"Australian Constitutional Perspectives"

Book Review, *University of Auckland Law Journal*,

H P Lee and George Winterton.

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BOOK REVIEW

H P Lee and George Winterton, *Australian Constitutional Perspectives*

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In the publication of books on constitutional law in Australia, you have to be lucky. As the editors point out, the subject, in its early days, did not exactly attract a flood of books. There was the magnificent *Annotated History of the Australian Commonwealth* of Quick and Garran in 1901, Inglis Clark's *Studies in Australian Constitutional Law* of the same year, and Harrison Moore's *The Constitution of the Commonwealth of Australia* in 1902. There then followed a long drought, to which Wynes' *Legislative and Executive Powers in Australia* gave some relief in 1936. This, and the 1956 update, was the text over which most law students of my generation laboured. Literalism triumphant. Hardly a hint at the great philosophical, social and political controversies that lay behind the constitutional words. For those we had to dig into the eleven chapters published by Justice Rae Else-Mitchell as *Essays in the Australian Constitution*, originally produced to celebrate the first fifty years of federation in 1951.

There are now a number of texts and case books on Australian constitutional law. Lee and Winterton is the latest addition to the crop. It is different in its style. And I feel a little sorry for the editors that they did not delay their work by a year or two. What a harvest they would then have gathered in. Implied constitutional rights to free speech. The revolution wrought by *Mabo*. The unprecedented attacks upon, and analysis of, the reasoning and creativity of the High Court of Australia in a remarkable series of cases delivered as this book was being

published. And to cap it all the debate about the republic, which secures only the slightest and most diffident reference in the last essay, by Professor George Winterton, on the constitutional position of Australian State governors. Professor Winterton was later to take part in the Republican Advisory Committee which produced a report which showed the legal complexities of changing the Australian Constitution. So many were these difficulties that the tide of republicanism seems to have turned, at least for the moment. A strong, full-blown debate about the legal issues of changing the Australian polity from monarchy to republic would probably have been of greater interest to most readers than the examination of the special position of the State governors. Winterton is clearly right in describing the constitutional law of the states and provinces of federal countries (such as the United States, Canada and Australia) as the "Cinderellas of constitutionalism". This is, perhaps, because of the declining political significance of the sub-national units of federations and gradual ascendancy of the centre to respond to national and international needs.

But never mind. What is here is valuable. I feel that much of it will seem a trifle abstruse to a New Zealand reader. It is sometimes unkindly said that the English and New Zealanders, virtually alone of the old Commonwealth of Nations, simply cannot understand federalism. They regard its debates as the modern version of the theological controversies about angels and pins. They sympathise with those whose political government is deliberately divided up into inefficient units and who must thereafter spend so much time, energy, effort and money on overcoming the divisions. They make it their business either to destroy the checks, as in New Zealand by the abolition of the Upper Chamber of the single Parliament, or to severely limit its powers to one of delay, and its legitimacy to an hereditary chamber, as in the United Kingdom. How strange to such people will seem the debates which are collected in Lee and Winterton.

Although the "F" word may not be mentioned in Britain, the answerability of the law of that country to European courts in Strasbourg and Luxembourg has already begun to open the eyes of English judges and lawyers to the

reality of limited constitutional law-making powers. This may not be called "federation"; but it is awfully like it. New Zealand, thus, seems to stand alone. And yet the special status accorded to the Waitangi Treaty[1], and the new status accorded to the Bill of Rights[2], suggests that constitutional law is alive and well in Aotearoa.

So come with me into the nooks and crannies of Australian constitutional law, as revealed in the nine chapters of Lee and Winterton. It is an interesting intellectual exercise, even if it is ultimately rather unsatisfying. One of the authors, Dr James Thomson, who teaches law in Perth, concludes:

> *"Constitutional law, especially emanating from the High Court, is not hermetically insulated against the influence of politics, philosophy, history, and economics. Enrichment, as well as impoverishment, inevitably results."*

In the diverse essays collected in this book one finds the academic analysis of the earnest attempts of nearly a century of jurisprudence centred on the document by which the Australian Commonwealth has been governed. That document will celebrate its centenary in 2001. It is the approach of the century that has propelled some commentators to the suggestion that a hundred years is enough and it is time for something quite new. Still other commentators urge that the date should be brought forward by a year so that we will not be embarrassed by our crustiness at the Olympic Games in 2000. A new flag, a new constitution and a new head of state is their cry. One of the justifications for the new flag is said to be the confusion with that of New Zealand. Fortunately, this book is free of such polemics. Perhaps that is a blessing arising from the authors' deadline and the fact that the book preceded the flash flood of republicanism in 1992-3.

