BOOK REVIEWS

CUTTING LOOSE: SECESSION AND AUSTRALIAN CONSTITUTIONAL LAW

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Review of Gregory Craven: *Secession: The Ultimate States Right* (Melbourne: Melbourne University Press, 1986), Pp. viii, 246. $35 (cloth).

Tearing federations[1] asunder is not impossible. Secession of component entities — states, provinces, cantons or territories — from federal systems of government is, however, an audacious adventure. Success or failure, predicated upon or precluded by a single issue or combination of circumstances, might eventuate. Causes and justifications — economic, social, cultural, political, legal, historical, religious and military — will, in every endeavour to sever federal links, inevitably vary. *Secession: The Ultimate States Right*[2] extracts one conundrum from that quagmire and, within the parameters of the Australian federation, explores its intricacies. When, if ever, does constitutional law authorize, permit or facilitate secession?

Divergent, but not judicially authoritative, answers can be proffered in response to questions concerning the legality of secession. From an Australian constitutional law perspective, *Secession: The Ultimate States Right* contributes to this enterprise by garnering

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1 Among the multitude of studies on federations and federalism see, e.g., G. Sawer, *Modern Federalism* (rev ed 1976), K. Wheare, *Federal Government* (4th ed 1963).

2 G Craven, *Secession The Ultimate States Right* (1986). This book is derived from G. Craven, *The Lawfulness of the Secession of an Australian State* (LL.M thesis, University of Melbourne, 1984). Several portions of the book were also published in Law Reviews See generally Craven, "An Indissoluble Federal Commonwealth? The Founding Fathers and the Secession of an Australian State" (1983), 14 Melb U.L.Rev. 281; Craven, "The Constitutionality of the Unilateral Secession of an Australian State" (1984), 15 Fed. L. Rev. 123; Craven, "The Kirmani Case — Could the Commonwealth Parliament Amend the Constitution without a Referendum?" (1986), 11 Syd. L. Rev 64.

historical, legal and comparative materials, adumbrating a spectrum of views and countervailing arguments, and formulating specific conclusions. Three unequivocal propositions emerge. As a matter of law,[3] a State[4] can secede from the Australian federation. That can occur under the aegis of Commonwealth legislation enacted pursuant to section 51(xxxviii) of the Australian Constitution.[5] Other methods of synchronizing constitutional law and secession confront "twisting and tortuous turn[s]" where "confusion and uncertainty reign supreme."[6] Possibilities and permutations include unilateral secession, United Kingdom legislation, amending the Australian Constitution by the referendum procedure in section 128 of the Constitution, and Commonwealth legislation deriving legal justification from section 2(2) of the *Statute of Westminster, 1931* (U.K.). Present political antipathy toward secession ought not to diminish the intrinsic interest and value of the topics and analysis presented by Gregory Craven in *Secession: The Ultimate States Right.* Their exposure contributes intellectual sustenance to discussions concerning a specific problem and, more importantly, provides a factual context within which to evaluate general, and frequently inarticulate, premises and themes which ultimately determine the ambiance of constitutional law.

If secession is defined to encompass "the action of one of the component regions of the federation ... in withdrawing from that federation, and thereby asserting its independence of both federal government and law,"[7] then is the assertion "that the vast majority of federations have eventually had to surmount or succumb to a movement for secession by one of their component regions"[8] correct? Federations mentioned by Craven are the Achaen League, United States of America, Canada, Australia, Switzerland, United Arab Republic, West Indian Federation, Federation of Rhodesia and

3 This, according to G Craven, supra note 2, does not include revolution See ibid at 202 n. 33 (discussing secession achieved by revolution)

4 Secession of States admitted or established under sections 121 or 124 of the Australian Constitution, of geographical portions of States and of territories is not dealt with in G. Craven, supra note 2. See ibid at 202 n 34.

