

**REVIEW: ZINES AND STELLIOS'S THE HIGH COURT AND THE CONSTITUTION (7<sup>TH</sup> EDITION)**

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Review of *Zines and Stellios's The High Court and the Constitution*  
(James Stellios, The Federation Press, 7<sup>th</sup> ed, 2022, ISBN  
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With the release of the seventh edition of *The High Court and the Constitution*, James Stellios has taken full intellectual ownership of the iconic work of Professor Leslie Zines. It is fitting that with this edition the book is now, for the first time, badged as *Zines and Stellios's The High Court and the Constitution*. Professor Zines set out to explain the governing dynamics of the nation's founding document. Stellios extends the exercise to recent developments without losing either the integrity or the distinctive tone of his predecessor's work. The slimline text of the Zines era has become a publication of doorstep proportions, but Stellios has managed to maintain the intellectual elegance of the earlier editions.

The result is a publication that will provide ever greater returns as a reference work for those seeking to understand the principles that now apply in most of the key battlegrounds of constitutional conflict. Inevitably, given the scale of the work, the reader must search harder for the throughlines of explanation that Zines sought to discern. However, the breadth and ambition of the analysis undertaken by Stellios keeps faith with the approach of Zines. The work retains a focus on the historical perspective, building on the account in the first chapter of the 'Struggle for Standards'<sup>1</sup> in the early years of the High Court and culminating in the *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd*.<sup>2</sup> The emphasis on historical development is not a matter of mere accretion of references over time, like legal coral. Within each chapter, the explanation of principle is made part of an historical account of the Australian concept of federalism and the continual shifts in understanding of the governing principles.

The evolution of the text itself is in many ways a reflection of the evolution of the *Constitution* in its interpretation and application by the High Court. The early editions documented the various demarcation disputes that required the High Court to give content to the Australian conception of federalism. Battles fought in the context of characterisation (for the purposes of section 51 powers in particular), fiscal relations and intergovernmental immunities gave rise to a relatively settled understanding of the respective positions of the Commonwealth and the States and Territories. Zines showed how these cases had their roots in the early struggle for standards. However, as later editions of the work explained, there is no such thing

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<sup>1</sup> James Stellios, *Zines and Stellios's The High Court and the Constitution* (The Federation Press, 7<sup>th</sup> ed, 2022) ch 1.

<sup>2</sup> *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129.

as a comprehensive or wholly settled understanding. In the context of executive power and Commonwealth expenditure, for example, *Pape v Federal Commissioner of Taxation*<sup>3</sup> and *Williams v Commonwealth*<sup>4</sup> demonstrated that more than a century after federation there was still scope for major changes in our conception of the Commonwealth and its powers.

There was also scope in recent times for the High Court to engage in some much needed housekeeping in areas of doctrinal untidiness. The COVID-19 pandemic lifted the concept of extreme quarantine laws from the obscurity of the history books to the reality of 21<sup>st</sup> century legislation. In *Palmer v Western Australia*,<sup>5</sup> concerning a challenge to the border controls introduced by Western Australia, the High Court held that the intercourse and trade and commerce limbs of section 92 were each to be understood as being concerned with protection against unjustified discriminatory burdens. This decision thus served to extend the analysis in *Cole v Whitfield*<sup>6</sup> to the intercourse limb, ending the unhappy divergence that had developed in the treatment of the latter.

Stellios explains a similar process of doctrinal alignment in relation to intergovernmental immunities. In the chapter on ‘Intergovernmental Relations’ he builds on the existing critique of the state of the law regarding intergovernmental immunities as considered in *Commonwealth v Cigamic Pty Ltd (in liq)*,<sup>7</sup> *Melbourne Corporation v Commonwealth* (‘*Melbourne Corporation*’)<sup>8</sup> and subsequent cases. *Spence v Queensland* (‘*Spence*’) presented the Court with an opportunity to consider the differences, fittingly described as ‘obscure’, between the implied immunities benefiting the Commonwealth and the States respectively.<sup>9</sup> Stellios gives a convincing account of the appropriateness of the Court’s solution in aligning the immunities by embracing *Melbourne Corporation* as a statement of the scope of the immunity as applied to both the Commonwealth and the States. Whether the positions remain aligned is another question – more recent authority suggests that *Spence* might be read as meaning that the Commonwealth’s immunity is at least as broad as the immunity recognised in *Melbourne Corporation*, but may extend further: *Aboriginal Areas Protection Authority v Director of National Parks*.<sup>10</sup>

Across the seven editions of *The High Court and the Constitution* there has been a significant shift towards constitutional cases that are concerned less with the relationship between the Commonwealth, States and Territories and more with the relationship between the state (in any of its guises) and the individual. This is particularly evident in the context of Chapter III.

Here Stellios is uniquely qualified to explain the principles emerging from the case law. The work of Stellios on Chapter III is rightly regarded as authoritative,

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<sup>3</sup> *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1.

<sup>4</sup> *Williams v Commonwealth* (2012) 248 CLR 156.

<sup>5</sup> (2021) 272 CLR 505, 525–526 (Kiefel CJ and Keane J), 571 (Gordon J), 578 (Edelman J).

<sup>6</sup> (1988) 165 CLR 360.

<sup>7</sup> *Commonwealth v Cigamic Pty Ltd (in liq)* (1962) 108 CLR 372.

<sup>8</sup> *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31.

<sup>9</sup> (2019) 268 CLR 355, 445 (Gordon J).

<sup>10</sup> [2022] NTSCFC 1, [85] (Grant CJ, Southwood and Barr JJ).

and here it finds expression in a lengthy and commanding chapter on judicial power. There is a detailed account of *Kable v Director of Public Prosecutions (NSW)* and the long line of cases which followed,<sup>11</sup> developing the concept of the institutional integrity of the Courts as an important check on legislative power. These principles, and related principles deriving from Chapter III, have proved to be of particular significance in an era of preventative detention, continued controversies under the *Migration Act 1958* (Cth) and aggressive modes of law enforcement against criminal organisations and terrorist threats. Stellios also explains the entrenched principles of judicial review deriving from Chapter III, operating at the State level through *Kirk v Industrial Court (NSW)*<sup>12</sup> and at the Commonwealth level through section 75 as seen in cases such as *Graham v Minister for Immigration and Border Protection*.<sup>13</sup>

As the title of the book indicates, this is as much an account of the High Court over time, in its constitutional jurisdiction, as it is an explanation of constitutional principles. Zines set out to demonstrate that the dynamics of the *Constitution* are as much about the shifting dynamics of the Court and its judicial characters as they are about the rules to be discovered in the document. This is most explicit in the final chapter on 'The High Court: Methods, Techniques and Attitudes',<sup>14</sup> but it is a theory woven into the analysis within each chapter. Stellios maintains the technique in describing recent developments. For example, in developing the analysis on the implied freedom of political communication, Stellios explains the ongoing tensions within the Court regarding the tests of structured proportionality. Controversies over the discovery of the implied limitation have given way to controversies about the Court's techniques for assessing justifiability and compatibility. Here, as elsewhere throughout the book, there is a sense that there is room for supposedly settled positions to be unsettled. At least Stellios and his readers may be assured of worthy material to be considered in the eighth edition.

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<sup>11</sup> *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.

<sup>12</sup> *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531.

<sup>13</sup> (2017) 263 CLR 1.

<sup>14</sup> Stellios (n 1) ch 17.