

BOOK REVIEWS

Labor and the Constitution 1972-1975, edited by GARETH EVANS; (Heinemann, 1977), pp. i-xv, 1-383. Cloth, recommended retail price \$20.00 (ISBN: 0 85859 146 4); Paperback, recommended retail price \$12.50 (ISBN: 0 85859 147 2).

"The Whitlam Years in Australian Government"—the nostalgia of the sub-title fails to reckon with the presence of the eponym himself, felt almost tangibly throughout the first three hundred pages of other men's (and two women's) comments on his "years" and eloquent in an unmistakably present tense in Whitlam's own concluding contribution to these essays and commentaries on the constitutional controversies of three years of Labor rule.

Melbourne University's August 1976 Seminar, which was the occasion for the delivery of the essays and commentaries gathered together in this book, did, for some, have a true nostalgia. When Geoffrey Sawer spoke from that same dais from which he had taught constitutional law thirty years ago, he evoked the shades of an earlier, now vintage Sawer, expounding a simpler, less controversial Constitution in which Commonwealth Law Reports numbered in the seventies and Senates and Governors-General played no part, transport cases and marketing boards jiggling instead in eccentric orbit round section 92's maypole. But such gentle shades soon disperse before the sharper emotions of 11 November 1975 which, perhaps for the first time in 75 years, have given Australian constitutional law a new cutting edge, apparent throughout the Seminar weekend. Gareth Evans, who both edited this book and played a leading part in the organisation of the Seminar, speaks in his preface of it being held "after the dust of partisan controversy had settled a little". Yet what gave the Seminar its unique savour were the clouds of such dust still there to be kicked up by any passing foot.

In print this special effervescence of the times is largely missing, but the substance remains; the essay writers and commentators account for not quite all of Australia's leading academic constitutional lawyers and there are also contributions from such notable actors in the constitutional crises of those years as the former Commonwealth Attorney-General Mr Ellicott and the Solicitor-General.

A review of the work of almost thirty contributors avoids mere precis only at the risk of leaving much unsaid. This should be said at the outset: for all those concerned with Australian government or with the law of its Constitution the book is invaluable for its discussion of many of the intractable problems of our federal system. These are discussed very fully from a lawyer's standpoint, although to a political scientist the emphasis may appear to be too much towards the law and judicial interpretation of the Constitution. This may, however, be no more than the necessary consequence for any polity whose constitutional shape is dictated by an Imperial statute and interpreted in a common law tradition.

The book's greatest virtue is that all but one of its nine major essays are accompanied by two commentaries, whose value is the greater when, as often occurs, they are actively critical of the essay which they follow. Whatever preconceived viewpoint a reader may have, he will find something to agree with, even if he fails in the more demanding task of allowing preconceptions to be influenced by argument.

The first essay, Professor Sawyer's "Towards a New Federal Structure", identifies reform of the Senate as the most immediate constitutional problem, the need being to create a Senate which can influence but not frustrate a Representatives majority. That the Senate's power of dissent should be limited to that of delaying money bills for one month and all others for three months is suggested as a possible solution. Assuming, for purposes of speculation, that so radical a constitutional amendment is a practical possibility, it is questionable whether a Senate with powers so limited would be worth retention. To devise a due sharing of legislative power in a bicameral system dominated by an entrenched two-party system, giving to the upper house a satisfactory role somewhere between the extremes of mere rubber stamp and mischievous weapon of obstruction, is not easy. Senator Carrick's commentary sees in any change to Senate powers the death knell of federalism and Professor Castles is silent on this aspect. We are thus denied what might have been interesting speculation upon what Sawyer sees as the dominant issue for those who identify the Senate as the main obstacle in the path of what he regards as desirable social objectives.

Michael Crommelin and Gareth Evans have produced a blockbuster of an essay in their "Explorations and Adventures with Commonwealth Powers". They aim at a review of Labor's constitutional initiatives "across the whole spectrum of governmental activity" and succeed in combining comprehensiveness with coherence. They cite, perhaps tongue in cheek, the former Attorney-General, Mr Ellicott, for the proposition that adventurous exploration of the limits of constitutional power is a proper course for a federal government. It is left to the Victorian Solicitor-General to say, of the title of their paper, that it is "somewhat euphemistic" in its description of the Labor Government's activities in office. The authors speak of the seabed and waters around Australia's shores as a new federal territory discovered by the majority judgments in the *Offshore Sovereignty* case¹ but Mr Dawson suggests, I think, that the Commonwealth, while ruler of the waves, would do well to bear in mind that many a sailor has been grateful for a friendly reception when, sated with the sea, he steps ashore into State territory. Mr Dawson also expresses State disquiet concerning the Commonwealth's sole power over appointments to the High Court. Mr Byers' commentary is itself an independent essay upon the constitutional significance of Australia's nationhood, both as an independent source of power and as affecting the quality of powers expressly conferred by the Constitution.

