

*Australian Constitutional Law*, by JACOB I. FAJGENBAUM and PETER HANKS, Senior Lecturers in Law, Monash University, Melbourne. (Butterworth and Company (Australia) Ltd, 1972), pp. i-xxxii, 1-709. P/B \$14.50, Cloth \$16.65. ISBN: 0 409 43570 8.

In Britain, books such as Hood Phillips, *Constitutional and Administrative Law* or Wade and Phillips, *Constitutional Law* provide undergraduate students with a fairly adequate account of the theory of English constitutional law and government in practice. These books also manage as a rule to include a description of the relationships between the citizen and the state.

Equivalent Australian text books do not exist and until a few years ago even in subjects such as Administrative Law the principal reference works frequently included English texts though much of their content, for example, the treatment of local government, had little relevance to Australian conditions. Over the years there has been a great increase in output of scholarly legal work in Australia but the existence of the federal system has continued to provide a sharp line of demarcation in the legal literature dealing with constitutional law. For example, Wynes, *Legislative, Executive and Judicial Powers in Australia* is almost entirely concerned to describe a body of Commonwealth constitutional law in terms of the judicial interpretation of the written Constitution. State Constitutions have received little attention from law school academics and Lumb's *The Constitutions of the Australian States* is still most used though it is little more than a hundred pages in length. None of the principal works have attempted to relate constitutional rules (apart from a few exceptions such as the politics behind the legislation considered by the High Court and the Privy Council in *Trethowan's* case in New South Wales) to the operations of parliamentary and executive government. There are, of course, books about the art of government in Australia written by political scientists, such as L. F. Crisp's well known *Australian National Government*. None of these works, however, are concerned with the legal theories which should preoccupy a constitutional scholar.

Now Messrs Fajgenbaum and Hanks have produced something intended to straddle the elements of Commonwealth and State constitutional law and at the same time explain the operation of governmental authority. Though in their modesty neither has done so, the two lawyers could claim that their book is for this reason a significant addition to existing Australian legal works. The inclusion of some subjects such, for example, as the analysis of the judicial power of the Commonwealth may preclude it from much use in the teaching of political science but there are chapters, for example, on the royal prerogatives, which render the book useful in courses dealing with political institutions.

It has to be appreciated that the work is not a text book of the English kind but a collection of materials accompanied by a reasonably comprehensive commentary. The materials consist mainly of judicial decisions but other materials which the authors have selected include

parts of the texts of Constitutions and Acts of Parliament, extracts from the works of other authors and a miscellany of governmental documents including, for example, letters patent and the correspondence of governors and premiers. As the authors explain, the book is intended as a basic course in Australian constitutional law and as teachers they believe in the value of the case method. As a book of cases and materials the book goes much further than the customary Australian casebook by reason of the inclusion of commentary and the range of materials selected.

When faced with the ever-difficult problem of deciding what to exclude in a single volume of such scope the authors rightly assumed that Australian law schools provided courses in administrative law and federal constitutional law and so they proceed to exclude most, though perhaps insufficient, material dealt with in such courses. They also omitted materials on civil liberties, not for the same reason, however, but because they thought that the subject needed a separate volume and another course. One cannot criticise the omission in a work which seems particularly well tailored to the study of the subject of Constitutional Law at the Monash University Law School. Yet an introduction to constitutional law of the Hanks and Fajgenbaum variety provides an eminently suitable background for an accompanying study of civil liberties as an alternative to pursuing an understanding of the content of civil liberties as a distinct intellectual exercise using, say, Campbell and Whitmore, *Freedom in Australia*. Moreover, if constitutional law and civil liberties are treated as separate subjects in a university law school bill of fare for undergraduates it may be that the law student will find it impossible in his personal circumstances to take both.

This year the ANU Law School introduced Constitutional Law and Civil Rights as a compulsory subject in the first year of the LL.B. curriculum. The faculty hopes that the subject will stimulate interest in gaining an understanding of the integral connection between law and government and the relationships of the citizen and the state. Hopefully, students will emerge who have some appreciation of the social responsibility and role of lawyers in the handling of contemporary community issues in which the dignity of the individual and the quality of life seem now to be at stake. Those who teach the new subject at ANU have prescribed Hanks' and Fajgenbaum's book for the constitutional component of the course. The extent to which the work is appropriate will be capable of much clearer assessment at the end rather than the beginning of 1973. Certainly, however, the book shows promise. In separate chapters it presents materials covering subjects such as the executive government of the Commonwealth and States, the royal prerogatives and their exercise, ministerial responsibility, Commonwealth and State legislative structures, parliamentary control of finance, reconstruction of State legislatures, judicial intervention in the legislative process, the operation of imperial law in Australia, the judicial power of the Commonwealth, problems of inconsistency between

Commonwealth and State laws, intergovernmental immunities, and the fiscal powers of the Commonwealth.

