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Excerpt

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Introduction

Who commands Australia's troops? Do Australians have the right to burn their flag? Should the powers of the Senate be curtailed? When should a Governor-General resign? What constitutional 'rights' do asylum-seekers have? Are retrospective laws unconstitutional? Who would be in control in a national emergency?

All of these questions have been asked, in the midst of controversy, in the first years of the twenty-first century. The answers may be surprising. They lie in Australia's Constitution – one way or another.

What is the Constitution?

The Constitution is the legal document upon which the Commonwealth of Australia was founded at federation in 1901. It can be thought of as a type of 'contract' or 'compact' between the people of the six Australian States (or colonies, as they were previously called). The colonies were self-governing in the nineteenth century, but they chose to come together, to create a federal nation, and thus to do things on a larger scale (like defence, trade, and immigration) more effectively than they could on their own.

The Constitution was written by elected delegates at a Federal Convention that met in Adelaide, Sydney and Melbourne, and ran for almost a full year, from 1897 to 1898. At its completion, it was put to a referendum of the voters in each of the colonies in 1899 (and in 1900 in Western Australia). The voters approved it, and the colonial parliaments also accepted it, and so (because the colonies were part of the empire) it was then taken to London, where the United Kingdom Parliament passed it as an Act.

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The Constitution was, thus, the work of Australians, but was given legal form in Britain. The significance of its enactment by Britain was very much greater in the past than it is now – indeed Australia's constitutional relationship with Britain is now almost entirely a matter of past history – but the Constitution still retains the words that suggest that the link is strong. (We consider many of these words in this book.)

The Constitution sets out what Australia's institutions of national government are to be: its first three chapters describe the Parliament, the Executive, and the 'Judicature' (or judiciary). Very significantly, section 51 in Chapter I lists things that the Commonwealth Parliament can do. The Parliament can make laws with respect to a range of subjects: trade between the States and with other countries; taxation; postal services; defence; lighthouses; marriage and divorce; certain welfare benefits; immigration; 'external affairs', and so on. In principle, all other powers are left to the States.

In its fourth chapter, the Constitution describes the trading and financial relations between the Commonwealth and the States. Its fifth chapter sets out certain limitations on what the States can do; followed by a sixth chapter saying how it is possible to create new States in Australia (this has never happened). Chapter VII is only really of interest now because it says that the federal capital has to be in New South Wales. The final chapter – chapter VIII – contains only one section. Section 128 says how the Constitution can be altered, that is, by a referendum in which a majority of the Australian voters, and a majority of all the States, approve of a proposed alteration. We will look at details of these chapters as we go along.

What the sections of these eight chapters do, essentially, is describe (and ordain) the institutions of Australia's parliamentary democracy. They also distribute powers across the different levels: between the three different arms of the Commonwealth Government (Parliament, Executive, Judiciary), and also between the Commonwealth and the States. They say, in places, what the limitations on these powers are.

This very short (and mostly succinct) document, thus, sets out where power lies, who can use it, and how it can be exercised. Strangely, despite its importance, many people know very little

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about it. And yet, increasingly, people have been asking questions about the way in which power is exercised in Australia. Often these are constitutional questions.

Governments can only do what the Constitution permits

In Australia, every year, disputes arise that demand a constitutional resolution. Handled by legal specialists and settled in the courts, mostly they go unnoticed by the public. But from time to time, controversies occur, drawing the country's attention to its Constitution. These raise major national questions about whether acts of government or parliament, decisions or actions of officials are 'constitutional', that is to say, whether they are authorised by the ultimate source of law and power in Australia.

The Constitution is that source. A Constitution like Australia's is a powerful thing. It is the overriding and supreme determinant – the final tie-breaker – on questions of law. It shapes the way in which policies are put into effect by government; it determines what sort of laws can be made and, directly and daily, it affects the lives of all who live within its reach.

