BOOK REVIEWS

The Constitution of the Commonwealth of Australia Annotated, by R. D. Lumb, LL.M.(Melb.), D.Phil.(Oxon.), Reader in Law, University of Queensland, and K. W. Ryan, B.A., LL.B. (Qld.), Ph.D. (Cantab.), Professor of Law, University of Queensland. (Australia, Butterworths Pty. Ltd., 1974. Pages i–xxxii; 1–360; Appendices 361–388; and Index 389–400.)

The 1970's have seen the burgeoning not only of Australian Federal Labor Governments, but also of high-quality texts and treatises on Australian constitutional law: apart from standard, by now almost traditional, works such as Quick and Garran's *Annotated Constitution of the Commonwealth,* and Dr. Wynes' *Legislative, Executive, and Judicial Powers in Australia,* this decade has seen the birth of Professor Howard's critical and learned *Australian Federal Constitutional Law,* and Professor Lane's highly-useful comparative study on the Australian and American federal constitutions. Dr. Lumb and Professor Ryan have made a valuable addition to the list, in the publication this year of their work on the Commonwealth Constitution.

In their Preface, the authors state that "...we have attempted to produce concise commentary on the constitutional text as it stands in 1973 with due deference to the demands of space and relevance." If space and relevance are the metwand of the authors' success, then their success is amply assured: their text runs to a mere 360 pages, compared with 510 for Dr. Wynes' fourth edition, and 510 also for Professor Howard's second edition. It is no criticism of the authors to suggest that this economy has resulted from a clear policy in keeping foot-notes short, almost terse – a notable contrast with Wynes for example, as well as a tendency to refrain from overly-long, critical evaluations of legal (and social) theorizing behind court decisions. If the constitutional enquirer is looking for discussions of what the law of our federal constitution *ought* to be, let him turn more to Howard than to Lumb and Ryan – the latter have markedly concentrated on stating the law as it *is,* as pithily as possible, and in this endeavour, they have succeeded mightily.

Although interested persons are now almost over-endowed with a plethora of Australian constitutional commentaries, Dr. Lumb and Professor Ryan are the first writers since Quick and Garran in 1901 to arrange their commentary in a section-by-section annotation form. This is an excellent format for those who want a speedy reference to an encapsulation of the law on a particular section; however it does pose problems on occasion: how can one discuss a question such as the applicability or otherwise of Federal legislation to the States or vice versa, within the confines of any one section of the Constitution? Or the related topic of the doctrine of Implied Prohibitions and State Reserved Powers? Since such issues pertain to numbers of areas in the Constitution, one finds that a section-by-section treatment, such as this book, tends to split up discussion of these issues into several segments; for example, Lumb and Ryan's treatment of Implied Prohibitions and whether Commonwealth can bind State (and vice verse) can be found in their Introduction; the authors' introduction to the legislative powers in S.51; and their exposition of S.106. Given the authors' method of attack upon their subject, such occasional fragmentation of treatment is unavoidable.

Concentration upon the law as it is, rather than speculating about what it might be, is an admirable time-saver for the over-worked practitioner, student or teacher;

it occasionally leads to the under-rating of potentialities inherent in cases which break new ground, or at least which review old principles: for instance, it is hard to resist the impression that the authors, in their comments on S.51(xx) – the corporations power – have been more concerned to re-state the limitations imposed upon S.51(xx) by *Huddard Parker v. Moorehead,* 8 C.L.R. 330, than to explore the potentially vast liberating possibilities of *Strickland v. Rocla Concrete Pipes,* 45 A.L.J.R. 485.

As well as producing a successfully succinct *corpus* of present-day Australian constitutional law, the authors have taken the useful step of including in their commentaries upon the various *placita* of S.51 a list of the major Commonwealth statutes which have been enacted in reliance upon particular heads of federal legislative power. In short, this book is a commendable addition to the library of any student of Australian constitutional law.

C. D. GILBERT

The Corporation and Australian Society. (Edited by K. E. Lindgren, H. H. Mason and B. K. J. Gordon) Pages i – x, 1 – 334 (1974) Australia: Law Book Company. Price: Hardback: $18.00; Paperback: $14.50.

The corporate entity is a subject of lively interest at the present time. From the legal viewpoint alone, one may consider the demand for continuing review of the *Companies Acts,* for new securities and exchange legislation, not to mention the present brave attempts of the Commonwealth government to open new fields of truly national law *via* its "corporations" and "trade and commerce" powers.

However the legal reviewer should at once remind himself that this collection of learned essays is by no means exclusively legal in character. Indeed, only eight of the twenty-two contributions are concerned with the law; for the rest, the collection is commendably broadened by contributions from businessmen and a Member of Federal Parliament, as well as from academic economists and professors of commercial studies. Every contributor has at his disposal an average of fifteen pages of the text.