If you think for a moment about the world's troubles and the instability of political government this century, it is actually a source of reasonable satisfaction that a continental country, speaking roughly the same language, has been quietly and peacefully governed for such a long time. In fact, the constitutional instrument which is examined in these pages is one of only six which have been operating for such a long time in the world of how many is it? 180 States.

The Australian Federal Parliament is broadcast and televised throughout Asia. Question Time is apparently compulsive viewing in some countries where the viewers are shocked by the robust exchanges and insults hurled at and by the Government. There seem no immediate signs of the decay of the Australian federal system. Creaking at the joints under certain inefficiencies, it is true. But, by and large, it has worked pretty well. And it looks reasonably safe for the foreseeable future. Those who yearn for radical democratic change at the hands of the people should go back to history. The Constitution can be changed by the referendum procedure borrowed from Switzerland. But it requires a majority of the people and a majority of the States (s 128). This has proved notoriously difficult to secure. Even proposals urging change supported by a unanimous call of the major political parties have been defeated. Constitutionally speaking, Australia remains, as Geoffrey Sawer described it long ago, "*the frozen continent*".

And yet the true achievement of the courts of Australia - especially the High Court of Australia, which was the sole effective guardian of the Constitution for the best part of a century - has been how the great freeze has thawed and how words written in the 1890s, and before, have been adapted to accommodate the needs of the late twentieth century. This is a mighty achievement on the part of the High Court. In a book that directs quite a lot of criticism at the Court, venturing even on the rude and the contemptuous at times, it would have been nice to see a word of praise for the achievement of the judicial branch of Australian government. In the business of constitutional law, we are ever so close to the realm of politics. Australians, not only in the parliamentary chamber, play their politics hard. Some of the heat of the blow torch has lately been turned on the High Court itself. One Member of the Federal Parliament even described the Justices of the High Court of Australia as a group of "pissants". Nobody batted an eyelid. It would not have happened in earlier decades when the Court kept its head down, wore wigs, heard a lot of appeals on real legal subjects, such as wills, caveats and tax, and stuck to the golden principle of "complete and absolute

legalism". But now, all that has changed. And the public, unlike the politicans, seem to realise it.

The first chapter by Mr Greg Craven begins the book provocatively enough. It is titled *"The Crisis of Constitutional Literalism in Australia"*. Craven is Reader-in-Law at the University of Melbourne. He co-edits the new *Public Law Review*. In a nutshell, his thesis is that the High Court has abandoned literalistic legalism but has not found a new guiding star.

The Court did not begin with a purely literalist approach to the language of the constitutional text. On the contrary, its early constitutional decisions emphasised the implied powers of the States and that the powers given to the Federal Parliament by the Constitution had to be interpreted in the context of a federal polity also comprising the States[3]. But then two steps were taken. The first was the emphasis upon the need to give constitutional language an ample construction, taking into account its nature as a constitution and the intention that it should last indefinitely and be difficult to change[4]. More importantly, in 1920, the *Engineers Case* pushed literalism to its limit. If the constitutional text gave the power to the Federal Parliament, no implied States' rights could be used to narrow the power so given[5]. It was that decision which marked the beginning of the long curial haul to the federal ascendancy that has been such a feature of Australian constitutional law over the years since 1920. As Craven points out, there was no basic difference between the judges of the early years and those who followed the *Engineers*' principle. All were seeking to express what they took to be the literal meaning of the constitutional text. The only difference was that the early judges embraced the notion that, like any other legal text, the constitutional words could not be read in isolation. They had to be read in the context of a federal arrangement. If the fundamental character of that arrangement could be undone by the undue expansion of federal power, this would impose on the Australian people a polity of a character quite different from that which they had accepted in the referenda leading up to federation. As all of the earliest High Court judges had taken part in the movement towards federation, they were well aware, in their bones as it were, of the essential nature of the

political compact which was acceptable to the people of the federating colonies. They interpreted the Constitution with those implications in mind.

