

Book Launch

The Constitution of the Commonwealth of Australia — History, Principle and Interpretation

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History, principle and interpretation are brought together in this book by Nicholas Aroney, Peter Gerangelos, Sarah Murray and James Stellios. Its title directs us to the book's disclosure of the dynamic nature of constitutional law — a wavefront moved by the historical, social and political energies of our society emerging from the great body of cases and governmental practices in which the constitutional text has been construed and applied.

A badly presented history is 'just one damned thing after another' as Arnold Toynbee is said to have remarked of history generally. Badly presented constitutional law, from a student's point of view, is just one damned case after another. Well presented, as in this book, constitutional law is an ongoing conversation between past and present which enhances awareness of possible future directions.

The importance of that conversation cannot be understated. The Constitution of the Commonwealth of Australia entrenches the rule of law in the thin but vital sense that there is no Commonwealth power, legislative, executive or judicial that can be exercised other than with the authority of the Constitution or laws made under it. The Constitution also sets limits, directly or indirectly, expressly or by implication, upon the law-making powers of the States.

The Constitution and the common law tradition in which it is embedded supports basic limits on statutory powers imposed by the confinement of each statute within constitutional boundaries and its scope, subject matter and purpose. Statutory texts operating within those limits, define the internal logic of statutes which must be observed in the exercise of the powers which they confer. The consequence expressed by Kirby and Callinan JJ is that:

'No Parliament of Australia [can] confer absolute power on anyone'¹.

I emphasise the importance of this thin concept of the rule of law. Some people see it as a rather poor relation of much richer or thicker concepts. Nevertheless, in societies in which executive governments from time to time test the boundaries of power and have a tendency sometimes to regard the judiciary as an inconvenient differentiation of government, to paraphrase the late Professor Gordon Reid, it is a concept which requires maintenance and reaffirmation.

The rule of law concept in Australia supports the federal structure of the Constitution or derives from it according to your perspective. The authors of this book, in its Preface, share their conviction that federalism is one of the Constitution's most important organising principles. They observe that the Constitution refers to the Australian polity as a 'federal Commonwealth' meaning that the Commonwealth was to be federal in its foundations, its institutions and its powers and that its development would be dependent upon that federal character and design. Constitutional principles essential to that design as explained by the authors, include the rule of law, representative democracy, responsible government, judicial review and the separation of powers. They say of the rule of law:

'The rule of law, which requires that all government power must be authorised by law — principally, the law of the Constitution — is shaped by the federal imperative of ensuring that both the Commonwealth and the States operate within their constitutionally-defined limits. Judicial review functions in tandem with the rule of law, for according to it the Courts have the constitutional responsibility to adjudicate in cases where it is believed that these constitutional limits have been trespassed.'

Representative democracy is treated as qualified by federalism. While responsible government poses a challenge to the idea of federal democracy that challenge is mitigated by the powers of the Senate. Its existence ensures that the legislative will of the Parliament is not necessarily identical with that of Government Ministers. The separation of the judiciary from the political branches of government is posited as vital to the federal system so that disputes between the Commonwealth and the States about their powers can be determined by Courts independent of their governments and legislatures.

¹ *Gerlach v Clifton Bricks Pty Ltd* (2002) 209 CLR 478, 504.

Against that background the authors state their purpose — to expound the meaning of the Constitution by putting it in its historical and intellectual context, explaining the concepts and principles that it embodies and critically analysing the High Court's interpretation of it in a manner that follows the Constitution's own logic and method of organisation. They speak critically but respectfully of the decisions of the High Court which is no less than should be expected of a work of this kind if it is to be useful not only to students and practitioners but also to judges. In so doing they reflect the fine academic tradition, expounded in rather purple and risqué prose by Karl Llewellyn, who told his students at Columbia University in 1930, in justification of his criticism of judicial decisions in his lectures²:

'So must we strip the Courts; so must we test them. The stripping is a tribute. An institution we could not honour naked, we should not dare to strip.'

The image which Llewellyn used, if reflected upon at undue length, is confronting after the manner of Lucian Freud. However the kind of criticism he describes is to be welcomed. It is that kind of criticism which is potentially influential. It is to be distinguished from that which revels in conclusionary epithets addressed to everyone in general and no one in particular, and which still abound.

In this context the authors observe that, although the design of the Constitution is federal, many of the Commonwealth's activities and many of the High Court's decisions have contributed to a centralisation of power in the Commonwealth, in a manner and to a degree, that is in tension with that design. That observation reflects a debate that has been continuing since the *Engineers' Case*³. Few would dispute that the scope of Commonwealth legislative power and governmental activity today would not have been foreseen by the drafters of the Constitution. Nevertheless, some of them at least seemed to have been aware that they were launching the Constitution into a future of unknown unknowns, to borrow from the mind-bending taxonomy of ignorance about the future enunciated by Donald Rumsfeld.

