

## BOOK REVIEW\*

### *Reflections on the Australian Constitution*

By ROBERT FRENCH, GEOFFREY LINDELL AND  
CHERYL SAUNDERS (EDS)

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Helen Irving, in her book *To Constitute a Nation: A Cultural History of Australia's Constitution*, describes the inauguration of the Australian Commonwealth on 1 January 1901 as 'more a marriage than an initiation'.<sup>1</sup> Like all marriages, she says, possibly with a degree of over-inclusiveness, it was 'partly a matter of love, partly of convenience, partly of proximity'.<sup>2</sup> If federation was a marriage of the six colonies, the Constitution was the marriage contract or perhaps, in modern terms, the ante-nuptial agreement.<sup>3</sup>

The pragmatism displayed by the framers in reaching an agreement has resulted in a remarkably durable union. So it was that in 2001 the nation celebrated the one hundredth anniversary of a Constitution that survives largely unchanged, at least in form, from the version enacted by the British Parliament on 9 July 1900. *Reflections on the Australian Constitution*, published under the auspices of the Australian Association of Constitutional Law, is a continuation of that celebration. It contains 13 essays written to mark the centenary. While the essays reflect a variety of perspectives, the 'organising principle [is] the manner in which the *Constitution* has accommodated the dramatic changes that have taken place' in the course of the 20<sup>th</sup> century.<sup>4</sup> According to the Introduction (unattributed but presumably written by the three editors), the intention is not merely to describe the accommodation but also to consider 'the legacies of the choices made and the approaches taken for the theory and practice of constitutionalism in Australia'.<sup>5</sup>

The first of the essays, by Sir Anthony Mason, provides a penetrating overview of 'The Australian Constitution in Retrospect and Prospect'. As Sir Anthony observes, the *Constitution* is a 'prosaic document expressed in lawyer's

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\* The Hon R Sackville, Judge of the Federal Court of Australia.

1 Helen Irving, *To Constitute a Nation: A Cultural History of Australia's Constitution* (1999) 7.

2 Ibid 23.

3 Of course, Western Australia gave its consent to the nuptials a little later than the other colonies: see *Commonwealth of Australia Constitution Act 1900* (UK), s 3; Justice Robert French, 'The Constitution and the People' in Robert French, Geoffrey Lindell and Cheryl Saunders (eds), *Reflections on the Australian Constitution* (2003) 60, 69–70.

4 Robert French, Geoffrey Lindell and Cheryl Saunders (eds), *Reflections on the Australian Constitution* (2003) 1, 1.

5 Ibid.

language',<sup>6</sup> virtually devoid of 'aspirational qualities'.<sup>7</sup> The same point is made by Justice French, who notes that to read the *Constitution* 'is not to experience a significant sense of moral uplift'.<sup>8</sup> It is perhaps for this reason that relatively few Australians are familiar with the contents of their foundation document. If they take the trouble to read the *Constitution* they may discover that it is set out in a section of an enactment of the British Parliament.<sup>9</sup> They certainly will find no reference to the common constitutional rallying cries of liberty, justice or even domestic tranquillity,<sup>10</sup> let alone democracy, human rights or the claims of indigenous peoples. Rather, as Sir Anthony says, the *Constitution* is 'an instrument which simply ... defines and delimits the powers of government'.<sup>11</sup>

As an instrument of government for the new Commonwealth, the *Constitution* may have ushered in Australian nationhood, in the sense of cultural distinctiveness or political destiny.<sup>12</sup> But the *Constitution* is not a declaration of Australian independence. Yet despite the unfinished business of a republic, commentators generally agree that Australia is now an independent nation. When did this happen? Was it in 1901, 1931 (the year the *Statute of Westminster* was enacted), 3 September 1939 (the date from which the *Statute of Westminster Adoption Act 1942* (Cth) deemed the *Statute of Westminster* to come into operation), 1986 (the enactment of the *Australia Acts*), or some other date?