Craven explains the reasons why literalism dominated for so long. It seemed to be in the traditional black letter, conservative mould of the general law fashionable at the time. Yet it was sufficiently progressive because it permitted gradual expansion of federal power. It became terribly necessary for an effective response to war in 1941 and the post-war reconstruction. Then comes what Craven describes as "the fall from grace of literalism". He sees the reasons for the change in the increasing interest of the High Court judges in constitutional theory, the final severance of the legal links with Britain in the form of the Privy Council, the increasing realisation of the uncertainty of language, including constitutional language, to ground decisions on the sparse text of the document and an appreciation that the literalist approach had achieved its political purpose and was presenting a "federal juggernaut" which threatened individual liberties, the viable existence of the States and even the judicial branch of government itself. According to Craven, this horrible realisation led to a search for a different principle for otherwise:

> *" without federal division of power cases, and with nothing else substituted, the High Court of Australia becomes a fairly pedestrian court of appeal."*

Rather prophetically, given developments which were to occur quite soon, Craven predicted the following way ahead:

> *"The most obvious possibility would be for the court to devote itself to the development of constitutional guarantees of democratic and individual rights, a currently fashionable field which it has so far neglected, but in which a number of its members show a lively interest. The problem with literalism in this context is that however apt it may have been as a tool of centralism, it is quite useless as a means of propounding rights which simply do not appear on the face of the text."*[6]

A more vivid illustration of this truth could not be found than in the comments of Justice Mason upon the suggestion of the late Justice Lionel Murphy that the constitution contained implied guarantees of free speech necessary to uphold the

democratic and representative nature of the constitution[7] Justice Mason (as he then was), in a jest hurled back at him, observed acidly:

> *"It is sufficient to say that I cannot find any basis for implying a new s 92A into the Constitution."*[8]

It is a good warning never to crack a joke in a judgment. In *Australian Capital Television Pty Ltd v The Commonwealth [No 2]*[9] Chief Justice Mason, together with the majority of his colleages, found the implied guarantee - not in the literal text (for s 92A was still not there) but in the implied requirements that derived from the system of political government which the Constitution established.

One can only imagine what Mr Craven would have made of all this, if he had only a *Capital Television* case when he penned his essay. And yet, there is nothing remarkable or unlawyerly in looking to implications and deriving them from the over-all purpose of the document and the context of the words under scrutiny. The real question which Craven poses is, where will it end? What is the new limit to literalism? And what new principle can be substituted for it? He suggests a few. But concludes that the High Court's rationalisation is in an increasing state of disarray. Australian constitutional law has entered an unstable and unpredictable phase. The only positive note which he can derive from these developments is that:

> *"...whatever interpretive theory the High Court may eventually come to accept, it could hardly be less intellectually appealing than literalism."*[10]

In his foreword to the book, Chief Justice Mason describes the "Nostradamus-like prophecy" as "unduly alarmist". But it certainly raises important questions for Australian constitutional law. Those questions have become more, and not less, insistent since the essay was written.

Chapter 2 comprises Professor Lesley Zines' very thoughtful essay on the highly practical problem of characterisation. How can the law, duly enacted by the Federal Parliament, allegedly based upon a head of federal power, be characterised as falling within or outside the brief text by which that power is described? It is the High

Court which ultimately charts the boundaries of the power. But how is this to be done?

Professor Zines illustrates the problems that arise in the border between the end of federal power and the existence of residual State power. For example, would it be a valid law of the Federal Parliament to enact provisions governing all zebra crossings upon the ground that this was reasonably necessary and proportional to the exercise of the federal power to regulate interstate transport? These problems arise all the time in the working life of judges faced with constitutional questions. Such a case arose recently in my own court concerning the outer limit of the power to regulate importation of drugs declared illegal by the Federal Parliament. At what point do the proceeds and property dealings arising out of the act of importation pass outside federal power so that they must, if they are to be impugned at all, be dealt with by State and not federal legislation?[11] The limits are hard to define. But they certainly exist. A rather unconvicing instance of crossing the limit is illustrated by reference to a series of attempts by the Federal Parliament to regulate property aspects of family law.[12] This is an area where semantics has tended to prevail over analysis, policy, implied limitations or the political nature of the Constitution. Thus judges use question-begging connectors of "sufficient connection", "reasonable connection" and "close reasonable connection" - even "very close connection" to justify the decision that the enactment is inside, or outside power. Professor Zines suggests that something more than semantics is needed.