Notwithstanding the centralising history of constitutional practice and interpretation over the last 115 years, less the number of years that preceded the *Engineers' Case*, federal structure has been explicitly recognised in a number of ways. In recent times consideration

² Karl Llewellyn, *On Legal Realism*, (Gryphon Editions, Legal Classics Library, 1986) 128–129.

³ *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129.

by the Court of the spending power of the Commonwealth Executive has been informed by federal considerations. The authors, in their discussion of *Williams (No 1)*⁴ referred to my quotation from Inglis Clarke that the central purpose of the Constitution was to create a truly federal government, the essential and distinctive character of which would be the preservation of the separate existence and corporate life of each of the component States of the Commonwealth while at the same time securing the capacity of the Commonwealth to operate as a real government whose laws would be enforced directly and effectively in each State. The continuing existence of the States and the capacity of their governments to carry out their functions has been the subject of recent decisions applying the development of ideas deriving from *Melbourne Corporation v Commonwealth*⁵, specifically in the cases of *Austin v Commonwealth*⁶ and *Clarke v Commissioner for Taxation*⁷. And, even allowing for the strictures of *Kable*⁸ and its sequelae, the diversity of State institutional arrangements is recognised and accepted.

The book comprises 10 chapters. The first gives an account of the origins of the Constitution and the *Constitution Act*. It locates the Constitution as part of the development of British constitutionalism and discusses four elements of the 'federal' idea to which it gives effect. The four elements are respectively the idea of a 'compact' carrying with it that of a union of States, the idea of a new political community namely a federal state which was to be a union of the constituents, the idea of a dual system of government with two distinct sets of governing institutions and the idea of a federal government with general authority over the federation as a whole. Each of those ideas, as the authors point out, has informed lines of constitutional interpretation particularly in relation to legislative power and its demarcation and limits.

The historical story of the movement to federation is set out. The opening chapter also provides an overview of Commonwealth institutions and fundamental principles informing the Constitution and constitutionalism in practice. The authors observe that the practical operation of our system of government is shaped by the interaction between its governing institutions, the Commonwealth and the States, influenced by the electoral process

⁴ *Williams v The Commonwealth* (2012) 248 CLR 156.

⁵ (1947) 74 CLR 31.

⁶ (2003) 215 CLR 185.

⁷ (2009) 240 CLR 272.

⁸ *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.

and popular elite opinion, the scrutiny of the media and many other public and private bodies and institutions. That may raise an interesting question about what qualifies as 'popular elite opinion'. Such opinion, hopefully, is located somewhere between the poles of the mind-numbingly unctuous bien pensants and the deafeningly raucous tabloid ideologues.

The gradual cutting of legal and political ties to the United Kingdom and Australia's evolution to full nationhood is reflected in the account of the development of its constitutional system of government. Various 'isms' attached to the taxonomy of interpretative methods are set out. The general perspective of the book is said to be 'documentarian'. That's a very fine word but I had some difficulty in tracking down its meaning which seems to be confined to photographers and film-makers. The perspective is explained by the authors, however, by reference to their purpose of explaining the law of the Constitution as interpreted by the High Court and to evaluate that interpretation in light of the Constitution considered as an authoritative document focusing upon its text and structure and understood in the light of its enactment history.

In each of the nine chapters that follows there is a valuable and comprehensive essay on the themes opened in the first chapter. The organisation of the chapter groups deals with the parliament, the executive and the judiciary as institutions and then with their powers and functions. Historical grounding is maintained by reference back to the Convention Debates and early commentaries on the Constitution particularly those of Quick and Garran. They help to remind us of the broad purposes of the Founders which are properly taken into account by those who have the task of interpreting and applying the Constitution in a very different world today. They do not confine us to a narrow 19th Century vision. Although there has been some debate about whether or not more than a very small number of the Founding Fathers could be labeled as 'progressivists', it is a rather patronising view of their intelligence which would suggest that they did not know that they were drafting a document for a nation moving into a future which they could not imagine. That perspective is made explicit by Andrew Inglis Clarke in his well-known statement about how the Constitution should be interpreted. It was reflected also in what Sir John Downer said when speaking of the future judiciary of the Commonwealth:

'With them rests the obligation of finding out principles which are on the minds of this Convention in framing this Bill and applying them to cases which have never occurred before, and which are very little thought of by any of us.'