The question itself is awkward if not embarrassing. What sort of country does not know when it became independent? Professor George Winterton, in a closely reasoned essay, provides an answer that is as satisfying as the circumstances permit. He argues that Australian independence, although resulting from a process of evolution, can be dated to the enactment of the *Statute of Westminster* in December 1931:

From that date, the removal of all vestiges of colonialism lay within Australian hands, either through Commonwealth legislation, as in the *Statute of Westminster Adoption Act 1942*, or by joint legislation by Commonwealth and State Parliaments, as in the *Australia Act 1986* (Cth), enacted pursuant to s 51(xxxviii) of the *Constitution*. Hence Australia's constitutional destiny lay entirely in Australian hands from 1931.<sup>13</sup>

Professor Winterton notes that the evolutionary process of independence culminated in legislation enacted by the British Parliament. But, he says, even if the question of independence requires reference to notions of popular sovereignty and international recognition,<sup>14</sup> Australian independence can still be dated from 1931.<sup>15</sup>

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6 Sir Anthony Mason, 'The Australian Constitution in Retrospect and Prospect' in Robert French, Geoffrey Lindell and Cheryl Saunders (eds), *Reflections on the Australian Constitution* (2003) 7, 8.

7 Ibid 9.

8 Above n 3, 60.

9 *Commonwealth of Australia Constitution Act 1900* (UK) s 9.

10 All words found in the preamble to the *United States Constitution*.

11 Mason, above n 6, 8.

12 Irving, above n 1, 7.

13 George Winterton, 'The Acquisition of Independence' in Robert French, Geoffrey Lindell and Cheryl Saunders (eds), *Reflections on the Australian Constitution* (2003) 31, 42–3.

14 As Deane J argued in *Kirmani v Captain Cook Cruises Pty Ltd* (No 1) (1985) 159 CLR 351, 441–2.

15 Winterton, above n 13, 44–6.

Professor Geoffrey Lindell, in an essay entitled 'Further Reflections on the Date of the Acquisition of Australia's Independence', pronounces himself persuaded by Professor Winterton's analysis.<sup>16</sup> He points out, however, that in Australia there has been a 'search for some autochthony'.<sup>17</sup> This, he contends, explains the enactment of the Australian version of the *Australia Acts* and the reliance by the High Court on that version rather than the version enacted by the British Parliament '[a]pparently out of a perceived need for abundant caution'.<sup>18</sup>

From its inception, the *Constitution* was regarded as deriving its binding force from its status as an enactment of the Imperial Parliament. The end of the Imperial Parliament's authority to legislate for Australia<sup>19</sup> requires a new theory of sovereign power. Justice French, while alert to the different senses in which the term 'sovereignty' is used,<sup>20</sup> examines the democratic credentials of the *Constitution*. As he points out, the draft Constitution was separately approved by voters in all six colonies, although on a more restricted franchise than would now be acceptable. Justice French argues<sup>21</sup> that the

legitimising function of the initial referendum supported the evolution of 'the people' as the contemporary ground of constitutional authority and in that sense the ultimate repository of sovereignty.

While the support of a majority of those eligible to vote in the colonies was an important historical step in securing passage of the *Commonwealth of Australia Constitution Act*, it might be thought to be a slender reed by which to support the current vesting of ultimate sovereignty in the people. Would the present position, in point of theory or practice, be different if no referenda had been held prior to the *Constitution* coming into effect?

Professor Zines' essay 'Changing Attitudes to Federalism and its Purpose' recounts the familiar story of the increase of Commonwealth power at the expense of the States, notwithstanding the reluctance of voters to approve Constitutional amendments conferring greater authority on the Commonwealth. Professor Zines attributes the phenomenon to two developments. First, the Commonwealth has relied on direct legislation supported by an expansive interpretation of its legislative powers, most importantly the corporations power<sup>22</sup> which has become 'the brightest star in the Commonwealth's constitutional firmament'<sup>23</sup> and has been the main vehicle for federal regulatory control of matters related to the national economy.<sup>24</sup> Secondly, the Commonwealth has exploited its greater financial powers, exemplified by its ability to impose a

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16 Geoffrey Lindell, 'Further Reflections on the Date of the Acquisition of Australia's Independence' in Robert French, Geoffrey Lindell and Cheryl Saunders (eds), *Reflections on the Australian Constitution* (2003) 51, 54.

