Book Review

Geoffrey Lindell and Robert Bennett (eds) *Parliament: The Vision in Hindsight*, Sydney: Federation Press, 2001.

Noted constitutional lawyer, Professor Geoffrey Lindell, and Mr Bob Bennett, the former Director of the Law and Bills Digest Group at the Parliamentary Library, have produced an edited series of papers to mark the centenary of the Australian federation. The aim of the project, according to Lindell, was to consider how the Commonwealth Parliament has influenced the operation of the Australian Constitution "by looking at the vision which the framers had in mind in developing the Parliament and its powers, the way that the Parliament has exercised those powers and how that original design now looks with the benefit of hindsight". In addition, this retrospective was designed to assist when considering "the powers and roles the Parliament should exercise and play in the future".

In order to carry out these tasks the Steering Committee, which comprised Professor Lindell, former Commonwealth Attorney-General, Mr Peter Durack QC, former South Australian Premier Mr John Bannon, and Dr John Uhr, a Senior Fellow in the Political Science Program at the Australian National University, commissioned papers from a group of scholars comprised largely of distinguished political scientists and academic lawyers. Eleven of the papers were chosen for publication in this book, which meets the high production standards readers have come to expect from Federation Press publications.

The papers not chosen for publication are available at the Parliamentary Library's web site.[1] Unfortunately, papers by Professor Enid Campbell on parliamentary privileges, and by Professor George Williams and Ms Jennifer Norberry on development of the federal franchise, did not make the cut. It is disappointing that another two of the commissioned papers,

[1] http://www.aph.gov.au/library/

one by Associate Professor Elaine Thompson and the other by Professor Glyn Davis and Mr Jim Chalmers, were not included in the book for they highlight longstanding concerns about the dominance of Parliament by the Executive. At a time when the lower House of Parliament, in particular, is seen by many commentators as contributing little more to the good governance of Australia than acting as the faithful servant for the autocracy which the majority of the members of that House elect to govern the country every three years, it would have added a little more balance to a book which is not unduly critical of the work of the national legislature to have included sober assessments of whether Parliament has done enough to justify the Constitutional framers' confidence in the virtues of responsible government.

The topics considered in the published papers range from Professor Brian Galligan's assessment of Parliament's development of federalism, to Dr John Uhr's analysis of parliamentary design of the Australian electoral system, with the final paper being an evaluation by Professor Cheryl Saunders of the role played by Parliament in the process of formal constitutional change by referendum.

Given the stature of the authors it is not surprising that the eleven papers successfully inform the reader of the vision propounded by those people who were responsible for drafting the Australian Constitution in the final decade of the 19th century. The various authors' evaluations of the role played by Parliament in the development of the Australian Constitution throughout the 20th century are similarly thorough and useful. It is when looking forward to the role of Parliament in the 21st century that readers eager to consider a blueprint for a reinvigorated role for our elected representatives may feel a trifle disappointed. Perhaps the brief given to the contributors, like the title to the collection, emphasised the past rather than the future.

In the first chapter in the book Galligan takes a rather discursive look at the development of the national Parliament as a federal institution. He is dismissive of the argument, which he attributes initially to Quick and Garran, that the House of Representatives is the truly democratic part of our bi-cameral legislature and that the Senators are an "unrepresentative swill", as former Prime Minister Paul Keating once colourfully described them, who exist in order to give a federal flavour to the Parliament. Whilst Galligan makes the obvious point that for most of the 20th century the Senate has not represented the interests of the States in the federal legislature, he argues that it has a legitimate role to "over-represent smaller State populations in national decision-making". The legitimacy of this role may be easier to comprehend if he had provided some illustrations of why the nation, as a federation, benefits from the Constitutional arrangement which permits a relatively small number of Tasmanian electors to elect Senators, such as Brian Harradine and Bob Brown, who represent interest groups which are not confined or defined by State boundaries, whilst the electors in the more populous States, such as New South Wales and

Victoria, have little proven capacity to elect a Senator from other than the two major parties. Why should Tasmanian special interest groups have a greater stake in national decision-making than their counterparts on the mainland, especially when Senators rarely, if ever, vote along State lines?

The papers by Ms Anne Twomey and Dr Andrew Frazer contain clear and comprehensive accounts of the evolution of two of the most legally contentious heads of Commonwealth legislative power, the 'external affairs' power (s 51(xxix)) and the 'industrial relations' power (s 51(xxxv)). Frazer's discussion of the voluminous litigation spawned by the 19 words in the 'industrial relations' power, and his description of the various unsuccessful attempts to change these words by referendum, are useful adjuncts to the considerable body of scholarship that already exists in this field.