Chapter 2 entitled 'The Parliament' deals with the composition of Parliament and its powers, functions and procedures as an institution. Chapter 3 concerns its legislative powers including a discussion of the nature of legislative power, the way in which the Court has interpreted those powers and reference to the particular cases of corporations, external affairs and implied nationhood.

The importance of the demarcation of power between Federal and State Parliaments and the constitutional guarantees and prohibitions supporting that demarcation is considered in Chapter 4, entitled 'Demarcations of Power'. The authors discuss the perennial question of inconsistency of State and Commonwealth laws and the operation of s 109 and, under the heading 'Intergovernmental Immunities', the recently revisited question of the limits of Commonwealth power to impair the capacity of States to fulfill their constitutional functions. Commonwealth immunity is also covered. As the authors observe in the conclusion to that chapter, constructing a system of partly independent, partly interdependent, self-governing political communities, requires a complex set of rules demarcating their respective powers and ensuring their capacity to exercise them.

Chapter 5, entitled 'Limits on Power' discusses the absence in the Australian Constitution of a Bill of Rights and the prevailing view at the time of the Conventions that appropriately operating systems of representative and responsible government would on the whole provide adequate protection for civil and political rights. Particular limits of importance which have been considered by the Court in recent times are discussed — acquisition on just terms, freedom of trade, freedom of political communication and freedom of religion.

The Executive as an institution and the executive power of the Commonwealth conferred by s 61 of the Constitution warrant two separate chapters. There is an important discussion in Chapter 6 — 'The Executive' — about the relationship between responsible government and federalism and the tension between responsible government and a bicameral parliament with two houses of equal standing which was well appreciated by the drafters of the Constitution.

In Chapter 7, 'Executive Power', the authors express what is no doubt a perspective shared by many when they say:

'At the time of writing it is not possible to predict with any certainty how this particular issue will develop. It nevertheless will ensure that the issue of the ambit of the executive power of the Commonwealth will continue to constitute a major, if not the major, focus of attention in Australian constitutional law and policy.'

*Ruddock v Vadarlis*⁹ gets its customary polite whacking. George Winterton's elegant breadth and depth analysis of judicial power is also seen as having continuing relevance.

The judicature and the judicial power attract two separate chapters. The objectives of the creation of the federal judicature are put in historical perspective in Chapter 8, namely the creation of a general Court of Appeal and of a judicial arm of government essential to an effective federal system. Three core concepts of federal jurisdiction, Commonwealth judicial power and the idea of the 'matter' in respect of which federal jurisdiction is conferred, are discussed. The heads of federal jurisdiction, the investing of federal jurisdiction in State courts and the expanding reach of that jurisdiction are each covered. That expansion is statutory but with each statutory expansion there is attracted the penumbral addition of further accrued jurisdiction.

In Chapter 9, entitled 'Judicial Power' the authors observe that a defining distinction of judicial power — that it involves the determination of rights rather than their mere creation — provides a conceptually neat framework for differentiating between judicial and non-judicial power. There are, of course, historically based exceptions to that distinction which demonstrate that the life of the law cannot be reduced to neat logic. History always leaves untidy loose ends. The authors offer a cautionary observation about an over rigid distinction constraining the federal parliament when designing government institutions and allocating decision-making authority particularly in the modern regulatory state where non-judicial bodies are increasingly entering fields occupied previously by judicial decision-makers. The practical application of the caution may be debated. Separation of powers, while operating in a practical environment, must operate within the framework of principle. The line of cases derived from the decision of the High Court in *Kable* is considered at some length with the conclusion offered that despite the inapplicability of the federal separation of power

⁹ (2001) 110 FCR 491.

principles to State parliaments and the absence of an entrenched separation at the State level, the distinctiveness of State judicial systems has, in various ways, been eroded.

The last chapter concerns the States and their role in the federation and the functioning of State Constitutions. The authors refer to George Winterton's description of State Constitutions as 'Constitutional Cinderellas'. As they say, however, a proper understanding of the Commonwealth Constitution and the basis on which it was formed requires a familiarity with the State constitutional landscape. Restrictions on State legislative power and the operation of the implied freedom of political communication are among the topics covered in this chapter which also deals with the creation of new States.

This book will enhance the respect which is its authors' due. It is a valuable addition to the body of Australian constitutional scholarship. That is not to say that everybody will agree with every aspect of the analyses which they offer. It would be an anodyne and boring work if they did. It offers an engaging conversation about Australia's Constitution, where it has come from, where it is today and where it is going. I commend the book and congratulate its authors and publishers.