to the 4th ed., see M. H. M. Kidwai, (1970) 7 U.Q.L.J. 130; H. Zelling, (1971) 4 F.L. Rev. 361.

³ W. P. M. Kennedy, (1937) 2 U. of Toronto L.J. 170, 171.

⁴ See especially W. P. M. Kennedy, R. T. E. Latham, S. A. De Smith, and E. McWhinney, cited note 2 *supra*.

⁵ R. T. E. Latham, note 2 *supra* at 579.

"ungraceful and redundant"⁵ and "somewhat difficult to read";⁶ Dr Wynes was judged not to have entirely succeeded "in cutting a clear path through the mazes of judicial undergrowth".⁷

These criticisms remain as true of the fifth edition as they were of the first; the style is ponderous, and reference to extra-legal factors is assiduously avoided. In response to the charge that his work is excessively legalistic, Wynes consistently maintained, with Sir Owen Dixon, that he should be sorry to think that it was anything else.⁸ His defence of legalism became less strident in later editions, but remained just as insistent and pervasive. This is not the place to engage in an extensive discussion of the nature of the judicial process, nor is it necessary to repeat what other reviewers have adequately pointed out, but two brief comments may be made to reinforce the criticism of Wynes' legalistic approach.

First, there is no clear-cut distinction between "legal" and "extra-legal" considerations which would warrant the use of the legalistic model as a complete description of the decision-making process of the High Court. It is not even an accurate description of what the High Court says, let alone of what it does; Professor Zines has made the point that commentators have rather underestimated the extent of the Court's explicit reference to broad policy considerations in its judgments.⁹ A more important criticism which should be made, he says, is that these policy considerations are never subjected to any argument or analysis which would reveal the existence of competing values and policies;¹⁰ they are dogmatically presented as unimpeachable fact and mostly used to justify rather than to guide a decision. Dr Wynes' presentation of the High Court's decision-making process certainly accords with the model which many of the Justices have strenuously asserted and which some continue to assert; furthermore, he acknowledges the influence of "practical" considerations,¹¹ which no doubt merge in legal doctrine as a consequence of their recognition in judgments. But the debate about legalism and realism is, I think, a good deal more sophisticated these days, both within the High Court and outside it. Within the Court, such factors as the need for government to be able to work, the value of judicial restraint, the extent of social and economic change since 1900, the place of Australia in international affairs, the notion of powers inherent in the Commonwealth as a national polity, and the implications of the democratic nature of aspects of the Constitution, are presently receiving far more explicit attention and elaboration than they might once have received, particularly (but not exclusively) in the judgments of Mason, Jacobs and Murphy JJ.¹² It may be, as Zines says, that

⁶ R. W. Baker, note 2 *supra* at 150.

⁷ W. P. M. Kennedy, note 3 *supra* at 171.

⁸ See Sir Owen Dixon's well-known and oft-quoted remarks made in his speech on assuming office as Chief Justice of the High Court, reported in (1952) 85 C.L.R. xi, xiv.

⁹ L. Zines, "The Australian Constitution 1951-1976" (1976) 7 F.L. Rev. 89, 134.

¹⁰ *Ibid.*

¹¹ See e.g., Wynes 3rd, vii-viii.

¹² See e.g., the major cases decided in 1975, including the *Australian Assistance Plan* case (*Victoria v. Commonwealth* (1975) 7 A.L.R. 277), the *Petroleum and Minerals Authority* case (*Victoria v. Commonwealth* (1975) 7 A.L.R. 1), the *Senate Representation of Territories* case (*Western Australia v. Commonwealth* (1975) 7 A.L.R. 159), the *Electoral Boundaries* case (*Attorney-General for Australia (ex. rel. McKinlay) v. Commonwealth* (1975) 7 A.L.R. 593), the *Offshore Sovereignty* case (*New South Wales v. Commonwealth* (1975) 8 A.L.R. 1), and *North Eastern Dairy Co. Ltd v. Dairy Industry Authority of New South Wales* (1975) 7 A.L.R. 433.

what is stated is in truth only one side of an argument, but the absence of dialogue within individual judgments is just as marked in relation to strictly legal arguments; if a Justice's reasons are to be persuasive and acceptable to the world at large, he should meet all of the arguments contrary to his point of view. To facilitate dialogue, it is perhaps the responsibility of counsel to marshal the relevant extra-legal factors and press them upon the Court to a greater extent than hitherto. But even if genuine dialogue is not yet the rule, it is interesting to note that the "extra-legal" observations of some of the Justices appear at least to have provoked other Justices to explicitly state contrary policy considerations, if only to deny the relevance of their brothers' observations and not merely their conclusiveness.¹³

