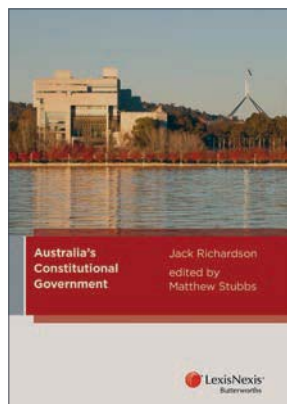


Australia's Constitutional Government

By Professor Jack Richardson AO (ed. Matthew Stubbs)
LexisNexis Butterworths, Australia, 2016



Not long before his 90th birthday, Professor Jack Richardson mentioned to his friend, Robert Ellicott QC, that he'd been working on a manuscript about Australia's Constitution. He'd consulted widely on it, including with friends Professor Leslie Zines, Professor Patrick Keyzer and Professor Dennis Pearce. He was working on it tirelessly; he was aware that physical illness might halt its completion.

He died in 2011, just before he finished it.

At the time of his death, he asked his family to finalise the book, and ready it for publication. Matthew Stubbs, Associate Professor at the Law School at the University of Adelaide 'complet[ed]' it, as editor. Stubbs never actually met Professor Richardson; the author's son, Matthew Richardson, chose him.

Now having read it, Ellicott considers it a seminal work on Australia's constitutional development.

Stubbs has preserved the views of the author, but he updated the manuscript before publication to take account of new case law and new or consolidated legislation. In a few parts of the book where he disagrees with the views of Professor Richardson, he includes reference to alternative viewpoints.

The book is very easy to read. It provides a thorough overview of the

important historical events leading up to Federation: Part One of the book is titled 'Colonisation to Federation' and includes seven chapters, including a chapter dedicated to the 1897-98 Convention Debates (which relies heavily on Quick and Garran's 1901 publication, *The Annotated Constitution of the Australian Commonwealth*), and a chapter on the first decade of Federation.

Each chapter is easy to follow, sign-posted with sub-headings. The author gives his opinion unapologetically.

For example, he discusses the backlash against the first governor-general, Earl Hopetoun, after he sent for William Lyne to be the first prime minister: Lyne, then premier of NSW, had been a prominent opponent of federation. Faced by such hostility, the governor-general, Richardson notes, '... appointed Barton, which he should have done in the first place'. As another example, the author notes that the first Commonwealth public administration included four new departments – Prime Minister's, Treasury, Home Affairs and Attorney-General's. In a footnote, he writes,

The job of organising the elections fell to Robert Garran, who was appointed Secretary to the Attorney-General's Department. Deakin was the Attorney-General. His Commonwealth Franchise Act 1902 (Cth) was a masterpiece.

(As an aside, that legislation was five clauses long.) The book then includes parts focused on the specifics of the Constitution, such as Parts 2, 4 and 6 on 'The Commonwealth Parliament', 'Commonwealth Legislative Powers', and 'Commonwealth Executive Powers' respectively. These are interspersed with civic perspectives on Australia in the Constitutional context, such as Part 3 titled 'The Growth of the Nation'.

Part 3 includes a chapter on Aboriginal

and Torres Strait Islander Peoples, and provides a short historical account of the treatment of Aboriginal and Torres Strait Islander Peoples, including governmental policies of assimilation that led to the Stolen Generation and the prime minister's apology in 2008.

The chapter touches on sections of the Constitution specific to Aboriginal and Torres Strait Islander Australians (s 25, s 51(xxvi), and the former s 127), accounts for the division of legislative power between the Commonwealth and the States for the treatment of Aboriginal and Torres Strait Islanders, and refers to the relevant Constitutional amendment to s 51(xxvi) and the deletion of s 127. It also includes a concise review of *Mabo v Queensland (No 2)* (1992) 175 CLR 1, and subsequent important native title cases. It includes short sections on Aboriginal sovereignty, the Northern Territory intervention, and the more recent push for Constitutional 'recognition'. (The book's editor, Matthew Stubbs must have included some information in this last section.)

Part 4 on Commonwealth legislative power includes eight chapters, each dedicated to a separate head of power. The chapters are sub-divided into short, pithy sections, and Richardson covers in concise language the important cases dealing with each head of power. The sections are particularly enjoyable to read because Richardson's prose is consistent and lucid. It is sometimes difficult to discern a purpose to the order of the sub-sections in each chapter, but this does not detract from the quality of the author's analysis, or the enjoyment in reading it.