17 Ibid 57.

18 *Sue v Hill* (1999) 199 CLR 462, 491 (Gleeson CJ, Gummow and Hayne JJ).

19 *Australia Act 1986* (Cth) s 1.

20 French, above n 3, 73. See Leslie Zines, *The High Court and the Constitution* (4<sup>th</sup> ed, 1997) 394–7.

21 Ibid 84.

22 *Australian Constitution* s 51(xx).

23 Leslie Zines, 'Changing Attitudes to Federalism and its Purpose' in Robert French, Geoffrey Lindell and Cheryl Saunders (eds), *Reflections on the Australian Constitution* (2003) 86, 93.

24 Ibid 94.

uniform tax system on the States. Professor Zines sees the arrangements whereby the States receive the net revenues derived from the Goods and Services Tax as increasing even further the vertical fiscal imbalance characteristic of the Australian federation. While the States have been given access to an important source of revenue, State taxes have been replaced by yet more federal grants.

Professor Zines also traces the moves towards greater cooperation between the Commonwealth and the States and Territories. He points out that federal cooperation requires the States to have 'some guaranteed autonomy and power'.<sup>25</sup> Like a number of other commentators, Professor Zines would have preferred the High Court in *Re Wakim*,<sup>26</sup> which struck down key elements of the cross-vesting scheme, to have concluded that it is inherent in the federal system that each government can consent to powers and duties being conferred on it by another government.<sup>27</sup> Be that as it may, it is difficult to resist Sir Anthony Mason's call for a constitutional amendment legitimising cooperative legislation, subject to constitutional prohibitions and the consent of the relevant government.<sup>28</sup> This would provide a more permanent solution to the difficulties for cooperative federalism created by *Re Wakim* than limited references of State powers to the Commonwealth.

Three essays in the volume consider the significance of globalisation for the constitutional development of Australia. Professor George Williams' contribution, curiously enough, is the only essay by an Australian contributor to refer extensively to the jurisprudence of countries other than Australia.<sup>29</sup> He argues that the final courts of many nations – especially those, like South Africa, which have recently adopted their own constitutional systems – have taken more readily than the High Court of Australia to international law as an aid to constitutional interpretation.<sup>30</sup> (The most prominent exception is, not surprisingly, the Supreme Court of the United States, which rarely invokes international norms to inform its construction of the Bill of Rights.) Professor Williams says that while the High Court of Australia has relied on international norms for construing legislation and developing the common law, it has been reluctant to adopt a similar approach in constitutional adjudication.<sup>31</sup> He acknowledges that the *Constitution* in its present form offers limited opportunities to embrace international norms since they 'lack purchase on an instrument drafted in a different era and for different times'.<sup>32</sup> Nonetheless he suggests that the High Court should develop guidelines setting out the inappropriate and appropriate uses of international law in constitutional adjudication. Professor Williams also renews his plea for a domestic Bill of

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25 Ibid 97.

26 *Re Wakim; Ex parte McNally* (1999) 198 CLR 511.

27 Zines, above n 23, 99.

28 Mason, above n 6, 18.

29 George Williams, 'Globalisation of the Constitution – The Impact of International Norms' in Robert French, Geoffrey Lindell and Cheryl Saunders (eds), *Reflections on the Australian Constitution* (2003) 192.

