BOOK REVIEWS

A Constitutional History of Australia, by W. G. McMinn, (Oxford University Press), pp. 1-197. Price $19.95. ISBN 0 19 550562.

Historians sometimes, quite rightly, accuse lawyers of distorting history. Their traditional sources are too restricted, their emphasis on political and legal developments misleading and their logical habit of mind too inflexible for objective analysis of the often illogical course of human events. The chain of reasoning works both ways however. Precision and logic are virtues for lawyers; occasionally they accuse historians of misstating the law.

A Constitutional History of Australia purports to cover the entire constitutional history of Australia since white settlement, from the commission issued to Captain Arthur Phillip in 1787 to the reform of the New South Wales Legislative Council in 1978. It is a comparatively short book for such an ambitious task. It falls roughly into three divisions, which are interwoven to some extent. The first is the constitutional development of the colonies, later States, from the autocratic rule of the governors through representative government to responsible government with bicameral legislatures. The 20th century struggle between upper and lower Houses and the changing role of the governors during that period in fact is dealt with towards the end of the book but nevertheless forms a smooth chronological and thematic continuation of the earlier part. The second is the federal movement, the drafting of the Federal Constitution and the establishment of the Commonwealth. The third is the evolution of the Commonwealth Constitution since 1901 through judicial review and political action. Each part requires separate comment.

McMinn's account of the constitutional development of the Australian colonies fills a need in Australian constitutional literature which has existed for a long time. The aims and attitudes of the colonists and the events of constitutional significance are set against the contemporary social and political structure of Australia and the United Kingdom and portrayed as natural outcomes of it. Particular constitutional problems which inevitably faced all the colonies sooner or later are identified and the solutions adopted are compared and explained. The technique is particularly successful in relation to two matters: the ambiguous introduction of responsible government to the colonies and the positions of their respective Upper Houses. The treatment of both is original, informative and convincing.

The second phase, the federal movement in Australia, is dealt with briefly but fairly adequately. This is a subject matter on which it is now hard to be impressive; the contemporary account of the federal movement by Quick and Garran in their *Annotated Constitution of the Australian Commonwealth*,[1] and the more recent *Making of the Australian Constitution* by J. A. La Nauze[2] have covered the ground far too well. In addition there are several features of this part of the book which raise doubts about the author's insight into the significance of the events which then took place. By way of example, the deadlocks clause (now section 57) is discussed as the 'answer to the fundamental problem of federation'.[3] But the fundamental problem referred to was the power of the Senate in relation to money Bills, precisely the range of Bills for which the deadlock provision is unsuited, as recent events have shown.

[1] Quick J. and Garran R. R., *The Annotated Constitution of the Australian Commonwealth* (1901).
[2] La Nauze J. A., *The Making of the Australian Constitution* (1972).
[3] McMinn W. G., *A Constitutional History of Australia* (1979) 113.

More seriously from an historian's point of view, undue emphasis seems to be given to the position of New South Wales in general and its Premier, Sir George Reid, in particular. It is undoubtedly the case that acceptance of the Constitution Bill by New South Wales was crucial for the immediate future of federalism in Australia and that therefore the position taken by New South Wales on such issues as the financial settlement and the resolution of deadlocks is a necessary part of any analysis of the reasons for the final form of the Bill. It may well be also that Sir George Reid played a more central role in the eventual achievement of federation in Australia than that with which he is generally credited. But on any view, McMinn's attachment to the New South Wales cause detracts from the accuracy of this part of the book. An example is provided by his account of the 1899 Premiers' Conference. He lists the alterations which the other Premiers were prepared to make to the Bill to placate New South Wales, including 'two vital amendments' to the deadlocks clause and to the provision for the return of revenue to the States. He mentions also a minor concession made to induce Queensland to accept the Bill. He ignores entirely the fact that the future section 96 was inserted into the Constitution Bill at this stage to compensate the smaller States for the alteration to the financial settlement. One result is an inaccurate picture of the bargaining strengths of the respective colonies. Another is the lack of an adequate foundation for the discussion of subsequent federal financial settlements later in the book. From the viewpoint of anyone aware of the current operation of the Commonwealth Constitution and the relative significance of its various provisions today, the omission is startling.

The final part of the book deals with the evolution of the Commonwealth Constitution. The emphasis is on judicial review, although some attention is also paid to change by political means. Although the author has made a conscientious attempt at mastering the entire range of High Court decisions on the Commonwealth Constitution since federation the attempt was patently unwise. His lack of familiarity with his subject matter shows itself persistently in simple inaccuracies. He refers, for example, to the 'drafting fault'[4] which prevented the Inter-State Commission from carrying out its functions, thus ignoring the ingenious course of judicial decisions which imposed the doctrine of separation of powers on the Commonwealth Constitution. He attributes to section 109 of the Constitution power to avoid any State law 'contrary to the interests of Australia as a whole',[5] on any view a pronouncement a little before its time. His analysis of *Dickenson's* case[6] is meaningless.[7] His account of the Australian Constitutional Convention[8] attributes to that body only two of its four plenary sessions and seriously underestimates its influence on the 1977 referendum results. He dismisses the practical effect of the doctrine of repugnancy in modern times,[9] although the efforts of the Commonwealth and State Attorneys-General have for some years been directed towards abolishing the doctrine largely because of the increased inconvenience of its operation: a fact which is not mentioned in the book. The list could be continued.

In the face of a book so variable in quality it is tempting to draw the conclusion that historians should confine themselves to history and lawyers to law. It is logically impossible however to draw a line at which constitutional history stops and constitutional law begins. The two are interdependent; a proper understanding of one is unattainable without sound knowledge of the other. Australia still needs a comprehensive constitutional history written from a modern perspective. The lesson of McMinn's book is, rather, that it will require a rare combination of talents in either an historian or a lawyer.

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[4] *Ibid.* 117.
[5] *Ibid.* 91.
[6] *Dickenson's Arcade Pty Ltd v. Tasmania* (1974) 130 C.L.R. 177.
[7] McMinn, *op. cit.* 170.
[8] *Ibid.* 194-5.
[9] *Ibid.* 164.

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