

BOOK REVIEWS

Commentaries on the Australian Constitution: A Tribute to Geoffrey Sawyer edited by LESLIE ZINES, LL.B. (Syd.), LL.M. (Harv.); Professor of Law, Faculty of Law, Australian National University. (Butterworths, 1977), pp. i-xxii, 1-275. Recommended retail price \$20.00 (ISBN: 0 409 43680 1).

The objective quality of these scholarly essays stands in high contrast to the emotionalism that has pervaded much recent discussion of constitutional issues. The essays reflect the virtues of meticulous research and analytical thought. They review the High Court's decisions comprehensively, at times critically, drawing out the differing points of view and points of emphasis in individual judgments. They provide a valuable addition to our knowledge and understanding of the Constitution.

Professor Zines' "The Growth of Australian Nationhood and its Effect on the Powers of the Commonwealth" is, as its title suggests, an historical survey tracing the development of Australian nationhood from the days of the self-governing colonies, through the establishment of the Commonwealth, the Imperial Conferences and the Statute of Westminster to the decision in *New South Wales v. The Commonwealth* (the *Seas and Submerged Lands* case).¹ My impression is that the essay was written before the *Seas and Submerged Lands* case was decided because it is mentioned once only and then in the last paragraph of the essay. Some of the judgments in that case provide support for views expressed elsewhere in the article. The author comments that "some of the judges took the view that the Commonwealth could under the external affairs power control things or activities outside Australia regardless of international agreements", a view which he characterises as a sound conclusion (p. 49). Yet earlier he states that "a law controlling mining under the ocean is a matter of direct concern to other nations and, therefore, in my view, within section 51(xxix)" (p. 48). This reflects a somewhat narrower view of the power, one which the author evidently would adopt if the wider view expressed by some of the judges in the *Seas and Submerged Lands* case does not ultimately prevail. Professor Zines does not refer to other possible potential applications of section 51(xxix) in new fields, e.g. the setting up of a wider territorial sea with an extended exclusive economic zone, the control of pollution and the protection of the marine environment beyond State boundaries, the regulation of intra-State navigation beyond those boundaries and the abolition of the appeal to the Privy Council from State courts, all of which would have been thought to be beyond the reach of the external affairs power before the *Seas and Submerged Lands* case and may conceivably now be within its grasp. Mention might also have been made of the steps taken by the Commonwealth in relation to extradition—the Extradition (Commonwealth Countries)

¹ (1975) 8 A.L.R. 1.

Act 1966 (as amended) and the Extradition (Foreign States) Act 1966 (as amended) and the decision in *Barton v. The Commonwealth*.²

Professor Richardson's "The Executive Power of the Commonwealth" gives close attention to the decided cases. He discusses the power of the executive Government to fetter the exercise of administrative discretions, with particular reference to the recent judgment of the Privy Council in *Cudgen Rutile (No. 2) Pty Ltd v. Chalk*.³ There is an examination of the doctrine of separation of powers and *Attorney-General for the Commonwealth v. The Queen* (the *Boilermakers' case*).⁴ Somewhat surprisingly there is no reference to the storm signals hoisted by Barwick C.J. in *R. v. Joske; Ex parte Australian Building Construction Employees and Builders' Labourers' Federation*,⁵ which encouraged the Commonwealth to launch an all-out assault on the *Boilermakers' case* in *R. v. Joske; Ex parte Shop Distributive and Allied Employees Association*,⁶ an assault which failed to provoke any response because the case lent itself to disposition on other grounds. At page 76 Professor Richardson refers to the view which I expressed in *Victoria v. The Commonwealth* (the *Australian Assistance Plan case*),⁷ that there is an implied executive power to engage in activities appropriate to a national Government. He goes on to say: "Other judges in the case did not indicate any disagreement with Mason J.'s views, and it is submitted that they represent the law on the subject". In fact Jacobs J.⁸ expressed a wider view of the implied power. And it would be a mistake for anyone to think that the absence of comment by other members of the Court indicates agreement with what one member of the Court says in his judgment. As in contracts, so with High Court judgments, mere silence evidences neither acceptance nor assent.

In "Parliament and The Executive" Professor Campbell examines the unresolved conflict which has arisen between the Executive and the Houses of Parliament, chiefly the Senate, when Government officers, acting in accordance with Government policy, have declined, when required so to do, to testify or produce documents in parliamentary investigations. Their refusal has been based on an assertion of Crown privilege accompanied by a professed unwillingness to accept a ruling by the House on the correctness or propriety of the claim. This attitude seemingly invests the Executive with a greater immunity than it now enjoys in the ordinary courts where a claim of privilege is valid only if it is accepted by the court and where the court is entitled to examine the documents in order to determine the claim of privilege. As Professor Campbell observes, the problem is essentially political in character. As such it is better resolved by reference to some appropriate definition of

² (1974) 3 A.L.R. 70.

³ [1975] A.C. 520.

⁴ (1957) 95 C.L.R. 529.

⁵ (1974) 130 C.L.R. 87, 90.

⁶ (1976) 10 A.L.R. 385.

