

Encounters with the Australian Constitution by Michael Coper (CCH Australia Limited 1987) pp. i-x, 1-493; index 494-502. Price \$89 (hardback) ISBN 0 86903 903 2.

Over the past few years, the Australian Constitution has been the subject of much popular, as well as political, debate; the important referendum proposals scheduled for presentation to the electorate in 1988 ensure that such interest should increase. However, as recent evidence attests, public ignorance of the Constitution (particularly among young Australian voters) has reached an abysmal level. Academics and politicians must despair when they hear that a sizeable proportion of Australian adults do not even know that we have a written Constitution. A massive program of public education is evidently necessary. Fortunately, in Professor Coper's new book, we have an excellent weapon with which to battle against this lack of knowledge.

Professor Coper deservedly has a reputation as a brilliant constitutional lawyer. His contributions to the law on freedom of interstate trade, excise duties and the external affairs power have been characterized by an enviable grasp of the material, great economy and clarity of expression and an ability to see beyond the purely legal boundaries of an issue to the broader social and political considerations. This new work exhibits all those qualities, complemented by an unflinching enthusiasm for the subject and an intelligent wit. It is scholarly (without being pedantic), coherent and persuasive. More remarkably perhaps, as Sir Ninian Stephen comments in the Foreword, 'there is a distinct risk that Coper may have committed the primal sin of converting constitutional law into reading for pleasure'.¹

Possibly the most striking feature of the book is its format or approach to the subject. *Encounters with the Australian Constitution* is neither a text book nor a collection of cases and materials. It is a personal journey through a living Constitution, a sketch of the way in which the document came into being, founded our political institutions and continues to affect individuals living in this country. As such, the potential audience of the book would appear to be wider than that of most conventional constitutional law works. However, I believe that the demand for this volume is difficult to gauge. The author notes in his Introduction that, while the project originated as a book primarily for lawyers, he hopes that it will be read by many people outside the law and political sciences. That hope would be shared by anyone who reads and appreciates the work's excellence, however, I cannot help but think that very few non-lawyers would even manage to complete Coper's opening chapter (on the external affairs power). Only with difficulty could the author have chosen three more complex constitutional law cases with which to open his book than those canvassed in this chapter; *Kirmani v. Captain Cook Cruises Pty Ltd (No. 1)*,² *University of Wollongong v. Metwally*³ and *Commonwealth v. Tasmania*.⁴ It is appreciated that such an introduction illustrates the author's central theme that the Constitution operates upon our daily lives and is not simply some dusty Imperial document, but I believe that a different beginning may have been more successful in attracting the work's desired wider audience. Opening with the second, historical chapter, *In The Beginning*, may have been preferable. That criticism aside, the rest of the book treads an assured line between its two audiences, introducing and explaining the basic framework of constitutional provisions, yet investigating several extremely complex questions (e.g. section 81). There is plenty for both the novice and the expert. The banishment of unsightly case citations and notes to the rear of the volume is a welcome move and helps to ensure that the non-lawyer will not be distracted by peripheral detail.

The work has four cardinal virtues. The first is the admirable clarity and economy of the author's prose. The complex law on freedom of interstate trade or the constitutional crisis of 1975 (to take two topics discussed at length in the book) can easily become unintelligible in the hands of a poor writer; Professor Coper, however, rarely loses or confuses an attentive reader. His writing style is sparse, intelligent, drily humorous but never condescending. Of particular note are the introductory passages

¹ *Encounters with the Australian Constitution v.*

² (1985) 159 C.L.R. 351.

³ (1984) 158 C.L.R. 447.

⁴ (1983) 158 C.L.R. 1.

in each chapter, in which the basic principles and issues to follow are explained concisely and accurately. In introducing the problem of vertical fiscal imbalance in the area of federal-state financial relations, Coper writes:

The reason why the imbalance is perceived to be a 'problem' lies in the mismatch of resources and responsibilities. The States have general legislative power, and general responsibility . . . but insufficient sources of finance. Conversely, the Commonwealth has limited legislative power but an over-abundant supply of finance. The consequent need for the Commonwealth to transfer large amounts of money to the States, involving a substantial separation of the functions of taxation and expenditure, entails a serious loss of accountability: the Commonwealth is not responsible for spending the money it raises, and the States are not responsible for raising the money they spend.⁵

Such observations are not startling nor novel, but demonstrate the author's ability to draft the nature of any debate briefly yet clearly. He displays a felicity of language too rarely found among academic writers.