Chapter 3 is Professor H P Lee's essay on the external affairs power. This is expressed crisply in s 51(xxix) of the Constitution. By it, the Federal Parliament is empowered to make laws with respect to "external affairs". From that austere text has flourished a great potential to legislate on matters of treaties and even, possibly, non-treaty elements of established international law.

In his foreword, Sir Anthony Mason suggests that the pass was sold when the High Court handed down *R v Burgess; ex parte Henry*[13]. But the full scope of the power of the Federal Parliament under this head has yet to be determined. On the one hand, it is undoubted that the Australian people should be able, through their

international representative, to join the growing movement to tackle global problems by international co-operation. On the other hand, the fear of the judicial dissentients is that this provision, which exists within the federal polity, might, unless controlled, become an instrument to completely undo the federal division of powers without the approval of the people at referendum.

Various possible limitations are explored by Professor Lee. They include the requirements of bona fides; the obligation to conform to the treaty; the necessity of reasonable proportionality and the possible argument that some limitations are ultimately imposed by the federal balance. Since Professor Lee wrote his text, the High Court of Australia delivered its judgment in *Mabo v Queensland*[14]. In that judgment, important on so many counts, Justice Brennan pointed to the future. With the accession of Australia to the First Optional Protocol to the International Covenant on Civil and Political Rights, it was inevitable, he said, that the powerful influence of the Covenant would be brought to bear upon Australian common law developments[15]. Here, then, is a clue to a new mechanism by which to provide the judges of Australia with fundamental principles that, for the most part, the Founding Fathers would have disclaimed.

It is that question which is explored in Chapter 4 by Professor Peter Hanks. He, especially, must be irritated that his analysis of this subject was in print when the *Capital Television* decision was handed down. Mind you, there were already hints of what was to come, for example the new life which the High Court had breathed into s 117 of the Constitution forbidding discrimination against residents of different States of Australia. In *Street v Queensland Bar Association*[16] it was held that the Rules of the Queensland Supreme Court which required applicants for admission to the Queensland Bar to be resident in Queensland, or to undertake to practise principally in that State, contravened s 117 of the Australian Constitution in their application to a New South Wales resident and barrister who sought admission to the Bar of Queensland.

Justice Lionel Murphy often told me how he kept the Australian Constitution next to his bed and frequently found in it fundamental rights which few others could see. It now seems that the scales of the blind have been lifted. Implied fundamental rights are there aplenty. Litigants are already urging their "discovery" upon the courts. For example, a number of media interests are suggesting that the same implied constitutional rights as were "discovered" in the *Capital Television* case limit or prevent politicians from suing to recover damages for defamation in respect of their political activities.

Hanks prophetically suggests that *Street* and a few other ex-curial writings:

> *"... may be harbingers of a dramatic shift in Australian constitutional thinking. Although there has been no widespread public support for the adoption in Australia of a comprehensive catalogue of fundamental rights, freedoms and values, and although the electorate apparently rejected a modest proposal to strengthen some of the current constitutional protections in September 1988, the level of articulated support for constitutional guarantees has clearly grown over the last 20 years".*[17]

The fifth chapter deals with s 92 of the Constitution. A lot of the old jurisprudence was effectively rejected in *Cole v Whitfield*[18]. The well-known guarantee that trade, commerce and intercourse between the States should be absolutely free is now limited to protection only from "discriminatory burdens of a protectonist kind". Dr Coper asks some rather searching questions, including the meaning of "intercourse" in s 92, and what, if anything, can be "salvaged from the judicial decisions" prior to *Cole v Whitfield*. The very fact that this question is asked demonstrates the radical nature of that decision and the departure from the strict legalism which would have left Chief Justice Dixon puzzled and depressed.