⁷ (1975) 7 A.L.R. 277, 327-328.

⁸ *Id.* 334.

the relationship which exists between the Houses of Parliament and the Executive than by reference to the doctrine of Crown privilege in litigation where the interests, at least on one side, are very different from those at stake in the conflict between Parliament and the Executive. Of course, to describe the conflict as one between Parliament and the Executive is in one sense to describe it inadequately. In the recent struggles the Government in power has had control of the House of Representatives and the Executive in defying the Senate has had, it seems, the tacit support at least of the Lower House. Viewed in this light the conflict is another manifestation of the problems which arise in the relationship between the two Houses, central to which is the power or capacity of the Senate to take action contrary to the wishes of the House. In this sense the conflict was a harbinger of the 1975 refusal to pass the Appropriation Bills. In another context the author rightly calls attention to the limitations which appear to have been placed on the power of Parliament to create commissions or inquiries armed with coercive or compulsory powers. Whether the distinction between a subject matter of inquiry within Commonwealth legislative power and one that stands outside that power, a distinction drawn by the Privy Council in *Attorney-General for the Commonwealth v. Colonial Sugar Refining Company Ltd*⁹ and followed by Fullagar J. in *Lockwood v. The Commonwealth*,¹⁰ can continue to be drawn in this context seems open to question, notwithstanding the very restricted view of Commonwealth legislative power that appears to have been expressed by the Privy Council in *Oteri v. R.*¹¹

Mr Pearce's "The Legislative Power of the Senate" discusses the limitations on the Senate's legislative power, including the provisions of section 57 relating to disagreement between the Houses, in the light of the recent decisions. There is a detailed examination of section 53 and of *Osborne v. The Commonwealth*¹² viewed in light of *Cormack v. Cope*.¹³

Mr Rose deals with "Discrimination, Uniformity and Preference". His conclusion is that the High Court has "a somewhat disappointing record" in cases of discrimination and preference, that there is "more scope for developing effective principles in regard to sections 51(ii) and 99" and that there is "no reason why the High Court should not seek to develop justifiable principles, even if they require departures from some leading decisions of the past". He argues that a version of the dissenting judgment of Stephen J. in *Henry v. Boehm*,¹⁴ as suitably amended by Mr Rose, should be embraced "at the earliest opportunity" and why "the approaches of all the justices in *Clyne* (1958) 100 C.L.R. 246, should be rejected" (p. 232). One aspect of his criticism of *Clyne's*

⁹ [1914] A.C. 237.

¹⁰ (1954) 90 C.L.R. 177.

¹¹ [1976] 1 W.L.R. 1272, 1275 (see Edeson, "The English Theft Act in Australian Waters" [1977] 1 Criminal Law Journal 71).

¹² (1911) 12 C.L.R. 321.

¹³ (1974) 48 A.L.J.R. 319.

¹⁴ (1973) 128 C.L.R. 482.

case at least is, I think, implausible. It is the statement that Parliament might not intend a Principal Act to continue in force unless it can operate with an amendment which is constitutionally invalid. As applied to the Income Tax Assessment Act the suggestion that Parliament might have intended to repeal the entire Act rather than have it operate independently of an amendment providing for an unconstitutional discrimination in the operation of one of its provisions is, if I may respectfully say so, a little fanciful. As the courts cannot divine the actual intention of Parliament, it seems sensible to attribute to it an intention to keep the Principal Act on foot shorn of the invalid amendment. There is a long-established distinction between the amendment of a statute and the repeal and re-enactment of a statute—see *Beaumont v. Yeomans*,¹⁵ *Mathieson v. Burton*¹⁶—and important consequences flow from this distinction. And in *Attorney-General for New South Wales (ex rel. Mackellar) v. The Commonwealth*¹⁷ Gibbs J.¹⁸ and Stephen J.,¹⁹ with whom I agreed, held that section 3 of the Representation Act 1964, because it was an invalid enactment, left section 10 of the pre-1964 Representation Act operative according to its terms. Their Honours followed the approach taken in *Clyne's case*. In passing I should mention that the Royal Commissions Act 1912 was not declared totally invalid in *Attorney-General for the Commonwealth v. Colonial Sugar Refining Company Ltd.*²⁰ Indeed, Fullagar J. explicitly so held in *Lockwood v. The Commonwealth*.²¹ Consequently the citation in footnote 26 on page 200 of *Lockwood's case* in support of a proposition dealing with statutes that have been declared totally invalid is incorrect.

Mr Lindell is to be congratulated on his "Duty to Exercise Judicial Review". It is a fascinating topic, not least because it has not been submerged by case law. This essay is, I think, the first occasion on which an endeavour has been made to bring together the related problems arising from the so-called obligation to exercise jurisdiction, the obligation to exercise judicial review, the relationship between judicial review and the Constitution and the special problems that arise in relation to jurisdictional facts in constitutional cases.

Dr Lumb keeps us abreast of developments in the Australian Constitutional Convention at its 1973 session. His account has been overtaken by the later sessions in 1975 and 1977 and in small part by the outcome of the 1977 referendum.