Related to this ability is the balance and coherence with which the author explains his material. This is the work's second notable virtue. The book is largely devoid of dogma, unsubstantiated assertion and cheap political moralising. Instead of half-truths, there is rational and comprehensive discussion of all topics, combined with frequent and successful attempts to relate different areas of constitutional law to one another. This does not imply, however, that the book does not advance particular arguments and points of view: the book is more partisan (in a 'weak' sense) than most textbooks. But opinions are clearly and carefully argued; never does the author overstate his case. What emerges is a personal, rational and *integrated* view of the Australian Constitution. This personal approach also provides much of the wit and flavour of the book.

The third attraction of this volume is its succession of fine 'cameo sketches', that is, chapters or parts of chapters which explain and debate particularly interesting and controversial topics in thorough detail. Examples include Coper's section on the basic themes of the Constitution, the history and fate of the decision in the *Engineers* case and the vexed question of politics on the High Court. The best example, however, is the chapter on the crisis of November 11, 1975. Nowhere does the author demonstrate to greater effect his ability to address volatile subject matter logically and methodically, exposing the dogma and empty rhetoric of others' accounts. Coper succeeds in presenting an opinion which transcends party politics. He begins by accepting that the Senate has the constitutional power to block supply, and suggests that the only justification for the use of such a power can be the federal nature of our political arrangements (*cf.* United Kingdom). He concludes that when the Senate is acting not as a States House but as the *alter ego* of the Opposition (as in 1975), its power to block supply *in order to force an election* cannot be supported by resort either to federalism or democracy. If, however, the Senate does block supply in such circumstances and thus raises the further question of the Governor-General's appropriate response, Coper believes that the Governor-General must preserve the neutrality of the Crown and salvage the principles of representative democracy. In the context of 1975, this would have required Sir John Kerr to accept the Prime Minister's advice to call a half-Senate election. After reading this account of that tumultuous time, one is convinced that the author's principles should be observed regardless of the merits of the incumbent Government and the temptations of short term political gain.

One of the author's key beliefs underlying his treatment of the 1975 crisis is evident in his general approach to constitutional law. This is the belief that a solution reached by the people's elected representatives is generally preferable to a solution imposed by the court or other unelected officials. The manner in which this basic theme — and others such as democracy, federalism and judicial method — is woven throughout the text, providing an integrity of approach and touchstones for comparison, is the fourth prominent feature of this book. Coper's opinions on the interaction of law and politics are detailed and interesting. While not directly challenging the desirability of judicial review of legislation, he appears to accept the view of Lionel Murphy that legislation passed by a parliament (state or federal) attracts a presumption of validity and should not be struck down lightly. Politicians, not lawyers or judges, should solve political questions, and the judicialization of all disputes is to be resisted. It is a controversial point of view; taken in isolation, it would ensure the categorization of Coper as a committed centralist. However, it results in solutions that would benefit

⁵ *Ibid.* 204.

state and Commonwealth governments alternately and is developed so logically throughout the book, that one is unable to believe that the author can be so neatly assigned to either of those increasingly meaningless categories, centralist or 'states-righter'.

Assessing the work as a whole, it is almost niggardly to find fault. Reservations about the complexity of the introductory chapter have already been noted. The index is detailed in some areas, such as the way in which it lists an individual justice's opinion in different High Court cases, but it is very unhelpful on major topics such as section 92 case law. The illustrations throughout the text are both diverting and very instructive and combine with the spacious layout to make the work a pleasure to read. However, it is unfortunate that this volume, wonderfully presented though it is, should be so expensive as to discourage purchasers. A substantially cheaper paperback edition is needed.

In summary, Professor Coper displays in his latest work an excellent understanding and assimilation of his material, complemented by an almost unflinching capacity to write clearly. He has succeeded in presenting a coherent, shifting and *relevant* picture of constitutional law and practice in Australia.

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