5 Ibid. at 179, 185, 187, 190 See also ibid at 59 (suggesting "a better method" of secession).

6 Ibid at 158

7 Ibid at 4.

8 Ibid at 7 See also ibid at 4 ("virtually all federal states").

Nyasaland and Nigeria.[9] Others could be added.[10] Detailed historical, political and legal analysis is, however, only extended to the 1930-1935 era of the Western Australian Secession Movement.[11] Even so, despite, or perhaps because of, the analytical precision and clarity by which this is accomplished, nuances, which invariably shape any constitutional crisis, are obliterated. To reconstruct the felt necessities of those times more extensive literature, than is alluded to in *Secession: The Ultimate States Right,* must be consulted.[12]

Historical research can also assist in revealing the meaning of words in the Constitution's preamble, covering clauses,[13] and text. In particular, *Secession: The Ultimate States Right* focuses on the word "indissoluble" in the preamble's phrase "indissoluble Federal Commonwealth". Craven pursues obvious sources — books read by delegates to the 1891 and 1897-1898 Conventions, debates on the Convention floor and in colonial parliaments — and more obscure evidence of the Framers' intentions, in newspapers, speeches and articles. Were other possible repositories, for example the private papers of delegates, perused? Do Robert Garran's papers assist in resolving any of the remaining doubts surrounding his apparently pivotal contribution to the inclusion of "indissoluble" in the preamble?[14] Whether or not such investigations would unsettle Craven's conclusion that the 1897-1898 Convention "chose merely to express its hopes for the future in the preamble, rather than to attempt any actual prohibition of secession",[15] an important question remains. How, if at all, are the intentions of those who drafted and

9 Ibid at 4-7.

10. See, e g., *Studies in Federalism* (R. Bowie & C. Friedrich ed. 1954) 753-789; C. Antieau, *States' Rights Under Federal Constitutions* (1984) 154; L Buchheit, *Secession The Legitimacy of Self Determination* (1978); B. Nwabueze, *Constitutionalism in the Emergent States* (1973) 257-298; M. Sopiee, *From Malayan Union to Singapore Separation Political Unification in the Malaysia Region, 1945-65* (1974); Lee, *"Constitutional Amendments in Malaysia"* (1976), 18 Malaya L. Rev. 59, 64-68, 99-100, Birch, "Another Liberal Theory of Secession" (1984), 32 Pol. Stud. 596. For the development of a theoretical secession model see Birch, ibid.

11. G. Craven, supra note 2, at 31-60

12. See, e.g., E. D Watt, *Western Separatism The History of the Secession Movement in Western Australia, 1918-1935* (M.A. thesis, University of Western Australia, 1957) 166-174 (Bibliography).

13. Sections 1-8 of the *Commonwealth of Australia Constitution Act, 1900*, 63 & 64 Vict , ch. 12 (U.K.).

14. For example, the equivocations in G. Craven, supra note 2, at 206 n.96

15. Ibid. at 28.

approved the Constitution relevant? Conflicting answers are unabashedly accepted and applied in *Secession: The Ultimate States Right*.[16] That approach to any facet of constitutional interpretation should be discarded. Overt selection and utilization of more coherent theories, methodologies and processes of textual interpretation [17] would expose methodological premises and promote greater confidence in postulated conclusions.

Questions and answers enticed by the problem of "the lawfulness of the unilateral secession of an Australian State"[18] also depend upon the selection of interpretive strategies. To thrust aside "the bare provisions of the Constitution Act" in search of "an inherent right of unilateral secession ... deriving from the fundamental nature of Australia as a 'federal' state" [19] abandons any textualization of Australian constitutional law. At this juncture, *Secession: The Ultimate States Right* seeks legal solutions in the realms of federal theory and jurisprudential notions of sovereignty. Federal compact and state sovereignty theories, because of historical, political and legal circumstances, are, Craven suggests, inapplicable in the Australian and American context. While underestimating the judicial contribution to the notion that the Australian Constitution is a compact,[20] Craven's exposition offers a fascinating glimpse at basic postulates which sustain federations and enhances a neglected area of comparative constitutional law scholarship. In stark contrast, relatively "uncomplicated statutory interpretation" [21] stands behind the conclusion that unilateral state secession is inconsistent with and not authorized by "the express terms" [22] of the *Commonwealth of Australia Constitution Act*.[23] The preamble, covering clauses 3, 4

16 Contrast the assertion that interpolation of "implications into the Constitution Act essentially rest upon the intention of the framers of that Act" (ibid. at 106) with the statement that "while history may be used to a *very limited* extent in the task of constitutional interpretation, it clearly could not be used" to imply a right of unilateral secession into the Constitution. Ibid. at 107 (emphasis added)

17 See generally Thomson, "Making Choices: Tribe's Constitutional Law" (1986), 33 Wayne L Rev 229, 233 n 11, 234 n 14 (citing references).