The specifically legal contributions are by no means legalistically narrow. Professor Colin Howard orientates a masterly summary of the Commonwealth's powers over corporations towards a future in which "Section 51(20) of the Constitution stands . . . as a virtually unexplored but potentially vast additional source of Commonwealth legalistic power" (page 25). Mr. Mason, in tracing the legal history of the body corporate, shrewdly observes (at page 10) that bureaucratic men and procedures within large-scale private enterprise have "probably done far more than they realise to foster the present welfare state." Mr. Presbury ("What are the Legal Powers and Responsibilities of Corporate Management?") well attends to the "Application of the Legal Rules in Practice". (at page 35 ff.). Here he might have made some acerbic comments on the real variations of company law from State to State, resulting not so much from differences in the *law* as from differences in quality and quantity of the responsible officers of the seeral Public Services involved.

Professor Lindgren does his usual thorough job on an elusive topic – "The Corporation and Control of the Physical Environment at Common Law". (Readers may find an interesting recent reassertion of the common law of trespass in *Graham* v. *K. D. Morris & Sons Pty. Ltd.* [1974] Qd.R. 1.). Dr. Geoffrey de Q. Walker writes with refreshing directness on "the piece of political window-dressing" (page 200) embodied in the former Australian Trade Practices legislation, just replaced by the *Trade Practices Act* 1974. (Unfortunately the latter Act came too late for treatment in the present work.) Professor Trebilcock ("The Consumer in the Post-

Industrial Market Place") has space only to raise, not to develop, some highly stimulating questions which transcend specific laws, e.g., "Do not consumer interests often conflict?" (page 329); "Is it really democratic to expect corporate managers to operate the 'social conscience'?" (page 334).

Turning briefly to the non-legal contributions:– Professor Johns thoughtfully suggests that the benefits of foreign investment in Australia outweigh, on balance, its defects, but fears that this is too often obscured by 'narrow nationalistic considerations' (page 291 ff.). Professor Gordon lucidly reminds the lawyer that in economics there are few differences of substance between registered "companies" and other (non-corporate) forms of business organisation. Mr. Hansen (pages 80–81) gives some useful insights into the actual workings of boards of large companies. Mr. Hansen's essay is at once less pretentious and less platitudinous than the rather "bitty" contribution of Mr. Young, a management consultant. Another piece which seems rather short on substance is Dr. Dufty's sociological essay: "Australian Companies and Their Workers."

This would appear to be a work for advanced general readers, or a valuable "background" for students for whom it is particularly prescribed – chiefly, one would imagine, students in economics, commerce or law. (Such students would find an index valuable.) In concept, this book is bold and generous; its virtue is breadth. Where it (occasionally) fails is, first, in lack of depth induced by limits of space, and, second, in the inevitably uneven quality of writing and penetrative ability among so many contributors. One may be forgiven for finding most of the legal contributions distinguished by lucidity of style, unity of structure, and adequacy of substance.

Principles of Company Law by H. A. J. Ford. Pages i–xiix, 1–493, Index 495–503 (1974) Butterworths: Australia. Price: Hardback $17.50; Paperback $10.50.

Professor Ford has set out to produce a true text, as distinct from an annotated statute, for Australian students of company law. For too long we have existed upon a thin gruel of local material, supplemented by the works of Gower and other English writers – masterly works in some cases, but necessarily drifting further and further away from Australian law.

Anyone familiar with earlier writings of this author – for example, his little gem, *Unincorporated Non-Profit Associations* (Oxford 1959) – will be pleased but not surprised by the command and elegance of this present work. The author has well kept his promise to "describe the law with attention to its modern business setting." Here is an academic writer with the will and the ability to unify instead of atomising his subject. He is mercifully free from that trick of the mediocre scholar, namely persistent "hedging" in the text, and "packing" of long, inconclusive footnotes.

This reviewer appreciated especially the chapters on Directors' Duties, Protection of the Minority, and Loan Finance. The topic of Liquidation, which is sometimes over-inflated into a discrete subject, is well covered in the final chapter of some thirty pages.

Most assuredly, this book deserves to become a *vade mecum* of the large and increasingly numbers of Australian company law students. It is hoped that every teacher in this field will give it his due place, even if he or one of his colleagues has rival material for distribution among his particular captive audience.

Building Contracts: The Law and Practice Relating to Building and Engineering Contracts by Robert Brooking. Pages i–xxiii, 1–199; Appendices 201–210, Index 211–216 (1974) Australia: Butterworths, Price: Hardback $15.00

Mr. Brooking's book meets a real need for a compact Australian work in this field. Sensibly he follows the general scheme of Hudson's standard English work. However he has grappled bravely and successfully with a problem which faces no English writer: as Sir Ninian Stephen observes in his foreword: "An Australian textbook on any general legal topic must extract the principles . . . from the decisions of the Supreme Courts of New Zealand, six states and two territories of Australia and of the High Court of Australia and do all this against the background of the whole developing body of English case law and a great variety of relevant statute law."

