

High Praise

Michael Kirby

H.P. Lee and George Winterton (eds)
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THE CENTENARY of the first sitting of the High Court of Australia was celebrated in the same courtroom in Melbourne in October 2003. There followed a conference in Canberra reviewing the decisions of the Court over the course of a century. The papers of that conference will shortly be published for a legal audience.

In advance of that book, CUP has published sixteen essays to give a more general audience an idea of the role the High Court has performed in the leading issues in which it has been involved. The writers are assigned important decisions or major themes. They explain the background. They describe proceedings in the High Court and (whilst it lasted) the Privy Council. They put their subjects in context and evaluate their significance in terms accessible to an informed lay reader. This book contains plenty of new insights that combine to make it a commemorative volume, but without many of the defects normal in that genre.

John Williams gets the book off to a good start with a description of the chancy business by which the Australian Constitution was cobbled together. But for a providential attack of catarrh on the part of Edmund Barton, at a critical moment in the Adelaide Convention in 1897, the whole enterprise might have collapsed. The colonial rivalries and political differences almost sunk the moves to Federation. Reading this chapter brings home what a close-run thing the Constitution was. Particular provisions, of the greatest importance in the succeeding century (such as the power of the High Court to grant writs against federal officials claimed to have acted unconstitutionally) were deleted until an urgent telegram from Andrew Inglis Clark urged Barton to read the decision of the United States Supreme Court a century earlier in *Marbury v Madison*, asserting the essentiality of judicial review.

The influence of the US Constitution pervaded the creation of its antipodean counterpart. I always thought that the word 'Commonwealth' had come directly from Cromwell's republic, well known to the Australian founders as to Queen Victoria, who hated it. But Williams digs up a letter that Barton wrote to James Bryce, whose book *The American Commonwealth* (1988) described the US Constitution. Barton told the American author: 'I fancy the Convention adopted the title "Commonwealth" from your pages.' This book is jam-packed with vignettes of that kind.

The second chapter, by Keven Booker and Arthur Glass, describes the *Engineers' Case* of 1921. Undoubtedly, this was a turning point in the High Court's exposition of federal powers. The earlier interpretations favouring 'reserved

powers' of the states were largely rejected. If we look for an explanation of the centripetal character of our Federation, it can be found in that decision and the unbending will of Justice Isaacs, who persisted through years of dissent until his approach prevailed.

Another illustration of the peculiarities of our federal system comes in Cheryl Saunders's chapter on the *Uniform Tax Cases*. The urgent needs for federal revenue in wartime shifted the taxation powers in favour of the Commonwealth. It would have been an orthodox legal approach to reject a federal taxing power having the practical effect of excluding state income taxes. Saunders analyses how the contrary decision came about. Menzies saw it as marking 'the end of the Federal era in this country'.

Peter Johnston describes the battles in the High Court and the Privy Council to fend off the Chifley government's bank nationalisation laws. In the end, in both courts, the private banks prevailed. This is not a tale of legal intricacies. The politics and personal animosities of the combatants, including at the bar table, are vividly described. Few would now see merit in nationalising all the banks. As the author points out, it is a great irony that the case law regarding section 92 of the Constitution that emerged from this endeavour did not endure for very long.

George Winterton, one of the editors, contributes a chapter on the *Communist Party Case*, rightly in my view described in the introduction as 'the most important case in Australian constitutional law'. The essay is an interesting concoction of law and politics. The legislation to ban the Communist Party was supported by a mandate of the electors and was initially overwhelmingly popular. Dr H.V. Evatt, who had lost the banking case, returned before the bench of his old colleagues in the High Court to challenge Menzies' legislation. This time he won, with only Chief Justice Latham dissenting. The High Court gained from the decision. Its reputation as a fearless defender of 'liberty under law' was never higher. The conclusion stands in marked contrast to the contemporary decision of the US Supreme Court, which reached the opposite result.

The next chapter, written by Harry Evans, Clerk to the Australian Senate, describes the *Browne and Fitzpatrick Case*. It involved imprisonment by a House of Parliament. The accused were charged before the House of Representatives for defamation and for attempting to intimidate a member of the parliament. This time, the High Court did not find that the traditional parliamentary power to punish for contempt of its privileges was modified because of the constitutional separation of judicial powers in Australia. Many lawyers today question the correctness of this outcome. However, parliament has not revisited its powers, despite some sore provocations. As befits his office, Mr Evans defends the parliamentary action. But one is left with a feeling that neither parliament nor the High Court came out of this case with its reputation enhanced.

Fiona Wheeler's chapter on the *Boilermakers' Case* of 1956 describes the decision in which the High Court struck

down the federal law establishing the Conciliation and Arbitration Court. Its defects were said to be the invalid mixture of judicial and non-judicial functions in the one body. Three judges wrote strong dissents. Later cases have repeatedly shown the artificiality of the supposed distinction.