18 G Craven, *supra* note 2, at 61.

19 Ibid.

20 Ibid at 78-80. Additional authorities are cited in Thomson, "The Australian Constitution: statute, fundamental document or compact?" (1985), 59 L. Inst. J. 1199, 1202 n. 32, 1203 n 33

21 G Craven, *supra* note 2, at 81, 101.

22 G. Craven, supra note 2, at 81, 101

23 Ibid. at 101.

and 6, and sections 51 and 107 are subjected to literal, contextual and structural techniques of interpretation.[24] At least in regard to the preamble and covering clauses, even if Craven's conclusions do not command unanimous endorsement,[25] this venture traverses virtually untouched constitutional terrain. Neither neglect nor novelty, however, surround the making and application of implications as a mode of constitutional interpretation. Nevertheless, *Secession: The Ultimate States Right* opines "that a right of unilateral secession cannot be implied into the Constitution Act." [26] To fatally impeach that assertion flaws in Craven's delineation of "the precise scope of the use of implications in the interpretation of the Constitution Act" [27] must be detected. Two possibilities emerge. Ambivalent, perhaps contradictory, characterizations of history's role in the process of constitutional interpretation reveal an initial defect.[28] More ominously, positive implications generating affirmative sources of constitutional power, not merely implications negatively delimiting state and federal legislative, executive and judicial powers, can, despite Craven's almost unequivocal denial,[29] be garnered from High Court interpretations of the Constitution.[30]

Regardless of the constitutional status assigned to unilateral secession, can Australian States secede by virtue of legislation enacted by the Parliament of the United Kingdom? Numerous questions, theories and doctrines pertaining to English parliamentary sovereignty *vis-à-vis* Australia are logically and coherently dissected in *Secession: The Ultimate States Right*. Diverse opinions, cases and conclusions on section 4 of the *Statute of Westminster*, Australia's status as a nation, constitutional conventions and State consent to secession legislation, encompassed within that topic, receive sustained

24 Ibid at 83-100. See also *ibid* at 99 (State Constitutions).

25 Opposing views are prominently displayed throughout Craven's book.

26 G. Craven, supra note 2, at 107

27. Ibid at 104

28. See supra note 16.

29. G Craven, *supra* note 2, at 105 ("generally", "nearly all cases"). See also *ibid* at 104, 218 n. 198

30 See generally, Saunders, "The National Implied Power and Implied Restrictions on Commonwealth Power" (1984), 14 Fed L. Rev 267. See also Winterton, "The Concept of Extra-Constitutional Executive Power in Domestic Affairs" (1979), 7 Hastings Const L Q 1.

attention.[31] Confronted by a multitude of permutations and speculative suggestions, Craven offers qualified and contingent responses about the legal efficacy of United Kingdom secession legislation.[32] Has this uncertainty been vanquished and a substantial portion of *Secession: The Ultimate States Right* rendered otiose by the 1986 severance of residual United Kingdom-Australian constitutional links? [33] Arguments to sustain a negative answer and, therefore, leave unresolved questions of parliamentary sovereignty are adumbrated by Craven.[34] Others, however, may endorse a contrary view.[35] Consequently, the alluring prospect is that articulation of sovereignty issues will feature prominently among the most intellectually intriguing enterprises in Australian constitutional law.

