

## BOOK REVIEWS

*The Making of the Australian Constitution*, by J. A. LA NAUZE, (Melbourne University Press, Melbourne, 1972), pp. i-xii, 1-369, 8 pp. plates. Recommended Australian price \$15.00. ISBN O 522 84016 7.

This book is the fourth in the *Studies in Australian Federation* series put out by Melbourne University Press. The purpose of the series, as described by the Press itself, is 'the publication of scholarly writing upon Australian Federation'. The present reviewer welcomed this policy on an earlier occasion<sup>1</sup> as helping to combat the national preoccupation with such unconstructive events as Gallipoli and Ned Kelly. He still does, and wishes the series a long and prosperous life. The standard set so far has been high, largely because the author of the book now under review, Professor J. A. La Nauze of the Research School of Social Sciences at the Australian National University, has been the major contributor as well as the senior member of the Editorial Advisory Board. Students of federation were already much in Professor La Nauze's debt for his editions of Alfred Deakin's works, his magnificent biography of Deakin<sup>2</sup> and his short but, to lawyers, devastating study of the genesis of section 92.<sup>3</sup> He has now produced the natural successor to these achievements, an account of the actual making of the Australian Constitution as a document.

Happily conscious that he is in no way equipped to detect faults which may be apparent to professional historians, the present reviewer is of opinion that *The Making of the Australian Constitution* is very good indeed. It is well written, perceptive and thorough. At no stage does the reader sense any failing of perspective or lack of exact understanding. One of the skills an historian should have is the ability to penetrate the minds behind the written records from which he chiefly works. Professor La Nauze has this skill in high degree and in addition the literary ability to convey his perceptions to the reader. The book brings to life the intellects and characters of the remarkable men who created the Constitution in the 1890s in a manner both vivid and cogent. It is embellished with eight pages of well-chosen illustrations and eight appendices of assorted documents and information.

The sense of independent nationhood which sustained and ultimately united the draftsmen of the Constitution had a character which is not common. There was an element of genuine vision which gave to such men as Barton, Deakin, Inglis Clark, Kingston, Baker, Garran, possibly even Griffith and Isaacs, and no doubt others less celebrated, the determination to persist and to rise above local political complications. Combined with this was a level-headed assessment of the practical which was illustrated in many ways. The first was the production at the very outset by Inglis Clark and Kingston of draft constitutions as working documents from which to proceed. Then the decision to use the machinery of Enabling Acts and elected delegates as a means of half-selling federation to the voters before there was even a federation to sell. Then the abstention from division on as many motions as possible. Then the shrewd ways in which the haverings of Western Australia, the intermittence of Queensland and Reid's last-minute embarrassments in New South Wales were handled, not to mention the lofty preciosity of New Zealand (pp. 21, 67, 259). And of course the final confrontation with a Joseph Chamberlain who, notwithstanding the author's generous presentation of his point of view (except for the Jameson raid: p. 261), emerges as a man totally lacking the ordinary decencies of negotiation. (At least he was impartial. He disregarded the Australian delegates no more than he disregarded his own advisers.) This combination of the ideal and

<sup>1</sup> Book review (1970) 7 M.U.L.R. 446, 447.

<sup>2</sup> Of these only *Federated Australia* (1968), edited selections from Deakin's anonymous post-federation letters to the *London Morning Post*, is part of the Australian federation series.

<sup>3</sup> 'A Little Bit of Lawyers' Language: The History of "Absolutely Free" 1890-1900', in Martin (ed.), *Essays in Australian Federation* (1969) 57. Cf. also his note on the probable origins of s. 51(5): 'Other Like Services': Physics and the Australian Constitution' (1968) 1 *Records of the Australian Academy of Science* (No. 3) 36.

the practical, the collective ability of the federalists to reduce the vision to an attainable goal and to compromise without losing anything essential, is excellently conveyed by the author.

The publishers' blurb, which may of course have been written by the author himself, says that he hopes the book 'will interest, and even occasionally surprise, constitutional lawyers'. As is apparent, this particular constitutional lawyer has been kept continuously interested. Surprise, however, is too flattering a term to apply to him and, he suspects, to many others, for it implies a state of knowledge some elements of which are shown to be mistaken. The reviewer's predominant reaction was awareness of previous ignorance, notwithstanding Quick and Garran, rather than surprise at mistaken belief. For instance, the fundamental part played by Inglis Clark's draft, and the consequently necessary re-assessment of Griffith's work at the Sydney conference in 1891, was something of which one was previously wholly unaware. Indeed the author does a service in bringing out as he does the contribution made by Inglis Clark and the quality of the man (pp. 26, 75, 234, 278). He performs the same service for Barton, whose sustained and successful personal commitment to federation appears throughout the book. Griffith's influence was of course well known in general terms and this book does nothing to diminish it in retrospect. It is interesting to see that he arrived in Australia at the age of 9 (p. 330). The nationalism which he particularly manifested in his dislike of appeals to the Privy Council (but *cf.* p. 219) is known to lawyers chiefly through his withering remarks in *Baxter v. Commissioners of Taxation (N.S.W.)*.<sup>4</sup> It may possibly explain his persisting with the idea that ministers need not necessarily be members of Parliament, which the author suggests reflected only his isolation from politics on becoming Chief Justice of Queensland (p. 168). Ministerial membership of Parliament is a distinctively English governmental doctrine. A strong case can be made that Australian federalism would have preserved more vigour if the American republican model had been followed in this too.