¹ *New South Wales v. Commonwealth* (1975) 8 A.L.R. 1.

The modest successes of the recent referendum calls, I think, for no major re-assessment of the conclusions of Professor Richardson in his essay "Reform of the Constitution: the Referendums and Constitutional Convention"; the fate of the proposal for simultaneous elections was, in the result, accurately enough predicted in Dr Lumb's commentary. Professor Richardson's view that public acceptance of the idea of change be nurtured by submitting to the electorate worthwhile but relatively uncontentious amendments may perhaps be seen to have borne fruit in the outcome of the 1977 referendums. His suggestion that an opposing case should be denied the present right of publication and circulation at government expense may be thought to run counter to popular movements for government assistance in the promulgation of minority opinions. Mr Finemore's opposition to the suggestion adds to this point the further and rather different ground that the present system at least provides a measure of public education as to issues. It would have been interesting to have had debated the subsequent suggestion of Klaus Woldring, writing in *Politics*,² that mere statutory repeal of compulsory voting at referendums might ease the task of constitutional alteration.

In Part Two of the book existing institutions are examined. With Professor Blackshield's essay on "Judges and the Court System" I fall under the same inability, or at least disinclination, to comment on this paper as was expressed by one of its commentators, Mr Justice M. D. Kirby. I note only that vigorous criticism and assessment of judicial appointments and performance is no thing of recent growth; Victorian legal journals of the nineteenth century offer instances in comparison with which modern examples of the genre are bland indeed.

Mr Hanks' essay on "Parliamentarians and the Electorate" consists in large part of a close scrutiny of recent decisions of the High Court affecting legislators and those who elect them, ably supplemented by commentaries by Messrs Brazil and Coper. With these again I refrain from comment other than to note, first, Hanks' interesting examination of the office of Speaker and of the extent to which its status and authority was affected when Speaker Cope was not supported by the Government of the day and felt obliged to resign. A Speaker's need for support by the majority of the House if his authority, and with it his usefulness, is to be maintained, emphasises the difficulties which, in Australia, would surround a non-partisan Speaker on the English model; even if conventions were to grow up concerning the office, they might, on recent experience, provide only uncertain support. Secondly, the progression from flouted convention to constitutional command which the recent referendum has achieved in relation to the filling of casual vacancies in the Senate is notable; both the essayist and his commentators deplore the former and will no doubt welcome the latter.

Professor Enid Campbell writes on "Ministers, Public Servants and the Executive Branch", one of her areas of particular expertise, and

² (1976) Vol. XI, 2, p. 209.

provides valuable insight in fields in which the ignorance of most lawyers must be remedied if judicial review of administrative decisions is to prosper; the commentaries of Professor Encel and of Dr Wilenski, as political scientist and "practising bureaucrat" respectively, add leaven to the legal loaf.

The third Part of the book is devoted to the contentious events of 11 November 1975. Professor Zines opens the debate with a full and careful statement of the background law and is attacked by his commentators in robust fashion. The next essay, by Professor Howard and Dr Saunders, subjects to a more detailed scrutiny the events themselves and is in turn challenged by Mr Ellicott in his commentary, while Sir Richard Eggleston provides a detailed exposition of his own particular interpretation of section 53 of the Constitution. Whatever conclusion is come to by the diligent and impartial reader (needless to say, a hypothetical figure), it will, after reading this Part, at least be founded on more solid material than has yet been offered by other, more sensational, works on the subject.

The final Part of the book, "A Labor Retrospect", consists of Mr Whitlam's own essay on his Government and the Constitution. It represents the latest in that sequence of recurring assessments of Australian federalism, as seen through a Labor leader's eyes, which, since the 1950s, have become a significant part of Mr Whitlam's contribution to political and constitutional debate. It alone of the essays lacks commentators and perhaps it is better so, a commentator would be hard put to match the characteristically astringent blend of analysis and pungent comment which is the hallmark of its author. To read it is to be reminded how much the other contributions in this book are necessarily biographical of three years of Mr Whitlam in office.

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Legislative, Executive and Judicial Powers in Australia by W. ANSTHEY WYNES, LL.D., of the South Australian Bar. (The Law Book Co. Ltd, 1976, 5th Edition), pp. i-xlv, 1-590. Cloth, recommended retail price \$34.50 (ISBN: 0 455 19389 4); Paperback, recommended retail price \$24.50 (ISBN: 0 455 19388 6).

The reviewer worked in the fifties in the same Canberra office block as Dr Anstey Wynes, then Legal Adviser to the Department of External Affairs, Mr Leslie Lyons, then head of the Commonwealth Attorney-General's Department's Advisings Division, and Mr Leslie Zines (now Professor Zines of the ANU Law School). Dr Wynes had come to the Department of External Affairs in 1938 from Adelaide, to which he

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