Foreword

The Hon James Spigelman AC

Chief Justice of New South Wales

This year is the sesquicentenary of the introduction of responsible government in New South Wales, Victoria, Tasmania and South Australia. A commitment was made to confer it on the soon to be separated colony of Queensland. Eventually, as an almost uniform national model, it was applied to Western Australia. This is a particularly appropriate time to produce a work which contains definitive treatments of the most important turning points in the development of State constitutional law.

In 1856, three of the four judges of the Supreme Court, the fourth was usually on circuit in Brisbane, accepted nomination as Members of the Legislative Council. The then Chief Justice, Sir Alfred Stephen, accepted the post of President of the Legislative Council. His only regret was that the new Constitution failed to adopt his own recommendation that, as Chief Justice, he would also, like the Lord Chancellor in England, be a member of the Ministry with the title "The Chancellor of New South Wales". The judges' role in the Parliament became controversial. Stephen soon resigned the presidency and within a few years all the serving judges had left, never to return.[1]

In this way Australia adopted, as a result of political controversy, a concept of the separation of powers which, notably in the case of the office of the Lord Chancellor, England and Wales have only implemented last year. Chapter III of the Commonwealth Constitution and its jurisprudence may have been quite different if this early confusion had not been so quickly resolved.

As chapters in this volume attest, the Legislative Council of New South Wales has shown itself a singularly fertile source of constitutional discord. I am particularly relieved that we avoided the conflicts that would inevitably have arisen if my distinguished predecessor, Sir Alfred Stephen, had had his way.

The chapters of this book cover the major landmarks, both cases and constitutional developments. Particularly for the early years they bring alive some of the personalities involved. Subject, as they have been for

1 See JM Bennett, *Colonial Law Lords* (Sydney: Federation Press, 2006), pp 6-18, 20-6.

over a century, to the overriding effects of Commonwealth constitutional law, State constitutional cases have arisen spasmodically but often with dramatic effect. They resolved deadlocks between the Houses of Parliament, determined the effect of manner and form provisions and the powers and privileges of individual Houses.

As in the case of the Commonwealth Constitution, there is no authoritative statement of the source of legitimacy of contemporary State Constitutions. Once, it was clear, the source of legitimacy for both the Commonwealth Constitution and of all of the State Constitutions, was by enactment of the British Imperial Parliament. That basis has long since been obsolete and was finally interred by the *Australia Acts*. There remain two general approaches to answering the question and it may never prove necessary to choose between them.

The first approach is to assert that the legitimacy of the Constitution lies in popular sovereignty. In the case of the Commonwealth, the relevant act of the sovereign people was the referenda held in each of the then Colonies which adopted the text of the Constitution of the Commonwealth. The second approach is to assert that legitimacy lies in the historical development of each Constitution, a development that can be traced back to common law foundations. The source of legitimacy on this analysis is the *legal* validity of each of the steps taken along the constitutional path.

The people of New South Wales have not voted for their Constitution except on one occasion. That was when the people of the then Colony voted in favour of the adoption of the Constitution of the Commonwealth. By s 106, that Constitution provides that the Constitution of each State continues in effect. Indeed, it was the Constitution of the Commonwealth that transmogrified the Colonies into States. It may well be that the State Constitutions will come to be regarded as having force by reason of s 106, based on the sovereign people who adopted that Constitution.[2]

On the other hand, historical continuity as a source of legitimacy reflects more accurately our common law legal tradition which has traditionally abjured abstract concepts such as popular sovereignty. In his famous essay on "The Common Law as an Ultimate Constitutional Foundation", Sir Owen Dixon emphasised the unique character of the common law as an antecedent system of jurisprudence.[3]

I congratulate Professor George Winterton on editing so impressive a collection of essays. I also applaud the Sesquicentenary of Responsible Government Committee of the State of New South Wales for providing financial assistance for this publication.

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2 See J Quick and RR Garran, *The Annotated Constitution of the Australian Commonwealth* (Sydney: Angus & Robertson, 1901), pp 928-30; B Selway, *The Constitution of South Australia* (Sydney: Federation Press, 1997), p 9; A Twomey, *The Constitution of New South Wales* (Sydney: Federation Press, 2004), pp 797-9.

3 O Dixon, *Jesting Pilate* (Melbourne: Law Book Co, 1965), pp 203ff.