Utilization of express provisions in the Australian Constitution to effect the secession of an Australian State is also explicated in *Secession: The Ultimate States Right*. Two sections — 128 and 51(xxxviii) — of the Constitution command predominant attention. At least three possibilities — insert into the Constitution a provision that a designated State was no longer a component of the Australian federation; amend covering clause 3; or amend section 128 — are generated by section 128. According to Craven, none is constitutionally viable and the reasons advanced by other scholars to induce an opposite result cannot be sustained.[36] Resting upon that foundation, an historical overview and textual

31 G Craven, supra note 2, at 110-158 For a subsequent discussion of the British Parliament's power see G Winterton, *Monarchy to Republic: Australian Republican Government* (1986) 127-132, 138-140.

32 G. Craven, supra note 2, at 158, 190

33 *Australia Acts (Request) Act, 1985* (W.A); *Australia (Request and Consent) Act, 1985*(C'th); *Australia Act, 1986* (C'th); *Australia Act, 1986* (U.K) For doubts as to the constitutional validity of portions of this legislative scheme see *Western Australian Parliamentary Hansard,* 1552-1554, 1812-1813 (1985) See also, *R v Minister for Justice and A G (Qld)* ex parte *Skyring* (unreported Qld Sup Court S.C. No. 8 of 1986) See generally, Goldring, "The Australia Act 1986 and the Formal Independence of Australia," [1986] Pub L 192; "Thomson, Australia Act 1986 A Declaration of Independence?" (April 1986) Brief 22, Lindell, "Why is Australia's Constitution Binding? — The Reasons in 1900 and Now, and the Effect of Independence" (1986), 16 Fed. L. Rev 29

34 G Craven supra note 2, at 193-194, 199

35 For example, Professor Winterton has concluded that "the discussion of the British Parliament's role [in amending the Australian Constitution] will cease to have practical relevance" after the 1986 severance of residual United Kingdom-Australian constitutional links. G Winterton, supra note 31, at x

36 G Craven, supra note 2, at 160-175

analysis of section 51(xxxviii) is the pivotal proposition of *Secession: The Ultimate States Right*: section 51(xxxviii) contains power to amend the covering clauses and, therefore, provides constitutional authority to sustain the validity of Commonwealth legislation which, inconsistently with covering clause 3, facilitates the secession of an Australian State.[37] Even if, as a matter of law, this is a tenable proposition,[38] Craven admits that its conversion from speculative legal theory to practical constitutional reality is "extremely remote."[39]

Other, presently less prominent, means to lawfully effectuate secession might also emerge. Section 2(2) of the Statute of Westminster and the external affairs power — section 51(xxix) — of the Constitution are potential examples. One vision of these provisions permits, without preconditions, Commonwealth legislation to amend the Constitution and the covering clauses and, therefore, would authorize Commonwealth laws which effected State secession.[40] Whether the High Court will or should endorse this or any other perspective in *Secession: The Ultimate States Right* remains open for debate. That, however, need not induce despondency. Persistence of uncertainty, conflicting views and leeways of choice can, at least in constitutional law, be welcomed as a virtue, not a vice.

37. See supra note 5. See generally, G Craven, supra note 2, at 176-190. Craven's view of the relationship between the covering clauses and section 51 (xxxviii) of the Constitution has been endorsed by G. Sawyer "The ending of the Imperial Dream, Canberra *Times*, 31 January 1987, p.2. But see infra note 38.

38. For the suggestion that "Craven's argument is unconvincing at a critical juncture" see G. Winterton, supra note 31, at 183 n. 16.

39. G. Craven, supra note 2, at 190.

40. Ibid at 195-198 (Statute of Westminster), 230 n. 34, 234 n. 40 (external affairs power).

WORDPERFECT 4.2

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Reviewing computer software in a Law Review may seem as peculiar as a review of a new fountain pen or writing pad. Yet a word processing program is more than a useful accoutrement. It shapes the way that one toils by encouraging rapid entry and correction of text, by providing instant spelling correction, antonyms and synonyms and sophisticated apparatus for generating tables of contents and indexes. (Yes, one must be ever heedful of the maxim of "GIGO": Garbage in, Garbage Out.)