30 Ibid 194–5.

31 Ibid 199.

32 Ibid 207.

Rights ‘in order to modernise our system and enable it to meet the aspirations of contemporary Australians’.<sup>33</sup>

The essay by David Jackson, ‘Internationalisation of Rights and the Constitution’, covers similar ground to that of Professor Williams. However, Mr Jackson warns, doubtless correctly, that in the short term the events of September 11 2001 and the perceived threat posed by what he describes as ‘illegal immigration’ will work against the implementation of human rights legislation in Australia.<sup>34</sup>

Professor Brian Opeskin’s stated aim is to explore, in a rudimentary way, the framework within which an assessment might be made of the effect of globalisation on constitutional law.<sup>35</sup> To this end he discusses<sup>36</sup> seven mechanisms identified by John Braithwaite and Peter Drahos ‘by which actors effect the processes of global regulation’.<sup>37</sup> These mechanisms include, for example, ‘modelling’ (whereby ‘globalisation is achieved by observational learning with symbolic content’) and ‘reciprocal adjustment’ (‘non-coerced negotiation where the parties agree to adjust the rules they follow’).

Professor Opeskin illustrates modelling by examining the patterns of citation by the High Court in reported constitutional decisions at intervals over a period of 100 years. This is said to show how the High Court employs a particular mechanism (modelling) ‘to mediate the effects of globalisation’.<sup>38</sup> He also sees the evolution of intergovernmental relations in Australia through the use of the reference power<sup>39</sup> as an illustration of reciprocal adjustment, since globalisation creates strong pressures for the harmonisation of laws. While globalisation may contribute (along with other factors) to policies favouring harmonisation of laws in a federation, it is difficult to see how a study of citation patterns in the High Court reveals anything meaningful about the effects of globalisation on constitutional law.

Two of the essays fall into a separate category from the other contributions. The only piece by a non-lawyer is by Professor John White, Professor of Physical and Theoretical Chemistry at the Australian National University. In his paper ‘National Science and Industry Policy – Balancing the Centrifugal Tendency’, Professor White rightly emphasises the pervasive impact of science on daily life.<sup>40</sup> He urges the creation and reinforcement of structures in the *Constitution* to produce national policy in areas such as nuclear energy and

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33 Ibid 210.

34 David Jackson, ‘Internationalisation of Rights and the Constitution’ in Robert French, Geoffrey Lindell and Cheryl Saunders (eds), *Reflections on the Australian Constitution* (2003) 105, 109.

35 Brian Opeskin, ‘Australian Constitutional Law in a Global Era’ in Robert French, Geoffrey Lindell and Cheryl Saunders (eds), *Reflections on the Australian Constitution* (2003) 171.

36 Ibid 175.

37 John Braithwaite and Peter Drahos, *Global Business Regulation* (2000) 25–6.

38 Opeskin, above n 35, 172.

39 *Australian Constitution*, s 51(xxxvii).

40 John W White, ‘National Science and Industry Policy – Balancing the Centrifugal Tendency’ in Robert French, Geoffrey Lindell and Cheryl Saunders (eds), *Reflections on the Australian Constitution* (2003) 116.

human cloning and, more generally, in higher education. Professor White sees the 'centrifugal tendency' as creating uncertainty and inefficiency.

Professor White's argument would appear, however, to be less about constitutional structures than about political will. If, for example, the Commonwealth was determined to implement national policy on the scientific, ethical and regulatory aspects of human cloning it would have available to it a number of mechanisms to achieve the desired results, not least its financial powers. Whether it is desirable to have national policies in relation to new technologies that give rise to acute moral dilemmas is a different question. For those wishing to participate in an internationally competitive scientific environment, the answer may well depend on what policies gain political support at a national level.

The only non-Australian contributor to the volume is Professor Thomas Fleiner, Director of the Institute of Federalism at the University of Fribourg, Switzerland. He characterises the modern era as 'the age of the constitution'<sup>41</sup> and undertakes a wide-ranging survey of modern constitutionalism.

Professor Fleiner identifies four major problems. First, modern constitutionalism has ignored the diversity of different peoples. Thus there is a need, in places like the Middle East and the Balkans, to resolve issues of self-determination and the appropriate foundation for new nations. Secondly, modern constitutions proclaim universality and inclusiveness, but often actually impose exclusivity (as in the case of Switzerland which accords foreign residents no voting rights). The challenge is how better to cope with cultural and religious diversity within a framework that often emphasises majoritarian democracy. Thirdly, the sovereignty of nation states is being subsumed in a globalised world. Sovereignty has been reduced for most states to 'a mere symbol'.<sup>42</sup> Constitutions therefore need to move away from 'real sovereignty' to a more symbolic concept. Fourthly, modern constitutionalism professes to recognise the worth of individuals. In that respect it is founded on secular notions. Yet this is difficult to reconcile with the pervasive influence of the majority religion in many societies – hence the need for democratic institutions to become instruments for conflict resolution between diverse social and religious groups.