This work will be a consolation to the practitioner whose heart sinks when he is confronted by an inescapable "building case". His dismay may arise from several causes: of these the least excusable is a feeling of almost complete unfamiliarity with the relevant law – a feeling exacerbated, perhaps, by the manner in which our "divided" legal profession divorces so many lawyers from all but the clerical routine of a few common types of case. This work treats not only the broad contractual principles but also the common terms and *ambience* of building contracts – "approval and certificates", "variations", "bills of quantities" etc. It includes also a concise treatment of commerical arbitration.

If only – pious thought! – classroom treatment of contract and of its derivatives were enriched by select studies of particular, modern applications of contractual principles (and relevant material from other theoretically distinct subjects), a work such as this might earn better than a patronising glance from more of our teachers of law.

The Legal Point of View by R. A. Samek. Pages i–xviii, 1–343, Biblio. 345–352, Notes 353–383, Index 385–403 (1974) Philosophical Library: New York. Price: Hardback U.S. $15.00.

The author, who is at present Professor of Law at Dalhousie University, Halifax, Canada, took his law degree at Cambridge, and then came in contact with Ludwig Wittgenstein himself, a seminal influence in European and British "linguistic" philosophy of recent decades.

The book falls into two parts. In the first part, the author adapts the philosophy of Wittgenstein to jurisprudence. The emphasis is shifted from the traditional search for definitive *answers* to an enquiry into possible linguistic confusions in the questions being asked. The author concludes that the search for *the* definition of law is not merely an extremely difficult quest, but a hopeless one, because the question is ultimately meaningless. Everyone is free to construct his own "model concept" of law, provided that he accepts the onus of showing (if asked) that *his* chosen "model" is a useful, though inevitably imperfect, instrument for interpreting the legal world.

The author's "model" is "that mode of institutional social control which is enforced through the effective application of a norm-system by courts or tribunals acting as norm – authorities of the system. The contact of the norms . . . is adapted . . . from different points of view, and in particular from the moral point of view . . . " (Pages 87–88).

In the second part of the book, Professor Samek tests his "model concept" against the attempts of Hobbes, Blackstone, Blackstone, Austin, Kelsen, Hart and others to make ultmate sense of legal phenomena.

This is by no means the first attempt to inject linguistic philosophy (which is now of most respectable vintage) into Anglo-American jurisprudence. It is perhaps the most sustained and interesting attempt.

The Law of Minors in Relation to Contracts and Property by David J. Harland Pages i–xxxvii, 1–213, Appendix 214–220 Index 221–238 (1974) Australia: Butterworths. Price Hardback $18.00.

Behind the encyclopaedic title stands a short Act of New South Wales, copiously annotated.

When intellectual and literary activities were less subsidised and institutionalised than they are at the present time, the author of a legal or other non-fictional text faced a testing task. If he were to secure publication, or at any rate advancement, he was expected to excogitate a large and fairly original theme, and to synthesise material as an *author,* in the classical sense of the term. And even then, the uncertainties of professional life went on: not for the author of a legal classic of the pre-1900s (or even the pre-1950s) a happy bourn in academia, let alone promotion in that secure world, upon the strength of some diligent compilation round a pre-fabricated theme, such as a statute of modest length and compass.

Times have changed. The semi-governmental positions pullulate. Compilation is so much speedier, for publication and promotion, than more highly creative production. So too, with Law Reform. An English commission begins its work. Prestigious Commissions of the several Australian States watch and wait with xerox machines and the petty tools of local adaptation. One Australian State follows England, then the other States follow – with local dignitaries basking in author's praises all the while. Then come the commentators upon the local variations upon the English theme.

In modern terms, the author has produced a book. It is indeed a useful work. So is many another handy compilation, legal and non-legal, which appears without plaudits or academic rewards. The sections of the new and related legislation, headnotes of the pre-existing judge-made law, and extracts from prior works have been diligently noted up and typed out as a *continuum.* Struggling junior barristers for many years have done as much for rewards far more transient.

The result here is a useful companion to the *Minors (Property and Contracts) Act* 1970 (N.S.W.), and to the offspring thereof. The N.S.W. Act itself significantly appeared in the year following England's *Family Law Reform Act* 1969. The N.S.W. Law Reform Commission was first entrusted with the task of preparing the local Bill in 1966. Its report appeared in 1969; again the corresponding English work was published one year earlier.

The index is very well presented in Butterworths' contemporary across-the-page style.

Commission Agency: The Law Relating to Payment of Commission Agents by P. E. Joske. Pages i–xxi, 1–127, Index 129–141 (1971) Australia: Butterworths. Price: Hardback $13.00

This modest yet very useful work is at least the sixth legal text from the pen of Mr. Justice Joske. His Honour produces his works in conjunction with full judicial duties: many a Chair in Law has been awarded for less.

It is pleasing to see how the work rapidly descends from safe abstractions to

helpful applications of principle – licensing of agents; the legal characteristics of a genuine purchaser; effectiveness of an agent's efforts; an auctioneer's rights when pre-empted by private treaty etc.

This work should prove valuable to every practitioner, as well as to teachers of commercial law who are concerned to treat the oft-neglected subject of agency in a modern and relevant manner. Legislation of New Zealand and all Australian States is referred to.