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REFLECTIONS ON THE AUSTRALIAN CONSTITUTION

Edited by Robert French, Geoffrey Lindell and Cheryl Saunders
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Australia's Constitutional centenary occurred in 2001. In 2003 the celebrations continued with the publication of *Reflections on the Australian Constitution*, a compilation of 13 essays edited by the Honourable Justice Robert French, and Professors Geoffrey Lindell and Cheryl Saunders.

According to the editors, this publication aims to 'evaluate the Australian Constitution in the light of the experience of the past 100 years and to identify issues for the future' and 'add an important new layer to the foundation of constitutional experience on what the next generation of scholars and practitioners may build'. The editorial philosophy is set out in the preface:

> The book takes as its organising principle the manner in which the Constitution has accommodated the dramatic changes that have taken place in Australia and the world over the course of the 20th century. It is not confined to whether and how this accommodation has taken place, which represents relatively well-trodden ground. The essays consider also the legacies of the choices made and the approaches taken for the theory and practice of constitutionalism in Australia.[1]

Contributors include the editors themselves, former Chief Justice Sir Anthony Mason, a number of well known constitutional scholars Leslie Zines, George Winterton, Brian Opeskin, George Williams, John Waugh and Christos Mantziaris, international constitutional scholar Thomas Fleiner, scientist John White and barrister David Jackson QC.

Sir Anthony Mason's essay forms the book's opening chapter. Entitled 'The Australian Constitution in Retrospect and Prospect', it provides a historical and factual foundation on which other chapter authors build. Sir Anthony predicts that, on present indications, the Australian constitution will survive in its present form for another century although he accepts that the process of amendment during this next century may well be more extensive than that which has already occurred. He expresses the view that although the constitution has defects it has enabled

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1 Preface, *Reflections on the Australian Constitution* (2003) 1.

Australians to make 'remarkable progress' and that 'subject to some qualifications the framers did well'.

In his essay 'Lawyers, Historians and Federation History', John Waugh traces the use of the Convention Debates by the High Court. He argues that lawyers and constitutional scholars have different interests to historians when it comes to constitutional history. Lawyers seek 'applicable history' — a history that they can use. Historians prefer reason to intention. He suggests that lawyers in search of original intention will probably be tempted to 'give up and go back to something safe like the convention debates or the Federal Law Review'. Despite this rather quirky view, Waugh concludes that it is the combination of lawyers' and historians' interests that is most valuable for constitutional interpretation.

George Winterton, in 'The Acquisition of Independence', questions whether Australia was a nation in 1901 and the meaning of the term 'nation'. He recounts historic events, reviews a number of relevant decisions and considers the views of other commentators and members of the judiciary. Winterton explores the theories of popular sovereignty and the acquisition of independence. Winterton sees Australia's achievement of independence as relevant to the interpretation of several constitutional provisions. He discusses how others see the achievement of independence as relevant to the Constitution's legitimacy. He concludes by acknowledging that although Australia has long been independent it will not be constitutionally free-standing while it depends upon the United Kingdom for its head of state.

Geoffrey Lindell's essay, 'Further Reflections on the Date of the Acquisition of Australia's Independence', builds upon George Winterton's chapter, and agrees with Winterton's analysis. Lindell describes Australia's process of independence as 'reluctant, fragmented and above all evolutionary'. He reviews the likely reasons and uses the description previously given to the process: 'constitutional schizophrenia'. Lindell argues that Australia has a set of three fundamental documents in what may be figuratively described as a constitutional triangle consisting of first, and at the apex of the triangle, the Australian Constitution, secondly the Statute of Westminster 1931 and the Australia Acts, and thirdly the State Constitutions. These documents would be best reduced to two basic laws — the Australian federal and state constitutions. Lindell concludes by sharing Winterton's view about taking that one further and final step to complete the process of 'independence'. He agrees that Australia should establish its own head of state but concedes that he does not share Winterton's degree of enthusiasm!