Outside the Court, the debate has passed beyond the stage of employing the labels which I have of necessity used to this point; "legalism" is now seen to be a rather vague concept which runs together a number of different features of the judicial process,¹⁴ and a sharper distinction is being drawn in evaluating the Court's performance between the reasoning it has used and the results it has achieved.¹⁵ In any event, neither the legalistic nor the pragmatist model exactly corresponds with reality. Just as it is apparent that strictly legal argument is often inconclusive and that leeways of choice are nearly always available,¹⁶ so it is clear that the words of the Constitution set limits within which the judicial discretion must be confined, however hard it is in some cases to identify those limits in an objective sense.¹⁷ It is clear, too, that the so-called extra-legal arguments may be similarly inconclusive, and that explicit recognition of extra-legal factors will not result in "slot-machine jurisprudence" any more than a strictly legal approach ever could.¹⁸ In adopting an unrelenting position of strict and complete legalism, Wynes does nothing to assist in developing techniques for the Court to handle satisfactorily the factors which inevitably flow in to fill the void when strictly legal considerations are inconclusive.

My second comment relates to the predictive value of Wynes' legalistic approach. No doubt the need for certainty in the law is a major argued justification for the High Court's legalistic method, yet to the extent that certainty is a function of predictability, it may be that an approach which explicitly recognized extra-legal factors would yield more rather than less certainty.¹⁹ This would be so for the reason that factors which in fact influenced decisions would be apparent rather than hidden. Even in the absence of judicial frankness, extra-legal speculation by commentators may be less arid than legal logic. Let me give just two examples of positions taken by Dr Wynes in the fourth edition of his book which, if regarded as predictions of what the High Court would decide when the respective points arose, turned out to be wrong.

¹³ See e.g., the *Offshore Sovereignty* case, note 12 *supra* at 45-47 *per* Gibbs J. See also his Honour's statement in *Dickenson's Arcade Pty Ltd v. Tasmania* (1974) 130 C.L.R. 177, 222 and the comment thereon in M. Coper, "The High Court and Section 90 of the Constitution" (1976) 7 F.L. Rev. 1, 44.

¹⁴ See e.g., Zines, note 9 *supra*.

¹⁵ See e.g., commentary by Zines on Evans, "The Most Dangerous Branch? The High Court and the Constitution in a Changing Society" in A. D. Hambly and J. L. Goldring (eds), *Australian Lawyers and Social Change* (1976) 13, 81.

¹⁶ See especially J. Stone, *Legal System and Lawyers' Reasonings* (1964) 209 ff.

¹⁷ This point is pursued in M. Coper, "A Decade of Chief Justice Barwick—Crisis in Constitutional Interpretation?" (unpublished paper presented to the Australasian University Law Schools Association Government Law Interest Group, August 1975).

¹⁸ Cf. G. Sawyer, *Australian Federalism in the Courts* (1967) 59-75.

¹⁹ Cf. K. S. Jacobs, "Lawyers' Reasonings: Some Extra-Judicial Reflections" (1967) 5 Syd. L. Rev. 425.

First, in relation to section 51(xx) (the corporations power) he expressed the view that, notwithstanding the demise of the doctrine of reserved State powers,²⁰ *Huddart Parker and Co. Pty Ltd v. Moorhead*,²¹ which invalidated sections of the Australian Industries Preservation Act 1906 (Cth), was correctly decided. This was because the Act was not a law with respect to corporations, but was a law with respect to "contracts of a designated class; the acts prohibited to the corporations specified were prohibited to them, not in their capacity of corporations, but because of the inherent quality of the acts themselves".²² This view failed to anticipate the decision in the *Concrete Pipes* case,²³ which effectively overruled the *Huddart Parker* case and affirmed the validity of properly drafted trade practices legislation in its application to corporations. In the fifth edition, Wynes concedes that his earlier view was too widely expressed, but invokes the refusal of the majority in *Concrete Pipes* to read down the Trade Practices Act 1965 (Cth), in order to support his modified view that "the power extends to cover the control of the activities of corporations . . . in respect of their direct and immediate connection with those corporations *as such*—i.e. not activities unconnected with the purposes for which they exist; not simply because of the inherent quality of the activities themselves" (page 165). No doubt there must be some limits to section 51(xx), so that a law will not be a law with respect to corporations merely because it is specifically addressed to them,²⁴ but I suggest, with respect, that with a little less emphasis on legal logic and semantics and a little more emphasis on the evident consensus about the pressing need for uniform trade practices legislation, the decision in *Concrete Pipes* would have been more easily foreseeable. The leeways of choice created by the inconclusiveness of the constitutional description of the power clearly permitted that need to be recognized, even if it was bound to be expressed in the language of characterization.

