

1973

Book Review: The Making of the Australian Constitution, by J. A. La Nauze

P. W. Hogg

Osgoode Hall Law School of York University

Follow this and additional works at: http://digitalcommons.osgoode.yorku.ca/scholarly_works



This work is licensed under a [Creative Commons Attribution-Noncommercial-No Derivative Works 4.0 License](#).

Recommended Citation

Hogg, Peter W. "Book Review: The Making of the Australian Constitution, by J. A. La Nauze." *Canadian Bar Review* 51.4 (1973): 728-730.

This Book Review is brought to you for free and open access by the Faculty Scholarship at Osgoode Digital Commons. It has been accepted for inclusion in Articles & Book Chapters by an authorized administrator of Osgoode Digital Commons.

The Making of the Australian Constitution. By J. A. LA NAUZE.
Melbourne: Melbourne U. P. 1972. Pp. xi, 369. (\$20.00 U.S.)

This book is a fascinating account of the events leading up to the enactment by the Imperial Parliament in 1900 of Australia's federal constitution, the Commonwealth of Australia Constitution Act. Professor J. A. La Nauze, the author, is an historian, not a lawyer, but his book will have a special interest for lawyers, especially those who study federal constitutional law.

Unlike the Canadian federation, which was first officially mooted in 1864 and was completed (not without plenty of dif-

¹ (1949), 338 U.S. 217.

² (1948), 335 U.S. 377.

* L. C. Green, University Professor, University of Alberta, Edmonton.

facilities) only three years later, the Australian federation took a lot longer, starting with a conference in Melbourne in 1890 and ending in 1900. The author takes us through the whole process. The narrative, which could have bogged down in the terrible prolonged business of draft after draft, amendment after amendment (and there is by necessity plenty of this), still holds the reader's interest because the author is such a good writer and good historian. Thus we learn of the personalities of the important "framers", of how they related to each other, and of the kinds of local and political pressures they were under; even the weather played its part, with the fierce heat of the Australian summer influencing the time and place of meetings and exacerbating tensions at those meetings which did not avoid the summer.

The Australians of the 1890's had a number of advantages over the Canadians of the 1860's. They were more self-confident, less oriented to the United Kingdom. Thus it never occurred to the Australians to follow the Canadian precedent of allowing British Colonial Office officials to have a hand in the drafting of the bill for enactment by the Imperial Parliament. They sent their delegates to London with a bill already drafted, and with instructions that it was not to be altered. In the end the delegates were forced to accept one alteration, but only one. Nor did the Australians believe that the Privy Council was the summit of judicial wisdom, and they not only established their own High Court of Australia, but sought to make it the final court of appeal in constitutional cases. It was the appeals clause which they were forced to modify in London, but the resulting compromise excluded the Privy Council from most constitutional appeals.

The later date of their federation also gave the Australians the models not only of the Swiss and United States' federal constitutions, but also the British North America Act. And many of the delegates to the various meetings did their homework well, displaying a close knowledge of the text of, and judicial gloss on, the earlier constitutions. It was probably the United States' model which was most influential, partly because James Bryce's text, *The American Commonwealth*¹ made its terms and rationale more accessible, and partly because the strong states' rights feeling among the Australians led them to reject the more centralized Canadian distribution of power. But it was the Canadian model which taught them the important lessons that federalism could be combined with membership of the British Empire under the British Crown, and with responsible government; and that a federation could live without a bill of rights. The failure to include a bill of rights was due not merely to the uplifting conviction that civilized men of British descent organized

¹ (1888).

as a parliamentary democracy would never deny due process or equal protection to their fellow man, but also to the inconvenient fact that it would have placed in legal jeopardy the existing legislation of some of the states, which discriminated against the Chinese and other non-white residents.

The author is always realistic in his assessments without being cynical. He points out, for example, that as well as the nationalistic and altruistic impulses to federation, the politicians and lawyers who headed the federal movement were members of the two occupations which "were bound to gain by the establishment of a federal constitution".² Furthermore, the division of legislative and executive powers which is essential to a federation imposed an obstacle to the rapid and sweeping changes proposed by the radicals of the 1890's and was "likely to assist the preservation of things as they were".³

It only remains to add the platitude which is mandatory in a review of this kind, but which is nevertheless true, that it is a great pity that the constitutional lawyers of Canada and Australia have not since 1900 taken more interest in each other's work. The two constitutions are similar in important respects, and so are many of the problems which beset the two federations, as current needs overwhelm the structures designed (and very well designed) last century. If this book helps to interest Canadians in the Australian constitution it will have performed a service for Canada. But the book must not be judged on that parochial basis; by any rational standard it is excellent.

P. W. Hogg*

² P. 281.

³ *Ibid.*

* P. W. Hogg, of Osgoode Hall Law School, York University, Toronto.

¹ Former Vice-Dean, Faculty of Law, University of Singapore. Presently Singapore's Ambassador to the United Nations.

² Morgan (1952), 4 J. of Leg. Ed. 379; Patterson (1952), 4 J. of Leg. Ed. 1 and Scott (1955), 8 J. of Leg. Ed. 198

³ Kronstein (1950), 3 J. of Leg. Ed. 265 and Gorla (1950), 3 J. of Leg. Ed. 515.