

ENCOUNTERS WITH THE AUSTRALIAN CONSTITUTION, by Michael Coper, North Ryde, CCH Australia Limited, 1987. x + 502 pp. \$98 (hard-back), \$38 (popular).

In "Encounters with the Australian Constitution", Michael Coper takes the High Court's interpretation of the Australian Constitution out of the Law Reports and academic texts and journals and attempts to put it into 'people-readable form'. To a great extent he succeeds in this aim so that the product is a piece of work equally at home in the office, the student's study, or on the lounge-room coffee table.

In order to produce a book which has this wide-appeal both the author and publisher have incorporated certain features that are not commonly found in publications on this subject. One example is the photographs, illustrations and cartoons that are scattered throughout the beautifully bound deluxe edition. From photographs which capture the beginnings of the Constitution in the study of Sir Henry Parkes and on the S.S. Lucinda, we travel through the 87 years of our Constitution's history to a snapshot of a recent High Court and a "Section 92 luncheon menu." The author has also dispensed with "those intrusive little numbers which bob up in legal texts and divert the reader into byways called footnotes",¹ replacing them with a table of Notes which is found at the end of the text. Some may criticise this departure from standard academic practice, however, it does allow for a smoother and less interrupted reading. Consequently, the book is a compromise between writing styles and publishing realities, but this in no way detracts from the quality of its content.

From what has already been said it should be obvious that this book does not sit well with the traditional format and approach of those who have previously written on the Constitution. The first chapter is conclusive evidence of this as the author lures the reader into the intrigue of s. 51(xxix) by discussing not only the recent tremendous impact the use and interpretation of this Federal head of power has had on the nation's affairs, but also on the everyday lives of individuals. So it is that the book opens with a discussion of how the external affairs power came into play after Mrs Shawar Kirmani took a cruise on Sydney harbour² and Mr Mohamed Metwally went to a barbeque sponsored by the University of Wollongong Metallurgical Society.³ These 'scene setters' then allow the author to move onto a sub-section entitled "Franklin, My Dear, I Don't Give a Dam", and so to open discussion on the Tasmanian Dam's Case.⁴ In this opening chapter the author displays the intention of his work—to bring to life the workings of the Constitution so that

¹ Michael Coper, *Encounters with the Australian Constitution* (Sydney: C.C.H., 1987), p. x.

² *Ibid.* p. 2; *Kirmani v. Captain Cook Cruises Pty. Ltd.* (No. 1) (1985) 159 C.L.R. 351; *Kirmani v. Captain Cook Cruises Pty. Ltd.* (No. 2) (1985) 159 C.L.R. 461.

³ *Ibid.* p. 20; *University of Wollongong v. Metwally* (1984) 158 C.L.R. 477; *Metwally v. University of Wollongong* (1985) 60 A.L.R. 68.

⁴ *Commonwealth v. Tasmania* (1983) 158 C.L.R. 1.

it is made more relevant to those who live under it and to make those who work with it understand that when it comes to the Constitution—legal, political and historical factors are all at play in its operation.

Another achievement of the author is to encourage us to take a closer look at the members of the High Court so that we do not see them as being “[p]erched along the wooden bench like seven black crows in spectacles”,⁵ but rather as individuals influenced by their own social and political beliefs as well as the arguments which are presented to them at the bar. Coper’s analysis of the Court is not only limited to their judgments, but also extends to various issues and controversies which have surrounded those who have been appointed to the High Court bench. In particular, he considers the issue of whether politicians should be appointed to the Court, whether High Court judges should take on extra-judicial duties, and the controversies over the judgments and actions of the late Justice Murphy.

While the author has sympathy with the legal realism of Murphy, he does not see that a court composed of “seven Murphys or of seven Barwicks would have the legitimacy of a court of more varied composition”.⁶ Yet while the High Court’s reading of the Constitution, is made more intelligible to those readers who are unfamiliar with its various approaches to interpretation, it has not been lowered to a level where the judgments and those who deliver them are treated irreverently. Coper seems to respect that High Court judges have an unforgiving task, and so that not unlike politicians, they can not please all of the people all of the time:

The High Court is not an assembly of Wise Persons, free to soar on the wings of policy as it sees fit. Nor is it an assembly of Legal Automaton, releasing the law on the slot machine theory of jurisprudence. It hovers somewhere between these two extremes, endeavouring not to stray so far from the latter that it endangers its legitimacy, nor to come so close to it that it endangers its credibility.⁷

Another outstanding feature in the book is the emphasis placed on our Constitution’s history. Standard texts have a tendency to only consider the Constitution from its implementation in 1901 and from there proceed to recount and analyse the long line of cases which are found in the Commonwealth Law Reports. Coper, however, does try to give the reader a more complete understanding of how our Constitution was written and the difficulties encountered in interpreting the language of the late Nineteenth Century throughout the past eighty-seven years. The major actors in the Constitutional Conventions prior to Federation are brought to life and their impact not only on early Constitutional inter-

⁵ *Op. cit.*, Coper, p. 104.

