

*Greg Taylor**

***CONSTITUTIONAL CONVENTIONS IN AUSTRALIA:
AN INTRODUCTION TO THE UNWRITTEN RULES OF
AUSTRALIA'S CONSTITUTIONS***

by Ian Killey

Australian Scholarly Publishing, Melbourne, 2009

xi + 345 pp.

ISBN 978 1 921509 23 0

One of the gravest dangers facing Australian constitutionalism arises from the fact that our constitutions are only partly written. The danger exists that politicians and others involved in operating the system will refer to the written constitution and, because a power is granted there, ignore the unwritten limitations on its exercise and argue that it may be employed at will and subject to no further requirements. The danger was well illustrated for me in late 2008 when I was teaching in Canada and heard the Prime Minister of that country stating that he would use all powers legally available to him to avoid a proposed vote of no-confidence while saying nothing at all about any conventional limitations that might exist. It is a shameful fact that many law schools unintentionally give credence to the idea that the written document is virtually everything by devoting little to no time in their courses on constitutional law to the subject of constitutional conventions.

Mr Killey has therefore done us all a service by publishing a work dedicated solely to the topic of constitutional conventions,¹ underlining their importance and reminding us of their crucial role in many areas. This is particularly so given that his work is one of the very few dedicated to this topic which have an Australian focus. That is not to say, however, that his work is narrowly Australian: Mr Killey considers precedents from the United Kingdom² and Canada at length — particularly pleasing given that constitutional precedents and lessons from the latter country are too often ignored here — and makes occasional mention of several other countries as well.

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¹ Ian Killey, *Constitutional Conventions in Australia: An Introduction to the Unwritten Rules of Australia's Constitutions* (2009).

² It should, however, be noted that Mr Killey does refer to a non-existent 'British Court of Appeal': *ibid* 12. Without detracting for a moment from the contents of the work, it does seem to me that it should have been more carefully checked for minor errors such as that and also for errors of spelling. On at least three occasions (*ibid* 10, 115, 169), for example, I noticed references to the presumably ecclesiastical office of 'First Minster' instead of the 'first Ministers' with which the work might be expected to concern itself.

Mr Killey is well qualified for his task, having been general counsel in the Victorian Department of Premier and Cabinet for a number of years. He now fulfils a similar role in the Victorian Ombudsman's Office. For his services in the former role, he received the Public Service Medal in 2005.

Indeed, Mr Killey is so well qualified to write about this field that he has unintentionally undersold his work in the title. His book claims to be an 'introduction' to the topic. It is really much more than that — so much more that I should hesitate to place it in the hands of a newcomer to the field, as one might with an introduction properly so called. The work is more of an extended essay on the operation of constitutional conventions in this country backed up by the author's scholarship and experience in practice. It is a work which goes well beyond a mere introduction, argues for the author's views on a number of contested topics, and makes a substantial contribution to scholarship on the topic. While it does not contain profound philosophical insights on the nature of conventions, it makes a number of substantial contributions to scholarship in the practical field of how conventions work. As well as an extended essay, it might therefore be considered a practical manual on the operation of conventions. As such, the book deserves a wide audience.

It would be impossible for me to list here all the virtues of the book or to enumerate the topics it discusses with distinction. I single out three for especial praise. Mr Killey deals briefly but very soundly with the events of 11 November 1975.³ Vast oceans of ink have been consumed by discussion of the dismissal, but Mr Killey manages to say all that really needs to be said on the dismissal (as distinct from the Senate's blocking of supply)⁴ in little more than four pages of great insight and the soundest judgment.⁵ Secondly, Mr Killey's analysis of the King/Byng crisis in Canada and similar breakdowns in Australia⁶ is also a triumph of brevity and insight which is a testament to the author's wide reading and knowledge of his subject.

Thirdly, Mr Killey also rightly rejects⁷ the view put forward by Professor Lindell that the cases on the implied freedom of political communication entail the justiciability of the conventions of representative and/or responsible government (a

³ Ibid 205–9.

⁴ Unlike Mr Killey, above n 1, 267, however, I am far from sure that any conventions about the blocking of supply have arisen in Australia. In those jurisdictions in which the Upper House can still block such Bills, above all the federal jurisdiction, the main reason for the non-exercise of the power to block has been that the Australian Democrats were pledged, as a matter of political viewpoint, not to do so while they held the balance of power in an upper House. There was no general agreement with their view by other parties that would entitle us to speak of a convention.