A reading of the essays excites two questions. The first and minor question is: How is it that Professor Stoljar's instructive essay "Austin and Kelsen on Public Law" came to be included in a volume entitled *Commentaries on the Australian Constitution*? Professor Stoljar is so absorbed in his topic that he makes not even a single reference to the

¹⁵ (1934) 34 S.R. (N.S.W.) 562.

¹⁶ (1971) 124 C.L.R. 1.

¹⁷ (1977) 12 A.L.R. 129.

¹⁸ *Id.* 147.

¹⁹ *Id.* 155.

²⁰ (1913) 17 C.L.R. 644.

²¹ (1954) 90 C.L.R. 177.

Constitution. Not that mention of the Constitution or of its provisions is an indispensable touchstone of learned writing on the Constitution. Far from it. But in this case there is no apparent connection between the contents of the essay and the character given to the volume by its title. Perhaps I am at fault in failing to perceive that the essay throws a subtle and mysterious illumination on the darker caverns of the Constitution. Or is it, as I suspect, that the essay was never intended to be a constitutional commentary?

The second and major question is of a different kind. As Mr Justice Else-Mitchell's introductory remarks remind us, Professor Sawyer has made a distinctive contribution to writing on the Australian Constitution. He has always seen the document as an organic working instrument and has sought to gain for its provisions an application which, within the permissible limits of legal interpretation, would make it an effective regulator of the processes of politics and government in this country. In this endeavour he has been assisted by his wide knowledge of comparative law and political science, by his acute political insight and by his lively, at times buccaneering, expressive style; he once had the temerity to describe the Chief Justice's views on section 90—and I mean section 90, not section 92—as “doctrinaire”. Despite these qualities and his own considerable achievement, Professor Sawyer has no obvious disciple among Australian academic lawyers. Indeed, these essays make the point. The majority of them have been contributed by his colleagues from the Australian National University and yet in content, approach and style they derive their inspiration from a different source. Despite the frequent invocations of his name and the acknowledgment by the authors of the departing hero's pre-eminence, the essays generally exhibit a more sober approach to constitutional discussion.

Reflection on the character of the essays evokes the question why space could not be found for a commentary on the work of the High Court noting and evaluating the general approaches which it has adopted in resolving constitutional questions, in particular its techniques of interpretation. The cases decided between 1974 and 1976 proceed according to a liberal interpretation of Commonwealth legislative powers. There have been indications that the scope and extent of a particular power will not be confined in order to avoid its having an overlapping operation with another power. There has also been less of a reluctance to depart from the meaning and application which words had in 1900. These developments merit examination. Perhaps the answer to the question lies partly, if not wholly, in the aims of the publishers. There is a larger market among lawyers for books that state the law as it is, than for books which state the law as it ought to be or books which examine judicial techniques. But I doubt whether the answer to the question lies wholly in the commercial aims of the publisher. Australian academic writing is mainly given to critical review of decided cases. Less attention is lavished on the more challenging task of designing new and alternative approaches to the resolution of constitutional problems, the accepted answers to which

may appear inadequate or less than satisfactory. In truth it is the academic writers who are or should be the pathfinders of the law; for the most part it is for the judges to consolidate ground which has been explored and cultivated in advance by the cut and thrust of academic commentary and controversy.

We have become absorbed with the constitutional issues that arose between 1972 and 1976 and with the cases that decided some of those issues. We cannot allow our absorption to become too introspective. Now that the hurricane has passed over, we should bend our minds in the direction of new problems that are likely to arise. If we are to be preoccupied with the Constitution, we should concentrate on the future rather than on the past.

ANTHONY MASON*

International Law by D. W. GREIG, M.A., LL.B., of the Middle Temple, Barrister; Professor of Law of the Australian National University. (Butterworths, London, 1976, 2nd Edition), pp. i-xxi, 1-944. Cloth, recommended retail price \$40.50 (ISBN: 406 59182 2); Paperback, recommended retail price \$27.50 (ISBN: 406 59183 0).

The second edition of this book, which is some 200 pages larger than its predecessor, could be more appropriately described as a general textbook rather than as an introduction. The aims of its author remain unchanged. They are to provide "a survey of both the general law of peace and the law of international institutions within the same framework [and] . . . to provide a far more detailed overall treatment of the subject matter than [is] given in most one-volume texts" (page v). The book contains four chapters on international organizations and one on the use of force by states, as well as a number of chapters on the usual topics of general international law.

Professor Greig's work is well written, scholarly in approach and contains much original thought. The book has relatively few footnotes and is thus of less use to the academic and the government practitioner than to the student, for whom it is written.

The production, after six years, of a second edition of a book covering such a wide subject matter must have been a daunting task. As the author comments, this is inevitably so given "[t]he increasing complexity of state practice and the rapidity with which the relations of states are being affected by new developments within the international community . . ." (page v). Yet there are only few gaps in updating, perhaps the most serious one being the lack of reference on page 200 to the adoption by the UN General Assembly in 1973, following the work of the Sixth Committee, of the Convention on the Prevention and Punishment of Crimes against Internationally Protected

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