Part 5 on 'Federalism' includes, amongst others, chapters on Commonwealth-State relations, inconsistency between State and Commonwealth laws, and the s 51(xxxvii) reference power.

Part 6 on the 'Commonwealth Executive

'Australia's Constitutional Government'

Power' includes a chapter on the powers of the Governor-General with reference to the double dissolution of 1975. It provides an overview of 11 principle criticisms of Sir John Kerr's decision, ranging from whether the governor-general ignored a convention that the Senate not reject appropriation bills essential to ordinary annual services of the government, to whether the governor-general had the reserve power to dismiss

the Whitlam Government, and whether it was right for the governor-general to have secretly sought the advice of the chief justice of the High Court, Sir Garfield Barwick, and Justice Sir Anthony Mason (and whether they should have given it). The chapter is fascinating.

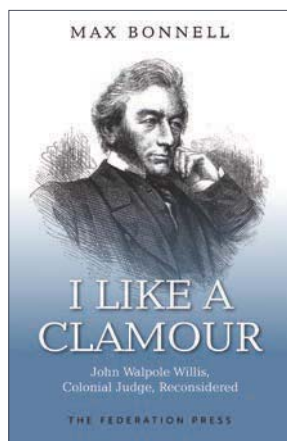
This book is not a Constitutional law textbook, but it includes thorough legal analysis on the most important aspects

of the Constitution. It also includes fascinating insights into the historical and contemporary workings of Australian federalism. I think it would be a worthwhile book for law students and a very worthy, enjoyable, and provocative read for practitioners.

Review by Charles Gregory

I Like a Clamour: John Walpole Willis, Colonial Judge, Reconsidered

By Max Bonnell | The Federation Press | 2017



On 16 March 2017 Chief Justice TF Bathurst AC was the guest of honour at the offices of King & Wood Mallesons to launch a new biography of Judge John Walpole Willis.*

It is a great pleasure to join you this evening in launching the first comprehensive biography of the colonial judge John Walpole Willis, *I Like a Clamour*, and to give a few short praises to the book and its author, Max Bonnell.

As some of you may or may not know, Max has been moonlighting as a sports writer and historian for some time; he is by no means a new entrant to the literary

world. But with the launch of his latest book, he takes the next logical step in his literary career, marking the collision of author, historian and lawyer.

For those who work with Max in commercial litigation and international arbitration, his choice for the subject of this book – an enigmatic colonial judge sitting in early nineteenth century Australia – might come as somewhat of an incongruence. Fittingly, it is paradox and incongruence that come to define the man at the centre of this book.

John Walpole Willis is a figure shrouded in controversy and intrigue. The book follows his life and legal career from his initial posting in Upper Canada, to his time as first *puisne* judge of the Court of Civil and Criminal Justice in British Guiana, and finally his position as a judge of the New South Wales Supreme Court and resident judge of Port Phillip, chronicling his ability to swiftly fall foul of the establishment in each fledgling community he visited. As Max highlights, for each contentious scenario 'there is a charitable explanation, and another that is less flattering to [Willis]'.² While historians to date have sought to

position themselves on either side of the battlelines, Max seeks to paint a more nuanced picture of mixed motivations. Was Willis a pedant or an activist? A man of principle and conviction or vindictive and self-promoting? Stubborn to a fault or courageously resilient? The answer to each of these questions raised throughout the book is, invariably both.

In one example, Max teases apart the motivations and reasoning underlying Willis' decision in *Bonjon*, a 'careful demolition of the *terra nullius* fallacy ... articulated 150 years before the High Court reached very similar conclusions in *Mabo*'.³ Max warns that this decision was not motivated by a genuinely sympathetic attitude towards the Aboriginal people but rather a conscientious and principled application of the law, coupled with a desire to prove this intellect to his superiors. In framing Willis in this way, Max manages to wrest him from the status of caricature and transform him into a thoroughly humanised, albeit tragically flawed, individual.

The enduring legacy of Willis today survives not in his judgments, as rigorous and learned as they were, but in his role as