Another piece of news to this reviewer is that Macrossan was one of the perceptive few who realised from the outset that the Senate would never function, or have to function, as a States' house (p. 44). In this he joined Deakin and Isaacs (pp. 119, 148, 188, 190-1). A fascinating item (pp. 55, 215-6) is that the incomprehensible reference in Constitution, section 99 to parts of States, which has utterly baffled the High Court on the question how one distinguishes a part of a State from a part of the Commonwealth in relation to the same piece of real estate, started out as a reference to parts of a State, which is perfectly comprehensible. Even Professor La Nauze is unable to explain precisely what the delegates thought they were achieving by the amendment. The references to aborigines, so offensive to the modern eye, in Constitution, sections 51(26) and 127, before their deletion in 1967, are shown (pp. 67-8) to have origins remote from any of the 1967 suppositions. The most conspicuous omission from the Australian Constitution, the absence of a bill of rights, is dealt with in detail (pp. 227-34). The passages on section 116 and on the American due process clause are particularly illuminating. The evolution of the very name of the new country, the Commonwealth of Australia, which one takes so much for granted, receives attention (pp. 56, 85, 138, 152, 187). One could continue almost indefinitely. One will not, but a few more examples of the book's sheer informativeness must be given. There is a valuable correction of Deakin's generally accepted account of Turner's opening speech to the Adelaide convention (pp. 116-8); the effects of the omission of Isaacs from the Adelaide drafting committee (pp. 129-30, 151); the real reason for the abortive Inter-State Commission (p. 134); and the remarkable degree of co-operativeness on the part of Chamberlain's advisers in 1900, reflecting not only a high capacity for understanding the Australian point of view but also, in Anderson's case, a similarly high capacity for changing an opinion shown to be wrong (pp. 173, 253).

The book does not lack a lighter side. There are recorded some superbly pithy comments by the delegates. Thus Griffith on the proposal to limit Commonwealth

<sup>4</sup> (1907) 4 C.L.R. 1087, 1118.

expenditure to named sums: 'A Sovereign State with an annual allowance for pocket money would certainly not need two Houses of Parliament and an elaborate Constitution.' (pp. 168-9) And Barton on a comment by the British law officers which began 'It may be a question . . .': 'It is a question. Is it worth discussion?' (p. 186) And Barton again, on appeals to the Privy Council: 'if Australia is to be the maker of its own Constitution, it is fairly competent to be the interpreter of its own Constitution'. (p. 222) The author himself is responsible for many shafts of his characteristically barbed wit. One of the best is his description of the famous David Syme of the *Age*: 'an able, powerful and infinitely self-confident Scot on whom had been laid, he believed, the thankless burden of guiding and governing through his paper a democracy which otherwise would be at the mercy of its elected representatives'. (p. 101) Possibly he derived the inspiration for this one from the anonymous lawyer who advised his son to draw wills in a manner which would cause litigation 'lest estates be "frittered away among the beneficiaries".' (p. 281) Similarly: 'Speeches at a banquet should not be held to bind those who make them' (p. 34); 'Australian posterity should at least record their names. That may be all that should be recorded about some of them'. (p. 30); 'He was now a knight, old, courteous, generally silent and completely useless.' (p. 102); and of the delights of Adelaide in March, 1897: 'The Indian juggler of the afternoon was followed in the evening by another gay Adelaide entertainment, a fireworks display on the Oval, which to their credit "a large proportion" of the delegates were said to have attended.' (p. 110) It comes as no surprise that the author takes a civilized delight in making jokes which are primarily for his own amusement. At least, this seems to be the explanation of the care with which he draws the reader's attention to anyone who was educated at Balliol (pp. 144, 171, 174). Professor La Nauze is a Balliol man himself. He should write a piece about the influence of Balliol College, Oxford, on the Australian Constitution.