Professor Fleiner's contribution, although it makes no reference to Australia, is a reminder of the value of comparative studies, a point often neglected in this country notwithstanding our familiarity with other common law systems. It is also a reminder that the 'demands of universalism and globalisation require constitutional lawyers to think outside the bounds of the traditional nation-state'.<sup>43</sup>

In a thoughtful consideration of 'Future Prospects for the Australian Constitution', Professor Cheryl Saunders identifies two competing accounts of the *Constitution*. The first is almost entirely positive, reflecting deep satisfaction with current arrangements. This account 'embraces a relatively uncomplicated

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41 Thomas Fleiner, 'The Age of Constitutions' in Robert French, Geoffrey Lindell and Cheryl Saunders (eds), *Reflections on the Australian Constitution* (2003) 236, 236.

42 Ibid 242.

43 Ibid 246.

concept of majoritarian democracy<sup>44</sup> and accepts that governments, once elected, are entitled to govern. It assumes that Parliament, together with the courts, applying the principles and procedures of the common law, offer sufficient protection to individual rights. The ultimate sanction lies in the ballot box. Evolutionary change is appropriate, given that the *Constitution* has served the country so well.

The competing account is deeply critical of a 'horse and buggy' *Constitution*. It sees the ballot box as an insufficient restraint on the exercise of public power, particularly in a community that is ill-informed about constitutional arrangements and susceptible to media manipulation. On this account, the democratic record of the *Constitution* is due more to the conjunction of favourable economic and social conditions than to the constitutional provisions themselves. Accordingly, evolutionary change to the express reliance on majoritarian democracy is not enough to ensure adequate checks and balances in the system.

Professor Saunders suggests that the two different accounts flow from the attempt to combine two forms of constitutionalism in one system. The founders took the concept of federalism under a written constitution from the United States, but retained the British reliance on unwritten constitutional conventions and practices to govern the relationship between Parliament and the executive. In consequence, the *Constitution* says little about such fundamental questions as the ground rules for representative government or the protection of individual rights.

Professor Saunders identifies three broad principles on which the *Constitution* rests: federalism, separation of powers and democracy. The constitutional conception of the first two is relatively well developed. There is, however, no constitutional conception of the third, in part because of the structure of the constitutional text which deals only obliquely with the core concepts of representative and responsible government. Professor Saunders argues<sup>45</sup> that the

partial commitment to a written Constitution as a foundation for Australian constitutionalism could be balanced by a commitment to unwritten norms and practices, creating a complex but rounded constitutional system.

Although Professor Saunders explores in her essay the influence of the common law on Australian constitutionalism, it is not clear whether her preference for unwritten norms implies that the High Court should be more willing to constitutionalise those norms. If so, the proposal leaves unresolved one of the basic paradoxes of Australian constitutionalism: a deep community suspicion of judicial 'activism' as counter-majoritarian, coupled with a persistent reluctance to countenance amendments to the text of a Constitution which, whatever its virtues, is unmistakably the product of the late nineteenth century.

As one would expect from a volume of essays including contributions from some of Australia's leading constitutional scholars, this is a worthwhile commemoration of the centenary of the *Constitution*. It offers incisive analyses of the themes that have dominated Australian federalism over the past hundred

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44 Cheryl Saunders, 'Future Prospects for the Australian Constitution' in Robert French, Geoffrey Lindell and Cheryl Saunders (eds), *Reflections on the Australian Constitution* (2003) 212, 213.

45 Ibid 225.

years. Perhaps the greatest challenge now facing scholars as the *Constitution* moves into its second century is to translate their dialogue into a national conversation about the adequacy and future of Australia's governmental institutions.