Secondly, in relation to section 92 (freedom of interstate trade), Wynes expressed the view in the fourth edition that *Home Benefits Pty Ltd v. Crafter*,²⁵ which validated State legislation prohibiting the use of trading stamps, was of doubtful validity.²⁶ But in *Samuels v. Readers Digest Association Pty Ltd*,²⁷ the High Court affirmed the earlier decision, notwithstanding the fact that much of the reasoning in it was based upon principles no longer regarded as sound. I think that Wynes' error stemmed from over-concentration on the niceties of the Dixonian doctrine in relation to section 92, with its focus on the distinction between what is an essential attribute of interstate trade and what is merely incidental, and from underplaying the importance of the legislature's view of what was an undesirable trading practice and the long history of legislative regulation of such practices. There are simply no criteria which can assist in drawing the metaphysical distinction between essential and non-essential attributes, and Wynes' disagreement in the fifth edition with the Court's application of the Dixonian doctrine in *Readers Digest* takes us nowhere (pages 272-273).

²⁰ *Amalgamated Society of Engineers v. Adelaide Steamship Co. Ltd* (1920) 28 C.L.R. 129.

²¹ (1909) 8 C.L.R. 330.

²² Wynes 4th, 155.

²³ *Strickland v. Rocla Concrete Pipes Ltd* (1971) 124 C.L.R. 468.

²⁴ Cf. *id.*, 490 per Barwick C.J.

²⁵ (1939) 61 C.L.R. 701.

²⁶ Wynes 4th, 263, 280. The legislation prohibited any advertising of goods for sale which offered some gift or material inducement other than a cash discount.

²⁷ (1969) 120 C.L.R. 1.

On the other hand, the doctrine that laws which are merely "regulatory" do not infringe section 92—although superficially much vaguer than the precision claimed for the Dixonian test—is in fact more helpful, even if it has seemed to some of the Justices that such a doctrine is objectionable because it is synonymous with a judgment on the desirability of the impugned legislation.²⁸ But if the choice thrown up by section 92 is not to be made arbitrarily, "extra-legal" considerations are inescapable; an approach which tends to make such considerations explicit is therefore preferable to one which keeps them hidden. The notion of laws which are merely regulatory does require attention to the arguments for and against a wide or narrow view of section 92, and arguments such as those advocating deference to legislative judgment in relation to undesirable business practices can yield general principles which go beyond a mere *ad hoc* assessment of the desirability of particular legislation. As these factors become more explicit, a firmer foundation for prediction is built and the law approaches the kind of certainty which encompasses and is compatible with change rather than the antithesis of it.

The point about these examples is not to suggest that there is an infallible way of predicting High Court decisions, nor even that prediction is particularly important, but is simply that the legalistic approach does stress certainty, and in doing so it is misleading and incomplete. One of the reasons that it is misleading is that it tends to treat the Court as a single whole rather than the sum of its individual Justices. To some extent, this may be a consequence of the positivist outlook and a corollary of the declaratory theory of judicial law-giving, but it is unfortunate that it distracts attention from the value of focusing on and drawing together through a line of decisions the views of particular Justices. This individual-oriented perspective is more likely, I think, to reveal the factors at work in the judicial process, which even so staunch an advocate of legalism as Sir Owen Dixon once remarked is essentially the work of individuals,²⁹ than is the attempt to reconcile cases, the results of which are often determined by purely fortuitous majorities. Certainly, the whole Court is sensitive to the value of precedent and *stare decisis* and naturally endeavours to take account of earlier decisions, irrespective of the diversity of reasoning within many of them, when similar or even identical questions arise again. But if the previous judicial exposition of the Constitution is elevated to a confident statement of what the law is, rather too much weight is being given to what is only one ingredient in the judicial decision. Quite apart from the ordinary ambiguities which create the leeways of choice in future decisions, the High Court's fondness for getting back to the text of the Constitution makes over-emphasis on the case-law gloss particularly unsafe. The fact that the

²⁸ See e.g., *ex parte Nelson* (No. 1) (1928) 42 C.L.R. 209, 225-227 and *ex parte Nelson* (No. 2) (1929) 42 C.L.R. 258, 264 *per* Isaacs J. and, more recently, *Buck v. Bavone* (1976) 9 A.L.R. 481 *per* Murphy J. Murphy J.'s view that s. 92 ought to be read as applicable only to fiscal burdens is, of course, directed to the same end as the views of those Justices who would give an expansive interpretation to the notion of regulation, namely, to narrow the effect of s. 92. Moreover, Mr Justice Murphy's test appears to be capable of rather easier application than the Dixonian test. Although Wynes' legalistic approach to *Readers Digest* is perhaps justified by the preoccupation of the Court itself in that case with the Dixonian doctrine rather than with the broader issues, it is interesting to note the erosion of the doctrine in the more recent *North Eastern Dairy* case, note 12 *supra*.