The faults one can find are few. Misprints were detected at p. 24, third line from the bottom; p. 196, second line of the second paragraph; p. 280, thirteen lines down; and probably at p. 119 in the quote from Deakin, where 'passible' looks as if it should be 'possible'. Also there is in the review copy bad type at p. 57, second and third lines down, and p. 72, ten lines down. After reading chapter 5 one wishes that the 1891 Constitution were included in the appendices. In a history book its omission is hardly justified by the observation (p. 136) that after Adelaide it had become 'merely an interesting historical document'. Merely forsooth! Also, for chapter 7 it would have been interesting to have a sample Enabling Act. But no doubt these omissions are attributable to cost.

In sum, this is a book written with the felicitous confidence of a scholar in complete command of his subject. His account of these men of the 1890s cannot fail to evoke the deepest admiration for the best of them, an admiration untinged by sentimentality. If we had a few politicians nowadays of even half their calibre and learning the stimulus to the national life would be inestimable. No doubt they had their less glorious moments, especially in local party politics. But they were at least capable of rising to an occasion and perceiving a principle, which is a judgment one would hesitate to make about anyone on the national scene today. This reviewer believes that the draftsmen of the Constitution were partly responsible, although they could hardly have been expected to foresee it, for the dismal condition of Australian political life at most times since. His theme is that it was a fundamental mistake to keep the British notion of responsible government because it has had the effect of linking the vigour of the federation to the States. As they have declined, so has it. It would have been better to adopt the American model wholly and separate the administration from the legislature. The decline of the States would then not have affected the quality of national political life, which would have been conditioned by the tension between legislature and administration. But of course there is no room for a Queen in that structure. Even in theory the power has to come from the people, for otherwise there is no basis for electing a President.

One last word. It is much to be hoped that Professor La Nauze will either turn his own attention to, or persuade others of similar competence to tackle, the

history of the federal movement as a whole in the nineteenth century, and the history of the referenda campaigns in 1898, 1899 and, in Western Australia, 1900.

COLIN HOWARD\*

*Property Law Cases and Materials*, by R. SACKVILLE, LL.B. (HONS) (MELB.), LL.M. (YALE) and M. A. NEAVE, LL.B. (HONS) (MELB.), (Butterworths, Australia, 1971), pp. 1-1187. Recommended Australian price \$25.00 (hard), \$18.00 (limp). ISBNs O 409 34012 X & O 409 34011 I.

The value of collections of cases and materials is always debatable. Much depends on a width of selection which will permit their use by those whose ideas do not entirely coincide, coupled with a sufficient depth to form the basis for discussion and analysis, both being accomplished within a book of less than encyclopaedic proportions. This collection wholly succeeds on all these points. The omission of mortgages will annoy some. While it seems entirely justifiable on practical grounds to exclude 'security' questions, perhaps a reference for 'alphabet' purposes is desirable. Trusts and perpetuities go together. Trusts make their bow but perpetuities remain off stage. One would have thought a brief mention in the context of the limitation on the ability to create future interests is called for. The only striking substantive omission appears to be remedies, specific references to which appear solely as part of a comparison between legal and equitable interests and in the context of leases. A surprising 'adjectival' omission is the lack of a table of statutes.

The materials include examples of documents of title of the general law and Torrens system—thereby meeting an often voiced criticism of property courses that the students cannot appreciate the details of transactions without examples of the documents used in them. Many of the 'notes' on the statutes and cases are in the form of testing questions. The value for teacher and student of these materials as a collection is indisputable. But it is perhaps questionable whether the book wholly attains its aim of providing 'a coherent set of materials for a property law course'.

First, the ordering of the materials seems at times to militate against the desired result. This is, perhaps, not so important in a collection such as this as in a text book or monograph. Teachers can always pick and choose. But there are some rather curious interruptions in what is mainly a steady progress from the concept of property to control of its use. The impact of the Federal Constitution with an excursion into the principles of compensation appears quite independently of the statutory regulation of proprietary interests. Concurrent ownership is not linked either with the notion of title or with fragmentation of proprietary interests. The doctrine of fixtures is included as part of the study of the concept of property—the translation of personal to real. But accession and accretion are treated as modes of acquisition. Wherein—in analysis rather than history—lies the distinction?

The last two chapters deal with planning. In chapter 11 the authors include covenants and easements and profits are briefly mentioned. Is it not difficult to fit some easements, profits and covenants into the concept of regulation of use—surely a right of way is no less and no more an interest in land than (for example) a lease or a licence? Even more could this be said of interests in gross or obligations on persons who have no interest in any land which is burdened.

The concluding chapter introduces an entirely new area—rights concerning water—and concludes with land development control. There is no doubt that

\* LL.D., Ph.D. (Adel.), LL.M. (Lond.); Barrister and Solicitor; Hearn Professor of Law in the University of Melbourne.