⁵ Again, however, this is marred by the odd spelling error, such as one referring to Kerr's fear of 'loosing' his office. Killey, above n 1, 209.

⁶ Ibid 229f.

⁷ Ibid 12–5.

view that is also not adopted in *Stewart v Ronalds*,⁸ decided after the book went to press). Recently another reason occurred to me for rejecting that view. It is a well-known defect in the reasoning in *ACTV v Commonwealth*⁹ that the Court appears to have assumed that any precondition for the operation of the Australian Constitution must *ipso facto* be within the realm of judicial oversight. This is clearly not so, as Professor Goldsworthy has pointed out.¹⁰ The example I use to illustrate this in class is that the effectiveness of the Australian Constitution depends on Australia's retaining control over its territory, but that does not mean that the judges are authorised to determine the adequacy of our armed forces. In order to show that a precondition for the effective operation of Australia's Constitution is entrusted to judicial oversight, something more is needed to show that the topic is one for the judges as distinct from some other mode of oversight. Perhaps free speech on political matters is a topic that lends itself to judicial enforcement, but in *ACTV* the argument for judicial enforcement was not even attempted.

Assuming that this error in the reasoning in *ACTV* would be recognised and not repeated by the Court if any major extensions of that case were ever contemplated, the Court would ask itself, if its aid were ever sought to enforce the constitutional conventions directly, whether there is some other method of enforcement aside from the judicial. In the case of constitutional conventions, which by definition are not enforced by the courts but by the practitioners themselves, the answer to this question would be clear and the need for judicial enforcement would disappear. Thus, *pace* Professor Lindell, from whose judgment no writer would differ lightly, the implied freedom of political communication should not be taken as a sign that constitutional conventions related to responsible or representative government have become susceptible of judicial enforcement.

One or two things did surprise me in Mr Killey's book. The greatest surprise was that the author — who places great weight on the practitioners' views of what is a convention¹¹ and has no desire to impose new conventions on them by authorial *fiat* — is still of the view that there is a convention of individual ministerial responsibility, even as he admits that practice has so often diverged from it.¹² I suspect that he would be virtually alone in this view today, but as politicians are unlikely to change their practices as a result of this book no harm (or good) will be done by his expression of this view.

There is, however, potential for harm in the author's pronouncement that a convention has arisen precluding the calling of ministerial advisors as witnesses before parliamentary committees.¹³ No doubt this part of the book will be gratefully seized upon by governments pushing that line, but I know of no suggestion by any

⁸ (2009) 232 FLR 331; 259 ALR 86.

⁹ (1992) 177 CLR 106 (*ACTV*).

¹⁰ Jeffrey Goldsworthy, 'The High Court, Implied Rights and Constitutional Change' (1995) 39(3) *Quadrant* 46.

¹¹ *Ibid* 8f.

¹² *Ibid* 112.

¹³ *Ibid* 127.

other writer or by any parliamentarian (other than a Minister of the Crown) that any such convention has arisen. Mr Killey seems to have gone out on a limb of his own here, which is perhaps attributable to his background in the Victorian Department of Premier and Cabinet. It is no doubt true, as Mr Killey points out, that on many occasions no action for enforcement of the legal powers of Houses of Parliament to call ministerial advisors has occurred – but this is not for the reason he postulates, the silent recognition of a convention by non-government parties. Upper Houses have continued to maintain the right of a House of Parliament to call any witnesses it chooses. If they recognised a convention along the lines proposed by Mr Killey, they would stop requiring the attendance of advisors entirely.

The obvious reason for the lack of enforcement is, rather, a praiseworthy reluctance on the part of parliamentarians to repeat the *Stockdale v Hansard*¹⁴ situation in which a private person became the innocent victim of a power struggle between two arms of government. In the words of a Senate Committee that has recently considered a related topic, enforcement is difficult for a number of reasons which have nothing to do with conventions precluding it:

there are no effective deterrents for non-compliance with the order. The Senate has no remedies to enforce its powers against Ministers who are members of the House of Representatives; its penalties in the Senate, such as suspending Ministers from the chamber, are ineffective; and it would be unfair for the Senate to punish public servants for following Ministers' directions.¹⁵