In 'The Constitution and the People', Justice Robert French remarks that Australia's Constitution lacks inspirational qualities although he acknowledges that it has helped deliver stable government for the last 100 years. He looks historically at the development of the Constitution, the conventions, 'the people' behind the

constitution as well as those the subject of its regulation. French argues that the constitution has derived its authority from the imperial parliament and then derived its legitimacy from referendum of people of the colonies. Accordingly, the way Australians look at each other has evolved and that is reflected in the changing laws of the states and the commonwealth and in the 1967 amendments to the Constitution. He believes that the inclusion of women and indigenous people has been 'in effect constitutionalised by irreversible conventions reflected in the statutes and practices of the commonwealth and the states'.[2] However he provocatively questions whether the concepts of sovereignty discussed have any relevance in describing the relationship between indigenous people and their country under traditional law and custom and their relationships with each other.

In 'Changing Attitudes to Federalism and its Purpose', Leslie Zines reviews how the Commonwealth has increased its power over the States. He expresses the view that this was done by direct legislation supported by an expansive interpretation of legislative powers and the influence that derives from having access to much larger financial resources. Zines explores the way in which the States have accepted direct and indirect control and regulation by the Commonwealth in fields such as the environment, industrial relations, universities, human rights and large areas of domestic trade and production over the last 100 years without any relevant alterations to the Constitution. Zines describes the expansion of Commonwealth power and notes that during World War II, Australia virtually ceased to be a federal state. Most aspects of life were controlled by the Commonwealth. This he argues highlights the need for national uniformity at specific times. Zines predicts that it is likely that 'an extremely high degree of vertical fiscal imbalance will remain for the foreseeable future' as it is 'a characteristic of federation that has existed for most of the life of the Commonwealth'.

The other contributing chapters are equally pertinent. David Jackson QC discusses the impact of global developments on the High Court's human rights jurisprudence in 'Internationalisation of Rights and the Constitution', and in the longer term he expects that a feature of Australia's constitutional and political discourse will involve endeavours by the Commonwealth to enact legislation that will protect fundamental and political rights. John White provides a refreshingly non-legal perspective. He believes that the impact of science is now so persuasive that it must be timely to provide an 'in principle' constitutional basis for future development. His essay 'National Science and Industry Policy — Balancing the Centrifugal Responsibility' is certainly thought provoking and a most beneficial contribution to this collection.

In 'The Executive — A Common Law Understanding of Legal Form and Responsibility', Christos Mantziaris examines the courts' contribution to the

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2 Ibid 84.

understanding of the executive's legal and political responsibilities and suggests a way in which this contribution might be integrated into the study of the Constitution. In 'Australian Constitutional Law in a Global Era', Brian Opeskin considers the relationship between globalisation and constitutional law in Australia. Opeskin is one of the few authors who does not seek to reach concrete conclusions, but instead he offers reflective observations of the past, the effect of globalisation and the capacity of the Constitution to meet the changes of the next century.

George Williams believes that Australian lawyers have not responded to globalisation in a coherent way. In 'Globalisation of the Constitution — The Impact of International Norms', he expresses the view that although the High Court of Australia has accepted and applied international norms, it has seemingly been reluctant to use them in its interpretation of the Constitution. Cheryl Saunders describes in detail the two dominant opposing accounts of the Constitution in 'Future Prospects for the Australian Constitution'. Thomas Fleiner believes that without doubt Australians are living through a 'crucial period' for the future development of constitutionalism. In 'The Age of Constitutions', he explores whether British constitutionalism born in the age of enlightenment will be replaced by new constitutional theories grounded in multiculturalism, globalisation, universality of human rights and democracy.

Reflections on the Australian Constitution is highly commended as being of interest to a wide and varied audience. Students, practitioners, academics and the judiciary should take the time to be enveloped by this intellectual smorgasbord. Detailed footnotes provide references to relevant authorities and legislation and the index enables more detailed searching. The potential for commentary, case and legislative analysis of human rights in the domestic and international sphere is virtually unlimited. Perhaps the most challenging issue is the uncertainty surrounding the ability of the Constitution to protect human rights.

The contributors' insightful perspectives provide interesting and informative reading. When analysed closely, many of the views expressed involve legally and politically sensitive topics. It is hoped that the ventilation of these issues in this forum will spark further commentary and debate. This is a text of great general interest.