The inclusion of materials on the financial aspects of government is most welcome since they provide the key to most relationships between the Commonwealth and the States in our federal system. One difficulty, however, is that the authors, consistently with their assumptions, have not included a description of federal legislative powers and their limits. Yet this seems to be needed to understand Commonwealth fiscal policies which are based on the fiscal powers of the Commonwealth, dealt with over some 100 pages in chapter 19. It should be possible for the authors to write a chapter describing Commonwealth powers, sufficiently for the purposes of the book, without having to make much use of case materials.

Constitutions even in Australia, it is to be hoped, are not permanently shaped and questions of constitutional change must occur to anyone taking an intelligent interest in the Australian federal system. A chapter would not be amiss in a future edition, bringing forward considerations which may point to some constitutional changes, for example, in the division of legislative powers between the Commonwealth and the States. Documentation is readily available, for instance, the Constitution Review Committee's report to the federal parliament in 1958 described the emergence of a national economy markedly different from 1900, pointing out that under the original allocation of powers no single government in Australia was legally responsible for the general state of the economy. The safeguarding of civil rights, too, may be regarded as a national rather than a State-based aspiration but the balance of legal authority rests with the six component States of the federation. On the side of the States the now extended meaning of the concept of a duty of excise has deprived the States of important sources of taxation.

Looking at the actual contents of the book, one is gratified by the inclusion of materials from other than traditional legal sources, but the publication of cases heavily overlays most chapters. Perhaps this does no more than accurately reflect the current role of the courts though legal training under more adequate law school syllabuses is beginning to demonstrate to students and most law school staffs that there is much more to law than undertaking a study of the decisions of judges made in cases which happen to come before them.

The major criticism as to the substance of the book is the treatment of the judicial power of the Commonwealth in chapter 16, which occupies some 78 pages. The problem of ascertaining what constitutes the judicial power of the Commonwealth is too involved for an introductory work and the materials presented in the chapter, for example, the extracts from the difficult *Rola Co.* case, will probably perplex students not already versed in Commonwealth constitutional law. One suspects that the authors must have a particular interest in the subject to make it a separate chapter in a book which seeks to bridge both the Commonwealth and State Constitutions. The inclusion of the chapter is

also inconsistent with the avowed intention of excluding materials which a student will encounter elsewhere in his law course. In content, the chapter suffers from a failure to make much use of the *Tasmanian Breweries* case, in 1970, in which the High Court held that the Trade Practice Tribunal did not exercise the judicial power of the Commonwealth. The decision opens up new areas ripe for federal governmental intervention, making use of administrative authorities.

The book is an earnest contribution to the study of constitutional law: the authors have accomplished a difficult task well and their labours deserve success.

J. E. RICHARDSON\*

*Succession of New States to International Treaties*, by OKON UDOKANG. (Oceana Publications (New York) Inc., 1972), pp. 1-525. Cloth U.S. \$17.00. ISBN 0 379 00168 3.

The aim of the author is to expound and analyse the attitude of the Afro-Asian states to the problems of treaty succession. It could therefore be expected that the book would offer useful guidance to a country like Papua New Guinea which can expect to face similar problems.

It is doubtful whether much real assistance will be gained. While the author would deny that the "clean slate" doctrine is the right one to apply in the case of newly independent states, he is unable to see clear guidelines. He finds, for example, that "the law of state succession with respect to concessionary contracts remains undefined and subject to continuing debate and controversy between states". This is of little assistance to a legal officer given the task of advising on the matter. Nor does an examination of the material on which the author's conclusions are based provide the reader with much help in forming his own assessment of the issues. In the case of concession contracts the section on state practice traces episodes such as Indonesia's nationalisation of Dutch owned enterprises in 1958 but no effort is made to investigate the legal implications of the episode in terms of Indonesia's succession to concession agreements in principle or in respect of its obligations under the 1949 Financial and Economic Agreement between Indonesia and the Netherlands.

A further weakness in the work is that it does not appear to have been updated since it was written to take account of developments in many areas since 1965. Obviously the book could not take account of the draft articles on state succession drawn up by the International Law Commission in 1972. But there are other omissions. Dealing with the attitude of the Afro-Asian States to declaratory resolutions of the United Nations, the author draws special attention to the Declaration of Human Rights, 1948 and comments that "any attempt to define the legal content of human rights would probably not receive the consensus of all states". This sweeping statement ignores successful United Nations efforts spear-

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\* Robert Garran Professor of Law, Faculty of Law, Australian National University.