But the hour is coming, if it is not already here, when, given the constant flouting of the law and contempt for Parliament shown by executive governments, a small degree of unfairness might have to be accepted in the interests of maintaining the rights of Parliament, which are surely at least as important as the rights of public servants not to be treated unfairly. As this review went to press, another opportunity for Parliament to assert itself was arising in Victoria. A Victorian parliamentary committee has expressly rejected the applicability of any so-called convention on Mr Killey's lines and, not stopping at mere words, has resolved to ask the House to repeat the committee's own summons for witnesses who were ministerial advisors.¹⁶ Even if time runs out for enforcement of a requirement to attend expressed by the House itself, should it still be disobeyed, before the State

¹⁴ (1840) 11 Ad & E 253; 113 ER 411.

¹⁵ Finance and Public Administration References Committee, Parliament of Australia, *Independent Arbitration of Public Interest Immunity Claims* (2010) 41f.

¹⁶ Legislative Council, Standing Committee on Finance and Public Administration, 11th Report to the Legislative Council, Parliamentary Paper No 347/2006-10, paras 43–57. At para 48, the committee refers to the possibility that a minister might accept responsibility for the actions of his advisers in which case it might not be right to call the latter. On the facts in this case, this is a hypothetical statement based on a view which the committee does not adopt as its own, and is raised only to dismiss the possibility of seeking answers from the Minister himself. The House itself takes the position in its guidelines for witnesses that public servants (including ministerial advisers) should not be asked questions about their confidential advice nor asked to

election at the end of November, the point has been clearly made that no such convention is accepted; and the House, by persisting with the request, will have succeeded in keeping the issue in question before the public.

There are also other difficulties with the proposed convention, such as the small number of cases in which enforcement has not occurred and the lack of time and opportunities for reflection for any such convention to develop. There is also a clear counter-example in New South Wales,¹⁷ on which Mr Killey wastes no words.

Now that the question has been raised by Mr Killey, however, it would be desirable if more commentators would consider the justification for and possible consequences of such a convention in more detail than Mr Killey had space for and with rather more detachment than a Minister of the Crown can usually muster. Once sufficient reflection on the topic has occurred, it might be possible to come to a more elaborated view on the topic, and as part of that, some form of limited role for conventions could not be ruled out. For example, conventions might restrict the types of topics on which questions may be asked of advisors.

I reject vehemently, however, the suggestion that there is a convention entirely precluding Houses of Parliament from calling ministerial advisors. It is to be hoped that in time human ingenuity and governmental goodwill will be sufficient to enable this matter to be resolved in a more sophisticated and balanced manner than a simple prohibition so that the greatest possible effect can be given both to Parliament's legitimate entitlement to information and to the executive's need for a degree of secrecy in its operations. A complete ban on appearances by ministerial advisors, whether its source were law or convention, would certainly not be the way to do this.

I am also at something of a loss to determine why Mr Killey is so strongly opposed to the idea that non-binding advice should be rendered by an outgoing first Minister to the Crown on who that first Minister's successor should be.¹⁸ It seems to me that there can be no objection at all to this when the outgoing first Minister has been ousted by his own party, which, however, retains control of the Lower House, or is simply retiring. Even in cases in which the Prime Minister has lost an election — and Mr Killey objects particularly to the advice by Mr Howard to send for Mr Rudd after the federal election of November 2007 — I can see harm in this practice only if some attempt is being made to disregard or distort the results of the election, which, needless to say, was not the case in 2007. Of course the result of the election will almost always be a notorious fact known to the Crown as well; thus, the provision of advice can do little harm, as long as it is clearly given and accepted as non-binding and the Crown assesses the value of the advice independently. That this is well understood is shown by the Tasmanian Governor's published 'Reasons

comment on government policy. That is sufficient protection; in the case at hand, questions were all factual.

¹⁷ Lynn Lovelock and John Evans, *New South Wales Legislative Council Practice* (2008) 503f.

¹⁸ Killey, above n 1, 137–9.

for Commissioning Mr Bartlett to Form a Government’ of 9 April 2010, in which his Excellency stated that ‘the Governor will take formal advice from the current [Premier] but is not bound to act on that advice’ and that ‘the commissioning of a person to form a government is entirely the Governor’s prerogative and it is not within the gift of any political leader’.¹⁹

In the usual case in which such advice is followed, its provision also maintains the tradition of the Crown’s acting on advice in all but the most exceptional circumstances. Indeed, I had always thought that the provision of such advice was standard practice in this situation, at least in the United Kingdom. The Hon Don Dunstan QC records that he advised the Governor of South Australia to call for the Leader of the Opposition after his defeat on the floor of the House following the election of 1968.²⁰ I have not attempted a survey of the question, but I suspect there would be many more such instances in Australia.