The sixth chapter is written by Mr Henry Burmester on locus standi in constitutional litigation. It includes an excellent analysis of the basic law, a good summary of the suggestions for reform by the Australian Law Reform Commission, an examination of developments in other jurisdictions, notably Canada, and an exploration of the possible avenues for broadening reforms. But it culminates in a rather emphatic

conclusion that an understanding of the nature of constitutional litigation and limited role of judicial review suggests that wider standing in constitutional cases may not be appropriate. This is, for Burmester, basically political business. According to him, even the States should not have standing unless they can show that in some way the federal legislation has a direct impact upon them. From a lifetime advising federal government, Mr Burmester insists that the views expressed in this chapter are solely his own. Whilst I do not doubt that this is is so, I suspect that seeing the problem from the particular perspective he has enjoyed, has coloured his conception of the solutions that should be offered. In fairness, it should be said that he concedes the need for wider standing rights in matters of environmental and administrative law. But why the Constitution should be exempted and put into a narrower class is not made entirely plain.

The seventh chapter by Mr Geoffrey Lindell, of the Australian National University, explores the rather unexplored territory of justiciability of political questions in constitutional litigation. In Australia, this notion has not been embraced as a judicial parachute to escape the worst controversies. In a sense, the issue is linked to the question of standing. Where people have sufficient connection with a case to invoke the orders of the Court, they will usually get relief if they can show a breach or excess of the law. For my own part, I believe that Mr Lindell's analysis of the question demonstrates the wisdom of this broad approach and the undesirability of carving out an area of political questions which are exempted from the courts' insistence upon the rule of law.

A very interesting chapter by James Thomson then follows on the appointment of the judges of the High Court of Australia. At the moment it resides where s 72 of the Constitution puts it, with the Governor-General-in-Council. There is now a statutory requirement to consult the States. But having gone through the motions, the federal Cabinet always carried the day.[19]

Mr Thomson asks why politics should not prevail over principles in the matter of judicial appointment? To some extent, politics inevitably comes into the

appointment of judges to a court as important to the politics of the nation as the High Court of Australia. But, as Thomson points out, successive governments of different political persuasions have tended generally to avoid "doctrinaire politics or rampant politics" which would be "calamitous" to the Court, its operation and its authority. He concludes with the opinion, sensibly enough,

> *"From the appointment of the first three Justices to the present, [the uncontrolled appointment to power] has not destabilised the Constitution or the High Court ... No panacea or sagacious advice ought to be proffered. Confronting conundrums will suffice."*

Elsewhere, Sir Anthony Mason has raised the question whether some form of parliamentary scrutiny of candidates, along the lines of the United States, will come with the growing appreciation of the extent of the judicial power and discretion - in constitutional as in other areas of the law. Perhaps the frightful experience with Justice Thomas will persuade the Australian legislature against going down the same path. Time will tell.

The final chapter by Professor George Winterton explores the constitutional position of the Australian State governors. The governors are the relics of our imperial past. For the most part they perform uncontroversial functions. They are no longer under royal instructions anywhere in Australia. But they occasionally have to make very important and political decisions. And they are seen as the ultimate watchdog of the Constitution and of obediently democratic government.

A good part of Winterton's chapter is devoted to the experience of Tasmania following the close election result of May 1989. The Governor, as is recounted, acted with impeccable neutrality, receiving a great deal of legal advice but guided always by the need for stable government and by the importance of reflecting the democratic will. This is as good an illustration as one can get of the stable continuity of the Australian political system and the essential decency of the conventions which are normally observed. In a sense, the chapter seems a trifle peripheral to the heady federal fare contained in the rest of the book. But it takes on a new significance because of the commitment of the Australian Prime Minister (Mr Paul

Keating) to propose constitutional amendments to establish a republic and to replace the Queen of Australia some time during the present decade.

Such a change would sever one more link which Australia enjoys with New Zealand. The original idea (reflected in the Australian Constitution) that New Zealand might be a part of the Australian Commonwealth came to nothing. But the ANZAC spirit survived two World Wars and beyond. The introduction of the requirement of passports, notorious under-arm bowling and other indignities tended to weaken the link. So did the change in the ethnic composition of both countries. The Closer Economic Relations Treaty and the institutional, linguistic, cultural and other connections continue to throw Australia and New Zealand together in a way that is unique. As two countries which have benefited from the long constitutional struggles of England and have enjoyed such an extended period of responsible government and political stability, it behoves us both to try to understand each other's constitutions and their problems.

