"Australian Constitutional Perspectives."

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Longer Book Reviews

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

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The authors of this book were awfully unlucky. If they had published just a year later, they would have been able to elaborate and illustrate their themes by reference to the *Mabo* decision, the spate of important holdings at the High Court in 1993 and the full-blown debate about whether the Australian Constitution should be changed to alter its basic character to a republic.

Instead, the authors had to content themselves with predicting radical decisions in the High Court. Professor George Winterton was obliged to confine his scrutiny of the fundamental polity to an examination of the somewhat esoteric subject of the constitutional position of Australian State Governors. For a larger republican theme he was obliged to await his appointment to the Republican Advisory Committee.

Nevertheless, the nine chapters of this book are certainly worthwhile. Many are engagingly provocative.

Dr James Thomson provides the text for a modern Australian book on constitutional law. He declares:

> *"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."*

Only a lawyer brought up in the tradition of strict and absolute legalism would find the development of the doctrines of constitutional interpretation, in harmony with the society served by the constitution, a cause for the slightest surprise. Given the rigidities of formal amendment by means of s 128 of the Constitution, it has been just as well for the health of our society that the High Court of Australia has found legal ways to thaw the great freeze which otherwise would have settled over our constitutional law. For the better part of this century, that Court was the sole guardian and expositer of the Constitution. Its adaptation of the sparse language of the document to the changing nature and needs of Australian society in the course of the century constitutes a mighty achievement for which a few well chosen words of praise might have been in order. In a book that directs quite a lot of criticism of the High Court (venturing even on the rude and contemptuous at times) it would have been nice to see words of approbation for the long haul achievement of the judicial branch of government. But Australian judges of the 1990s must, it seems, become used to calumny as the pendulum swings from earlier decades of fawning adulation.

In the business of constitutional law, we are necessarily 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 as its creative function is asserted, explained and at last realised. 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 wills, caveats and tax, and stuck to the golden principle of *"complete and absolute legalism"*.

The first chapter by Mr Greg Craven begins the book provocatively enough. It is titled *"The Crisis of Constitutional Literalism in Australia"*. 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, such as *D'Emden v Peder* (1904) 1 CLR 91, emphasised the powers of the States implied in the Federal character of the constitution. 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. More importantly, the *Engineers Case* (1920) 28 CLR 129 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.

Craven seeks to explain 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 also seemed progressive because its results permitted gradual expansion of Federal power. It became essential for an effective response to war in 1941 and then to the post-war reconstruction. Then comes what Craven describes as "the fall from grace of literalism". He finds 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 England 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 by now presenting a *"federal juggernaut"* which threatened individual liberties, the viable existence of the States and even the judicial branch of government itself.

Given developments which were to occur quite soon, Craven predicted that the way ahead would be the re-discovery of constitutional implied rights. The prophetic nature of his words was very soon borne out in *Australian Capital Television Pty Ltd v The Commonwealth [No 2]* (1992) 66 ALJR 695 (HC). The majority of the High Court found an implied guarantee - not in the literal text but in the implications that necessarily derived from the very system of political government which the Constitution established.

What would Mr Craven have made of all this, if he had only had *Capital Television* when he wrote his chapter? Yet, there is nothing remarkable or unlawyerly in looking to implications and deriving them from the over-all purpose of a document and from the context of the words under scrutiny. The real question which Craven poses is, where will the implications end? What is the new limit, beyond 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. In his foreword to the book, Chief Justice Mason protests that this *"Nostradamus-like prophecy"* is *"unduly alarmist"*. But it certainly raises important questions for Australian constitutional law. Those questions have become more, and not less, insistent since Mr Craven's essay was written.

Chapter 2 comprises Professor Lesley Zines's analysis of the highly practical problem of characterisation. How can a 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 in the Constitution? It is the High Court which ultimately charts the boundaries of the power. But how is this to be done in a principled way.

Professor Zines illustrates the problems that arise in the border land between the end of Federal power and the existence of residual State power. These problems arise all the time in the working life of judges faced with constitutional questions. The limits are hard to define. But they certainly exist. 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 phrases such as "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 contains Professor H P Lee's examination of the external affairs power. This is expressed crisply in s 51 (xxix) of the Constitution ("external affairs")... From that brief 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, Chief Justice Mason suggests that the pass was sold when the High Court handed down *R v Burgess; ex parte Henry* (1936) 55 CLR 608. But the full scope of the power of the Federal Parliament under this head has yet to be determined. Various possible limitations are explored by Professor Lee. They include the requirements of bona fides; the extent of any 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.

Chapter 4 is written by Professor Peter Hanks. He, especially, must be irritated that his analysis of fundamental principles was in print when the *Capital Television* decision was handed down. Mind you, there were already hints of what was to come. An example was the new life which the High Court had breathed into s 117 of the Constitution

forbidding discrimination against residents of different States of Australia. See *Street v Queensland Bar Association* (1989) 168 CLR 461.

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

> *"... [M]ay 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".*

The fifth chapter deals with s 92 of the Constitution. A lot of the old jurisprudence was effectively discarded in *Cole v Whitfield* (1988) 165 CLR 360. The well-known guarantee that trade, commerce and intercourse between the States should be absolutely free is now pared down to protection only from *"discriminatory burdens of a protectionist kind"*. Dr Michael 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 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 and an exploration of the possible avenues for further reforms. But the author's conclusion is that the nature of constitutional litigation makes it inappropriate for a wider standing rule. I suspect that Mr Burmester's own distinguished career in Federal service may have influenced his perspective of the problem of troublesome interveners.

The seventh chapter by Mr Geoffrey Lindell, of the Australian National University, explores the rarely examined territory of justiciability

of political questions in constitutional litigation. In Australia, this notion has not been embraced as a judicial parachute to escape the toughest controversies. Mr Lindell's analysis of the question demonstrates the wisdom of our broad approach and the undesirability of carving out an area of "political questions" which are exempted from the court's 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. 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. Conventions, when they survive, soften the generation of the legal text in a way which safeguards the integrity of vital institutions. When they break down, courts are tempted to re-act or even over-react. The recent decision of the Supreme Court of India effectively reserving judicial appointments to the Supreme and High Courts in India to those approved by the Chief Justice of India is an illustration. See *Supreme Court Advocates-on-Record Association & Ors v Union of India* (1993) 4 SCC 441 (SCI).

The final chapter by Professor George Winterton explores the constitutional position of the Australian State governors. The governors are still useful 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 political decisions. A good illustration is given in the conduct of the Governor of Tasmania in 1989. This chapter takes on a new significance

because of the commitment of the Prime Minister (Mr Paul Keating), some time during the present decade, to propose constitutional amendments to establish a republic and to replace the Queen of Australia.

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 under 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 the people a service by displaying the document's strengths as well as its suggested weaknesses.

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