

BOOK REVIEWS

Cases and Materials on Constitutional Law by COLIN HOWARD, LL.M. (Lond.), PH.D. (Adel.), LL.D. (Melb.); Hearn Professor of Law, University of Melbourne and CHERYL SAUNDERS, B.A., LL.B., PH.D. (Melb.), Lecturer in Law, University of Melbourne. (The Law Book Company, 1979), pp. i-lxiii, 1-420. Cloth, recommended retail price \$29.50 (ISBN: 0 455 19851 9); Paperback, recommended retail price \$18.50 (ISBN: 0 455 19852 7).

One of the legacies of eight decades of Australian federalism is a large set of primary and secondary materials of interest to the constitutional lawyer. To provide a selection of cases in a volume of 483 pages is a difficult task. The authors have been more ambitious. Their book contains extracts of cases and also includes the Constitution, proclamations, statutes, letters, academic comment and other literature of constitutional significance.

The contextual material in which the Constitution and the cases are embedded ranges from Earl Grey's 1847 despatch to Governor Fitzroy to Sir John Kerr's statement of reasons for his decision to dismiss Prime Minister Whitlam in 1975. The matrix of non-case material is useful because it assists in reaching an understanding of the content of the cases and of the nature of the task which confronts the judiciary when construing the words of the Constitution. Some of the documents included in the book are also helpful as a guide to the law of the Constitution on topics which have not been the subject of High Court deliberations.

The book is divided into six chapters. Chapter one contains historical material on the process of federation and the emergence of Australia as an independent sovereign entity. The extracts from the draft Constitution Bills of 1891, 1897 and 1898 provide an interesting link between this chapter and the remainder of the book. The second chapter covers the law on the composition of the two Houses of Federal Parliament and the relationship between the Senate and the House of Representatives. Chapter three deals with the scope of Commonwealth executive power and power with respect to appropriation and delegation. A large section of the chapter is devoted to the powers of the Governor-General. The fourth chapter uses cases on immunity, grants, taxation and the offshore zone as a vehicle for examining the methods the High Court uses in interpreting the words of the Constitution. Chapters five and six contain selected cases on several section 51 heads of legislative power and further material on the division of financial powers in the Australian federal system.

To assist the student or the researcher in obtaining maximum benefit from this collection, the authors have compiled tables of cases and statutes, a detailed table of contents and a comprehensive index. Professor Howard and Dr Saunders have included excellent notes at the end of most of the extracts. The notes highlight themes connecting the

various chapters and serve as a guide to other constitutional literature, as well as providing comment on the law as revealed in the cases and materials. All official documents and secondary materials cited in the notes are also listed in the bibliography in the front of the book. The bibliography lists 61 official documents, 86 books and 297 articles, chapters, monographs and comments. This combination of research aids makes the book a well-integrated family of cases and materials. If a judgment or document is not in the collection provided, then at least for the topics covered in the chapters summarised above, the book is a good starting point for the location of the relevant law and debate concerning that law.

Unfortunately some topics of constitutional importance receive cursory treatment while others have been omitted altogether. In their preface the authors say their policy was to give "a thorough coverage to a selection of topics". This aim is not always met. If there is merit in reading the joint judgment in *Amalgamated Society of Engineers v. Adelaide Steamship Co. Ltd*¹ instead of merely reading a summary of what the case decided, then the case deserves more than the 56 line extract given in this book. The treatment of the law on section 90 of the Constitution is inadequate. The sole case extracted is *Dickenson's Arcade v. Tasmania*.² It is difficult to understand the judgments in this case without first reading *Dennis Hotels Pty Ltd v. Victoria*.³ A proper understanding of the competing doctrines about excise duty also requires a detailed study of cases such as *Anderson's Pty Ltd v. Victoria*,⁴ *M. G. Kailis Pty Ltd v. Western Australia*,⁵ *H. C. Sleigh Ltd v. South Australia*⁶ and *Logan Downs Pty Ltd v. Queensland*.⁷ If the book was being used as a text for a course on Australian constitutional law which included excise duty as a topic for study a supplementary set of cases would be needed.

A more serious problem in relation to the market potential of the book is the omission of freedom of interstate trade as a topic. There are strong reasons for the inclusion of cases and materials on section 92 in any collection of constitutional topics. Section 92 has generated a large number of cases. Despite the volume of cases, the section continues to give rise to split decisions which reveal fundamental differences in the interpretation of its words and of the Constitution in general. There is no better illustration of the fact that constitutional interpretation is not just a game with dictionaries but involves issues rooted in ideological schisms in the Australian community. The student of judicial review in Australia must grapple with the elements of the judicial process revealed in the struggles which rage over construing section 92. The guarantee of freedom of interstate trade was a motivating factor in establishing the Australian federal system and the limit that guarantee places on the ambit of Commonwealth and State legislative and executive powers is

¹ (1920) 28 C.L.R. 129.

² (1974) 130 C.L.R. 177.

³ (1960) 104 C.L.R. 529.

⁴ (1964) 111 C.L.R. 353.

⁵ (1974) 130 C.L.R. 245.

⁶ (1977) 136 C.L.R. 475.

⁷ (1977) 137 C.L.R. 59.

still critical to an understanding of how the federal structure works today.

The authors have acknowledged the omission of section 92 and other important topics such as section 51(xxxv) and federal jurisdiction. Three reasons are given in their preface. The literature is described as being "voluminous and technical". This might well be a reason for inclusion at the expense of other material which is short and easy to understand. If a topic is straightforward it can be treated briefly or simply referred to in notes. It is precisely when the relevant material is intractable that the researcher and the student looks to books such as this one to assist in the location of the essential elements. The second reason is the coverage given in major narrative texts. If this was a criterion it should have dictated the exclusion of other topics which have been included. Also, this excuse overlooks the difference in purpose between a narrative text and a book of cases and materials. Thirdly, the topics left out are described as being only "incidental to the main structural characteristics of the federation". This is arguably true of section 51(xxxv) and federal jurisdiction but is difficult to justify in regard to section 92. The federal structure cannot be comprehended simply by learning how power is divided between the Commonwealth and the States and between the various federal organs. It is also necessary to study the way in which prohibitions in the Constitution deny power to the constituent elements of the federation.

If section 92 and other topics had been included it may not have been possible to retain all the valuable non-case material and the highly readable format. Some space could have been saved. Having reproduced the entire Constitution in the front of the book it was not necessary to reprint sections of it in various places throughout the chapters. Perhaps the volume of literature on the Australian Constitution is now so large that a treatment of this kind, which moves beyond just being a selection of High Court judgments, requires more than one volume to do justice to the important topics. Chapters one to four of this book could be expanded to form one volume. Improved versions of chapters five and six, together with chapters on topics not covered, would form an excellent companion volume.

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