⁶ *Ibid.* p. 421.

⁷ *Ibid.* p. 422.

pretation but on the life of the new federation of Australia is emphasised. Accordingly, the reader is made aware of the tremendous influence these figures from the past have had on our Constitution and that it is improper to dismiss as irrelevant the constitutional debates prior to Federation and early decisions of the High Court.

Finally, the most significant achievement of this work is that it personalizes the Constitution. It takes the Constitution down from the level where it is rarely consulted by Australians, apart from the student of law, the practitioner, and the High Court judge, so that the average Australian may have some sense of the importance and the interpretation of this fundamental document which controls our nation's affairs. In this way the reader who is not legally trained will become more aware of their own Constitution (rather than that of the United States of America), so that when they visit National Parks in Tasmania, cross State borders, or consider whether there is a freedom of religion in this country, they will understand the impact the relevant provisions in the Constitution have upon these very basic human activities.

As previously noted, Chapter One on the external affairs power and Chapter Two on the writing of the Constitution and early years after Federation, lay the basis for the author's 'encounter' with the Constitution. While the following chapters only discuss Constitutional issues selectively, there is no attempt to avoid the difficult issues. Consequently, after discussing the High Court in Chapter Three, the author moves on to an analysis of s. 109, the 'reserve powers' doctrine and inter-governmental immunities in Chapter Four, and in Chapter Five tackles federal-state financial arrangements in what he has appropriately called "The Fiery Fiscal Furnace".

The events of 1975 are considered in Chapter Six, while in the following Chapter the author gives us his insight into the difficulties the High Court has encountered interpreting s. 92. While this commentary was written prior to the landmark 1988 decision of *Cole v. Whitfield*,⁸ he confidently (and correctly) predicts that it would not be too long before the High Court adopted a new interpretation of the freedom of "trade, commerce and intercourse among the States." Chapter Eight addresses the question of whether a Bill of Rights exists in the Constitution, while Chapter Nine considers the difficulty in amending the Constitution. Both Chapters are timely commentaries on sometimes neglected issues and especially relevant given the debate over a Bill of Rights in the 1980's and the referenda taking place this year.

In the final chapter Coper addresses the problems faced by the High Court in interpreting the Constitution. He refers to the various "touchstones of interpretation" which the Court can refer to, especially: historical considerations, whether powers should be interpreted broadly and

⁸ (1988) 62 A.L.J.R. 303.

prohibitions narrowly, and the difficulty in assessing whether the framers intended that an historical or a contemporary interpretation be adopted. While the author seems to approve of the way in which the Court has in the past handled this difficult problem, he does not believe that we should expect the Court to be perfect. We are consequently reminded that judicial excesses which result in decisions that are totally beyond the 'norm' can always be subject to rectification by way of s. 128.⁹ Despite this reservation, the author advocates that the courts are the best placed of all institutions to interpret the Constitution, as in "a varied court, in which the individual contributions are both diffused and defused, we may more readily accept whatever outcome emerges from the balance of opinion from time to time."¹⁰

Michael Coper and his publisher are to be commended for this landmark publication on Australian Constitutional Law, a project which may have been considered by some to have been too risky. News that the publisher is in the process of releasing a 'popular' edition will be appreciated by those who see the present deluxe edition beyond their budget. This will especially be the case for law students who will find this book an attractive option to the presently available constitutional law texts. Our Constitution is still as relevant to Australia's future as when it was first implemented in 1901, however it suffers from being seen as an obscure, lifeless legal document which is unintelligible to the public. However, if writers with Coper's skill continue to publish on its interpretation and impact on our lives, many will begin to read and understand our Constitution to a greater extent than is now the case. This can only be welcomed as it will allow more Australians to become aware of this fundamental element of our nation's life.

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⁹ *Op. cit.*, Coper, p. 418.

¹⁰ *Ibid.* p. 421.