It is pleasing to see that — as well as the thanks Mr Killey renders to me in the preface despite my having contributed only very modestly to the work — the author mentions my own *Constitution of Victoria*²¹ on several occasions. On three occasions he disagrees with one or other of my views.²² The last of those disagreements relates to such a minor matter that I can barely perceive the difference between us. The first of our disagreements relates to the very important question whether Cabinet solidarity is a constitutional convention. I remain of the view I expressed earlier that it is a mere political practice and not a constitutional convention, except in relation to dealings of Ministers with the Crown, and readers will be able to make their own judgment on the point; it is an issue on which more than one view is clearly legitimate, and I welcome Mr Killey’s contribution to the debate,²³ backed up, as it is, by the additional authority that comes from having observed operations at close hand. I cannot resist observing, however, that even as Mr Killey maintains that this requirement is a convention, he is compelled to document recent instances in Australian States in which the supposed convention has not been observed over long periods; and Mr Killey cites no parliamentary

¹⁹ See <http://www.govhouse.tas.gov.au/sites/default/files/speeches/Reasons_for_commissioning_Mr_Bartlett_to_form_a_government.pdf> on 25 September 2010.

²⁰ Don Dunstan QC, *Felicia: The Political Memoirs of Don Dunstan* (1981) 157. Mr Killey is also a bit generous to Mr Dunstan in assessing his reasons for not resigning as Premier as soon as the fate of his government had become clear (Killey, above n 1, 213). Mr Dunstan knew well before the House met that he would be defeated on the floor; his real objective was to campaign for electoral reform from the most prominent office available, and to draw the maximum possible attention to the anomalies of the electoral system that had made defeat in the House inevitable: Neal Blewett and Dean Jaensch, *Playford to Dunstan: The Politics of Transition* (1971) 172f.

²¹ Greg Taylor, *The Constitution of Victoria* (2006).

²² Killey, above n 1, 80f, 137, 330 n 20.

²³ Except to the extent that he has accused me of distorting another writer’s view (Killey, above n 1, 307, n 60). I do not believe I have done this. Certainly I did not do so deliberately, and I believe a reading of the other author’s remarks as a whole justifies what I said about his view.

who is of the view that a binding rule of constitutional law, as distinct from a merely political practice, is being disregarded.

On the third issue in question, Mr Killey is clearly right and I was wrong. In the *Constitution of Victoria*, I wrote that advice given to the Crown on the exercise of the reserve powers from non-official sources should be made available to all *dramatis personae*,²⁴ but this was an error. In saying this I was concerned to avoid the appalling situation of 1975, in which the Prime Minister of the day was ambushed by the Crown and no warning of the proposed dismissal was given for wholly inadequate reasons.²⁵ Obviously, the best, most open, most honest and most trust-enhancing way of avoiding the colossal blunder of 1975 and providing the necessary warning is to provide a complete copy of any legal advice on which action is to be based; and, although it is dangerous to generalise about reserve powers, which by definition will be needed in exceptional cases, I cannot myself see any objection to doing that in many cases. Mr Killey is however right to say that there is strictly no obligation to provide copies of legal advice as such to the parliamentarians involved as distinct from giving them a warning of any proposed action based on that advice. I am grateful for his correction while still hopeful that the Crown will always, in future, go out of the way to ensure that its dealings with politicians are marked by a degree of fairness and openness that goes well beyond what is strictly required of it.

It is natural for a book review to concentrate on areas of disagreement and perceived room for improvement. No purpose is served by the regrettable modern practice of writing panegyrics instead of honest book reviews, οὐ γὰρ περὶ τοῦ ἐπιτυχόντος ὁ λόγος. Thus I emphasise in conclusion that Mr Killey's book, despite its occasional fault, is a most worthwhile contribution to the field in which he writes and deserves a wide readership. Mr Killey deserves our thanks for his contribution to the important and often neglected topic on which he has written.

²⁴ Taylor, above n 21, 121.

²⁵ As Mr Killey demonstrates: *ibid* 208f.