²⁹ Sir Owen Dixon, "Concerning Judicial Method", *Jesting Pilate* (1965) 152, 157.

text of the Constitution, of itself, can hardly be said to supply the answer—the very existence of the case law is proof enough of that—only reinforces my point that commentators cannot ignore the role of extra-legal factors. If these factors are not generally acknowledged in the reasons given by the Court for its decisions, it is all the more important for commentators to attempt to widen the debate and assist in legitimizing explicit and systematic judicial examination of policies relevant to the determination of legal questions.

This brings me to an associated criticism I have of Wynes' fifth edition: it does no more than make minor additions to the text and footnotes, so as to incorporate decisions made since the publication of the previous edition, with which it is otherwise identical. Even for a book which purports to do no more than set out the law as it is, there comes a time when substantial re-writing is called for to take account of changes which cannot be adequately assimilated in the existing text.³⁰ If this is not done, subsequent editions of a book may become less rather than more useful. In Wynes' book, the problem is compounded by the legalistic approach, for it leads the author to overestimate what is settled law. In some areas, notably sections 90 and 92, the very accumulation of precedent has resulted in such an unsatisfactory tangle of conflicting views and decisions, under the guise of mere application of settled principles, that it has actually strengthened the case for a fresh start;³¹ in other areas, such as the separation of the judicial power, the unsatisfactory practical consequences of strict legal doctrine have led to judicial hints that this might be good reason for departing from what was thought to be settled.³² Furthermore, social, economic and political developments throw up new problems which sometimes manifest themselves in hitherto untouched areas of the Constitution, and the scheme of an earlier edition of a text may lead the author to resist the inclusion or discussion of cases which do not easily fit the scheme. All of this again underlines the need for commentators to assist in devising, in relation to disputed questions of constitutional law, criteria for deciding not what is the "correct" view, but what is the "better" view. I think such a shift in emphasis is necessary if learned commentators are to have any role in guiding rather than merely recording High Court decisions.

If the dominant tone of this review has been critical, it should not obscure the very substantial positive achievements of Dr Wynes' book. It remains extremely valuable, for example, as a reference book for practising lawyers, judges, academics and students. Moreover, although Wynes was criticized in the past for not expressing his own views frequently enough, when he did so he was by no means always proven later to be wrong.³³ Nor did he necessarily take a narrow approach to constitutional

³⁰ There are additions to the narrative on about 50 of the book's 546 pages of text. However, they are not allowed to disturb the summaries and conclusions of the 4th edition. It may be mentioned that a reviewer of that edition had pressed on Dr Wynes the need for re-writing: Zelling, note 2 *supra* at 363.

³¹ Murphy J. has forcefully made such a start in relation to s. 92: note 28 *supra*.

³² *Re Joske; ex parte Australian Building Construction Employees and Builders' Labourers' Federation* (1974) 130 C.L.R. 87, *per* Barwick C.J. and Mason J., noted in Wynes 5th at 419.

³³ In the 1st ed., e.g., Dr Wynes successfully predicted the outcome of *James v. Commonwealth* (1936) 55 C.L.R. 1, and of *R. v. Brislan; ex parte Williams* (1935) 54 C.L.R. 262.

interpretation.³⁴ Dr Wynes' approach is predominantly legalistic, but such an approach is to a large extent an inevitable consequence of any subject-matter orientation, and in any event it finds substantial expression and justification in the methods of many Justices of the High Court itself; my comments in this review are as much directed to those methods as to Dr Wynes' description of them.³⁵

Dr Wynes died on 22 July 1975, shortly after revision of the galley proofs for the fifth edition. If there is to be another edition of *Legislative, Executive and Judicial Powers in Australia*, it will bear the imprint of another mind; nevertheless, the fifth edition stands, despite its limitations, as a monument to Dr Wynes' industrious and outstanding scholarship.

Michael Coper*

³⁴ See, e.g., Dr Wynes' view of the external affairs power (s. 51(xxix)) (Wynes 5th, 298), a view perhaps influenced by his association with the External Affairs Department.

³⁵ Cf. R. T. E. Latham, note 2 *supra*.

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