There are those who believe that writing is akin to painting and requires the hand to fondle original material. Lawyers, especially, often have a Luddite aversion to electronics although the sharp legal mind (sharpened by narrowing) fits right in to the computer world.

There are 30 useful and credible word processing programs for the IBM PC and compatible computers. WordPerfect 4.2, produced in Orem, Utah purports to offer special tools for the lawyer and thus deserves special attention.

Ease of Learning

A conventional criterion for evaluating a software program is the ease with which it can be learnt. WordPerfect contains an interactive tutorial on the computer screen which guides one through the rudiments of the program. After that stage, a bit of struggle is necessary.

There are various schemes used in word processors to invoke different functions or features. Some programs attempt mnemonic key combinations, as, for example, the use of special keys marked

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Control or Alt on the IBM keyboard in conjunction with the letter "D" in order to delete a word. Others do not bother making sense and require you to swallow whole an alphabet soup of combinations, such as "Control K Q" used in WordStar (a well known word processor) to perform the function of abandoning a session.

WordPerfect makes use of ten special purpose function keys found on IBM type machines marked F1 through to F10. These function keys in combination with the Shift, Control and Alt keys provide the range of functions available in WordPerfect.

There is no way that you can remember that Shift plus F5 inserts the date or that Control plus F2 does a spelling check. WordPerfect therefore provides a little plastic template which fits over the function keys and uses colour coding to show you what combination will perform what function. This requires a bit of squinting from time to time and it would take about a month of regular use until the combinations take root in your mind. Lose the template and it becomes as difficult to use the program as it would to find a moral soul in Kings Cross.

It is not possible to access the tutorial in the middle of a session and the "help" instructions available during a session are rather laconic. There is thus, as they say in the computer world, a "learning curve" that must be traversed to make the program fully functional. The written manual is well written and clearly presented but its essentially wordy nature makes it poor refuge during moments of computer frustration or bewilderment.

If you climb the learning curve, WordPerfect presents a very sophisticated and comprehensive tool. The initial weeks spent in learning the program are not without rewards as new features are revealed as you plod through fresh landscape.

The Philosophy of WordPerfect

Each word processor has a different priority, design and philosophy. WordStar is primarily concerned with rapid entry of text and formatting (underlining, margins, etc) is an after-thought. Another superb word processor, Microsoft Word, concentrates on formatting as the prime objective, showing italics and small capitals on the screen as well as providing access to a wide range of printing fonts.

WordPerfect is directed to the incorporation of the greatest range of features. The capacity for movement around a document is not

as complete or rapid as WordStar and its formatting possibilities are not as extensive or easy to implement as Microsoft Word. Yet it contains a wider range of functions and features than any other word processor now available.

For a legal academic or lawyer, the extra features may constitute the sole reason for choosing WordPerfect over other products which have smoother or more sophisticated implementations of text entry or formatting.

WordPerfect for the Lawyer

The spelling dictionary available at any time in WordPerfect to check a word, page or document contains a large number of legal words. Latin phrases, such as "Res Ipsa Loquitur" are partially recognised ("ipsa" and "loquitur" but not "res") and there is full recognition of terms of art such as certiorari, mandamus, nisi and counterclaim. The excellent thesaurus which leaps on the screen with synonyms and antonyms does not contain uniquely legal words but is otherwise very helpful in smoothing your work (chore, labour, toil).

You can instruct WordPerfect to automatically number paragraphs which it will do in customary legal style (1.1., 1.2). As well, each line could be numbered for the production and correction of drafts. An outline capability uses special numbering and indentation as well as tools for rearrangement of headings grouped with subheadings. As WordPerfect can switch rapidly between two documents at once (or have each on half the screen) it is convenient to work from an outline of ideas.

There is a "macro" feature where boiler plate can be stored with a unique name (e.g. "copyright") and retrieved instantly for insertion. This is not an arcane function and is easily mastered to prevent repetitive typing in the drafting of documents.

The capacity to "redline" text that has been added and to "strikeout" text that has been deleted is well implemented. The redline text is marked by a vertical bar in the left margin when printed and text struck out has a line through it.