Justice Robert French then provides a splendid analysis of Australia's constitutional approach to race. Beginning with the laws and policies of the decades of White Australia, he reaches the 1967 constitutional amendment that gave the federal parliament the power to make special laws for Aborigines and did so with the largest referendum majority in what has otherwise been a pretty dismal story of formal constitutional changes. He brings the story up to date with the 1997 High Court case concerned with the Hindmarsh Bridge in South Australia. Correctly, he describes the origin of the race power in our Constitution as 'a darker aspect of the early Australian psyche'. If he is more confident about the future on this score than others might be, one can only hope that he is correct.

A past chief justice, Sir Anthony Mason, writes on the *Double Dissolution Cases* and the circumstances surrounding the use of this unusual procedure in 1914 and 1974. Here was the interface of a special parliamentary procedure with the powers of a vigilant constitutional court. As is pointed out, many issues remain unresolved after the cases that followed the 1974 dissolution.

The tenth chapter, also by George Winterton, concerns the dismissal of the Whitlam government. Clearly, this was a constitutional milestone. Its full implications for the constitutional monarchy, represented by the governor-general, remain to be seen. Formally, the High Court did not become involved in the dismissal; although then Chief Justice Barwick gave private advice to Governor-General Kerr concerning the legality of the removal of Mr Whitlam as prime minister.

Professor Winterton explores the propriety of that advice, citing the opinion of Chief Justice Brennan at the time the Court marked the death of Barwick. Because of the controversy, Brennan said, 'it would not happen again'. Winterton, an advocate of the republic, notes that it is ironic that the dismissal left a legacy of republicanism. He concedes that Sir John Kerr did not act in the way normal to a constitutional monarchy and that a president, inheriting the same powers but with electoral legitimacy, might feel entitled to do the same thing unless specifically restrained.

The chapter on the *Tasmanian Dams Case* by Professor Leslie Zines describes another close-run constitutional contest. The use of the external affairs power to cut across federal arrangements presents a continuing difficulty of reconciling the 1901 text to the contemporary world. One of the judges of the High Court most involved in that reconciliation was Lionel Murphy. His travails, prior to his death in 1986, are described in a chapter by Geoffrey Lindell. Apart from recounting the controversies surrounding Justice Murphy, the chapter explains various problems with

the constitutional power for the removal of federal judges. By reference to later events, Professor Lindell concludes that 'the increasing politicisation of judicial appointments' will lead to further attacks on judges. He declares that this is 'a disturbing trend which unfortunately is unlikely to abate'.

Sir Gerard Brennan has contributed a typically fair review of the Privy Council's contributions to Australian constitutional law. Somewhat more acid in tone is an essay by Dennis Rose on the 1988 decision that re-expressed the meaning of section 92 of the Constitution, with its apparently absolute guarantee of 'trade, commerce and intercourse'. Mr Rose, who laboured in the federal attorney-general's department over many of the earlier section 92 cases, may have more affection for the obscurities of the old doctrines than most others.

The last two chapters are by Marilyn Pittard on the labour relations power and by the other editor, H.P. Lee, on the implied freedom of political communication discovered in constitutional assumptions found essential to representative democracy. Whereas industrial cases were once common in the High Court, they are relatively rare today. The implied protections of free speech clearly grew out of Lionel Murphy's earlier reasoning. A constitution stated in such brief terms is bound to depend on implications. The real controversy is about how they are to be found and where they stop.

This book is beautifully produced, with excellent tables and a splendid index. I do not understand why the publishers consigned all the footnotes to the back of the book, given the ease of computer formatting today. The sixteen constitutional landmarks are well chosen. Perhaps the editors might have added a postscript drawing together some common themes and pointing us towards our constitutional future. Clearly, they are of the opinion that, overall, the High Court has done a good job in applying and developing the brief text of the Australian Constitution to serve the nation over a century. In their introduction, they state:

The Court's pivotal role ... can be demonstrated by speculating how different Australia's history would have been if the High Court had reached the opposite result in these cases: The Communist Party would have been banned; the private banks would have been nationalised; Australia would be paying both Commonwealth and State income tax; Commonwealth laws could not bind State Governments or their instrumentalities; professional employees could not be governed by Commonwealth industrial awards; and Australia would enjoy no freedom of political communication.

Even if there is a little hyperbole here, the book demonstrates in a readable way how, when it has faced major tests concerning the welfare of the Australian Commonwealth, the High Court has usually come down on the side of wisdom. No doubt an alternative book could be written on the mistakes, failings and wrong turnings of the judges. In Australia, too much praise is strangely unsettling.