Few provisions in the Australian Constitution can have moved further from the framers' vision, or created more controversy, than the 'external affairs' power. At a time when issues such as 'lighthouses, lightships, beacons and buoys' (s 51(vii)) and 'weights and measures' (s 51(xv)) were adjudged to be fit and proper subjects for national legislation, it was inconceivable that any head of Commonwealth law-making power would support legislation dealing with issues such as air traffic control, protection of the environment, and discrimination on the grounds of race, sex and disability. Whilst it would have been more in keeping with the democratic roots of Australia's basic law for developments of this nature to have been produced by successful referenda, this outcome has been achieved because of the willingness of the High Court, particularly in more recent times, to play a constructive role in Australian governance by permitting organic growth of the 'external affairs' power in response to a changing world. Often the High Court receives insufficient credit for this gap-filling role, which has arisen because, as Professor Cheryl Saunders points out in her paper, "Parliament has not proved an effective mechanism for helping voters to understand proposals for change".

One of the high points in the collection is Professor John McMillan's paper on 'Parliament and Administrative Law'. McMillan reminds readers that the 'new Administrative law' package of the late 1970's and early 1980's, which created the Administrative Appeals Tribunal, the Ombudsman and freedom of information legislation, and which simplified the procedures and codified the grounds for judicial review of administrative action, received bipartisan political support. The reforms were described by the Canadian Law Reform Commission as "an awesome leap towards changing [the] whole legal structure with regard to public administration".

Much of McMillan's paper is concerned with the inter-connection of parliamentary and judicial, or political and legal, supervision of Executive decision-making. McMillan argues, as he has elsewhere, that "Parliament's role as an accountability forum for government administration is meant

to be supplemented but not overshadowed" by other mechanisms for controlling excesses of Executive power. Where to draw the line between Executive actions for which there is legal accountability, and those for which the Executive is only politically accountable, is one of the most complex and corrosive core of government issues that demands attention in the second century of the Australian federation.

Whilst the issue has been cast as one of 'Tensions between the Executive and the Judiciary' (the title of a recent address by Justice Michael McHugh at an Australian Bar Association Conference), it has arisen because some members of the judiciary, whether rightly or wrongly, have sought to occupy the accountability mechanism space reserved for, but largely unoccupied by, Parliament. The failure, or at least the fracturing, of the framers' vision of responsible government has lead to even moderate members of the judiciary deciding to assume the responsibilities originally assigned to elected representatives of the people. Without root and branch constitutional change this issue won't disappear for the combination of party discipline, a politicised public service and the lure of one day enjoying front bench spoils of office is likely to ensure that 21st century legislators will not devote much time to holding Ministers responsible to Parliament.

Dennis James provides an interesting and thorough account of Commonwealth and State financial relations against the backdrop of Deakin's accurate assessment, made over a century ago, that the States are "legally free, but financially bound to the chariot wheels of the central government". Dr John Uhr chronicles the development of the Commonwealth electoral system and observes that whilst the framers delegated much of the detail to the first Parliament, "the original constitutional vision has been little altered through parliamentary initiative".

The chapter by Mr John Summers highlights Parliament's dismal record in the field of indigenous affairs between 1901 and 1967 when the Australian Constitution was amended by the repeal of s 127, which excluded Aborigines from the census, and the deletion of the exclusion of Aborigines from the Commonwealth's 'race power' (s 51(xxvi)). Professor Stephen Bottomley looks at the role of Parliament in making government business enterprises accountable, whilst Professor Jack Richardson considers the relatively sparse use of s 57 of the Australian Constitution, which is the mechanism devised by the framers to resolve disputes between the two Houses of Parliament. In his conclusion Richardson makes the sage point that "[i]nstitutions of British origin sometimes do not perform efficiently but they usually have an enduring quality about them and this can be said about the Australian Parliament".

In a paper concerned with Executive and High Court appointments, Dr Max Spry recalls that prominent Australians, most notably former Prime Minister Bob Hawke, have suggested that appointments to the Ministry should be capable of being made from outside of Parliament. At the moment s 64 of the *Constitution* precludes this practice and, as Spry

notes, there is little parliamentary enthusiasm for change, maybe because ministerial office is one of the richest spoils of electoral victory. Spry also provides a useful account of the on-going debate, which has been particularly intense recently, concerning mechanisms other than Cabinet selection for the appointment of judges to the High Court.

The collection well demonstrates that the framers' vision for the Parliament was cautious. Perhaps this is one of the reasons why the institution has endured. Many readers may depart this book believing that our constitutional commentators are performing at a higher level than our national legislature. The authors and editors merit praise.

Neil Rees