WordPerfect contains several features useful for presentation of legal documents. Columns are easily set up and the program can automatically hyphenate words to enhance the presentation of justified paragraphs. It is fairly accurate in insertion of automatic hyphenation and asks you if it is not sure where to break a word.

Occasionally, it makes a mistake (formatt-ing) which is easily corrected.

A table of contents, list of figures or index is derived by first marking the words to be included and then having the program automatically generate the result. It would take no more than 5 minutes to go through a twenty page document, mark the headings and generate a neatly arranged table of contents with correct page numbers. An index, of course, would take longer as each word must be marked and its level in the index specified. However, WordPerfect has the nice feature of permitting you to set up a separate list of words to be recognised and included, where found, in the index.

The program contains the capacity to maintain and store a mailing list of names and addresses and later have these automatically inserted in a form letter for a multiple mailing. As in all word processors, this is not a smooth operation and is better left to data base management programs that perform this function specifically. WordPerfect does perform this function fully but it would require a solid afternoon's work to get it fully operational.

WordPerfect permits you to draw lines and boxes on the screen which will be printed, if your printer has that capacity. This is a primitive device for the creation of forms and should only be used for the most basic of line drawing needs.

The program goes some way in assisting you in finding a word or phrase in another document lying somewhere on your storage disk. However, this requires the computer to look at every word in every possible document. Even on the fastest of computers, this is laborious. Some word processors permit you to go beyond the cryptic rules of naming documents imposed by computers and to take an undecipherable name like ANREP.JON and describe it fully as "Annual Report for Mr Jones". For usage in a busy law office, this will create some problems and require you to observe some standard naming convention of your own devising.

WordPerfect for the Academic

The prime feature for academic use is the creation and editing of footnotes. In WordPerfect, this is a trivial task. At the place where a footnote is to be included a number is placed and a blank screen with the next footnote number is presented. When the content of the footnote is entered, you then are returned to the document to

continue entry of text. The program will place the footnote at the bottom of a page or at the end of the document. Each footnote can be preceded by a number, as is usual in legal scholarship or another character, such as an asterisk.

Notes or comments not to be printed but later as a place for stray ideas can be readily created, viewed or hidden from view. When you choose to enter a comment, a small box appears on the screen to receive your words. Unfortunately, you can only choose to view all your comments or none at all. This is a new feature in the latest version of WordPerfect which will require a less cumbersome implementation before it can be said to be especially useful.

It only takes a press of one key in WordPerfect to have a paragraph indented and two keys will give you a paragraph indented on both sides for quotation. Most word processors require elaborate resetting of margins for quotations.

There are good tools to convert a document written by a colleague on another word processor to WordPerfect format. The program can convert documents created using WordStar, Multimate or from a program that can save a document in what is called "Revisable DCA" form. This latter form was invented to have a way of transferring documents with formatting controls left intact and is being included in the latest releases of word processors.

Table of Legal Authorities

WordPerfect is distinguished for lawyers and academics in its ability to create a list of cases, statutes and other material. The process is a bit complicated to start with but convenient once you have been through it once or twice.

The first step is to highlight an entire citation or reference. At that stage, you are asked a "nickname" for that case or statute (usually the first name). Using a search facility, you quickly go through the text and highlight the nickname of the same authority where it appears. Once all authorities are marked in this way, you tell the program what type of authority you are referencing: a case, statute or treaty. A Table is then generated with headings and groupings of cases and statutes.

The main advantage of this feature is the ability to supply short forms of long named cases and statutes while writing a document. These can then be recognised and grouped in the appropriate classification when preparing a table or list of authorities to be us-

ed in conjunction with that document or, more usually, as a list for a trial or appeal.

For a short document, the process is more trouble than it is worth. For long opinions, it is an invaluable tool to add extra sophistication to your work.

Life without WordPerfect

It is now true to say that a word processor in your own hands will increase productivity for any document that requires drafting or which is too complex to be easily manipulated while using a dictaphone. WordPerfect is one of the best word processors for a lawyer to use. It is not the only one that has features that are useful but it, like a good text book, will give you more than you hoped for.