To an Australian, the New Zealand constitutional arrangements seem blissfully simple. To a New Zealander, the Australian system must seem horribly complex. It will not appear any less so from a reading of Lee and Winterton. But in the 21st century, as we have already begun to discern in this century, there will be great pressure to concentrate power in few hands. Technology will aid and abet the process. The media, in its constant quest for simple solutions to complex issues, will applaud the process. The Australian federal Constitution has the abiding merit of dividing up great power. If this occasions the apparent inefficiency, delay and uncertainty that New Zealanders abhor, it also prevents great wrongs, as the decision of the High Court on the legislation to ban the Communist Party demonstrated.[20]

As Australia moves towards the centenary of its Constitution, it is likely that there will be more texts like Lee and Winterton. Perhaps the greatest compliment to the Australian Constitution is that most of the people governed by it are blissfully ignorant of what it provides. In the next ten years, as features of the Constitution come under inevitable scrutiny, lawyers and other citizens will do a service by displaying the

strengths as well as the weaknesses of the Australian Constitution. And by acknowledging the role which the judges, especially of the High Court of Australia, have played in modernizing the concepts formulated in the minds of a few colonists in the 1870s so that they would work as the foundation of the constitutional government of a multi-cultural continent on the edge of Asia and the Pacific as it enters a new milennium.

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1. See Claudia Orange, *The Treaty of Waitangi*, Allen & Unwin NZ, 1987, Wellington, Bridget Williams Books reprint, 1992, 212ff

2. New Zealand Billl of Rights Act 1990 (NZ). See R Cooke, *A Sketch from the Blue Train - Non-discrimination and freedom of expression: the New Zealand Constitution* (1994) NZLJ 10

3. See *D'Emden v Pedder* (1904) 1 CLR 91. Cf *In Re Income Tax Acts (No 4), Wollaston's Case* (1902) 28 VLR 357, 4 CLR 141. See also R Sackville, "The Doctrine of Immunity of Instrumentalities in the United States and Australia: A Comparative Analysis" (1969) 7 *Melbourne Uni L Rev 15* and discussion see Howard, *Australian Federal Constitutional Law* (Law Book Co, Sydney, 1972) (2nd Ed) 37ff;

4. See *The Jumbunna Coal Mine NL v The Victorian Coal Miner's Association* (1908) 6 CLR 309, 367ff

5. *The Amalgamated Society of Engineers v The Adelaide Steamship Company Limited & Ors* (1920) 28 CLR 129

6. See G Craven "The Crisis of Constitutional Literalism in Australia" (Ch 1) at 15.

7. See eg Murphy J in *Ansett Transport Industries (Operations) Pty Limited v The Commonwealth* (1977) 139 CLR 54, 88.

8. *Miller v TCN Channel Nine Pty Limited* (1986) 161 CLR 556, 579

9. (1992) 66 ALJR 695 (HC)

10. Craven above n6, 32

11. *Director of Public Prosecutions v Toro-Martinez & Ors* , Court of Appeal (NSW), unreported, 22 December 1993

12. See eg *Russell v Russell* (1976) 134 CLR 495; *R v Lambert; ex parte Plummer* (1980) 146 CLR 447, 450

13. (1936) 55 CLR 608. There is a misreference to this decision in the footnotes to the Chief Justice's foreword. There are other items of careless proof-reading, eg the reference to *Quin*'s case (1990) 170 CLR 1 which is repeatedly described, including in the Table of Cases as "*Quinn*". See p 254, 264, 270, 271.

14. (1992) 175 CLR 1

15. Ibid at 42

16. (1989) 168 CLR 461

17. P Hanks "Constitutional Guarantees" (Ch 4), at 128

18. (1988) 165 CLR 360

19. See the *High Court of Australia Act* 1979 (Cth) s 6

20. *The Australian Communist Party v The Commonwealth* (1951) 83 CLR 1.