The first, and most fundamental thing one needs to know about the Constitution, is that governments can only do what the Constitution permits. A breach of the Constitution – through an attempt to wield powers that it does not grant or to exceed the limits of those that it does – cannot stand. Such an attempt is 'unconstitutional'. It is unlawful. Those who hold power in Australia – parliaments, governments, public officers, courts – can only use that power as the Constitution permits.

For example, if a State established its own defence force (unless approved by the Commonwealth Parliament) this would be unconstitutional, since the Constitution forbids it (see section 114 of the Constitution, at the back of the book). It is as certain as night follows day that a challenge would be brought against it in the High Court of Australia. The Court would rule that it was unconstitutional, and that ruling would have the force of law, overriding the State and preventing its continuing on its path.

From the last years of the twentieth century, the Constitution has been almost constantly in the public eye. A referendum in

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1999 asked the Australian people whether they wanted to change Australia from a constitutional monarchy into a republic. The proposal was defeated. The issue was put aside. But that was about a proposal for *change*. Since that time, one after the other, issues have arisen about the Constitution's powers as they exist now.

Should the twenty-third Governor-General, Peter Hollingworth, have been dismissed in mid-2003 for actions he had taken, or failed to take, in the past, and, if so, who had the power to dismiss him? Who decided to commit Australia's troops to the invasion of Iraq early in that same year? Should the powers of the Senate be diminished, to make the minor parties less of an irritant to government? Is flag-burning so 'un-Australian' and repugnant that it should be made a criminal offence? How can the government simply 'excise', or cut out, four thousand islands from Australia's migration zone, as it did in late 2003?

Many people in the media as well as the public wanted to make sense of these questions. To hold a fully informed opinion, one needed (as quickly became apparent) more than knowledge of the events themselves. An understanding of the constitutional context – what the Constitution did or did not permit – was necessary.

There was, however, a difficulty. With controversies such as these it is rare for the answer to be straightforward. Although the Constitution determines, ultimately, how they should be resolved, it is frequently difficult to understand how it does this without being a specialist (and even the specialists can disagree). To find an answer in the Constitution itself – like solving a cryptic crossword – is a mysterious process for the uninitiated.

Australia's Constitution is powerful, but mysterious

Many Australians, perhaps most, have never seen the Constitution. It is certain that most have never read it. This, however, is not the main reason for the mystery.

The reality is, most people would be none-the-wiser if they did read the Constitution. In fact most would be more mystified *after* they had read it than before. Certainly some parts (like section 114) are clear and intelligible. Few people would have difficulty in

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knowing whether a State Government could raise and maintain its own defence force after reading that section. But very large parts of the Constitution are not clear in this way. They are mysterious, not because the language is particularly opaque or arcane – the language of Australia's Constitution is, in fact, reasonably straightforward.

But much of the Constitution does not mean what it says. Equally, in large parts, it does not say what it means. It says some things without actually *saying* them, and other things that fundamentally contradict each other. It is silent on certain significant matters that, in the twenty-first century, may be important. And yet, the Constitution is Australia's fundamental law, and belongs to all Australians.

Some parts are out of date

The Constitution created a single Australian people and turned a continent (and its islands) into a nation. It is among the oldest of the world's functioning constitutions and this is much to its credit. But, being over one hundred years old, it is now out of date (as might be expected), in at least a number of ways.

A few of its parts are missing references to technological or material changes that have occurred since 1901 but were not anticipated at the time. For example, the defence power (section 51 (vi)) refers to the 'naval and military defence of the Commonwealth' and does not mention the air force. Air transport only became a real possibility two years after federation. Bearing in mind that the Commonwealth can only do what the Constitution permits, how, then, does Australia have its own air force? Simply because it is accepted that the power to make laws for Australia's 'naval and military' defence also extends to the air.

Some other parts of the Constitution themselves anticipate change and make allowance for modern needs in legislation. The Commonwealth has always had the power to make laws about 'postal, telegraphic and telephonic' services (section 51 (v)). The telephone had just become a reality in the 1890s, and the Constitution's framers sensed that other wonderful inventions in communications might be around the corner. With this in mind,

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they added the words ‘other like services’. This left it open for the Commonwealth Parliament to pass laws for future communications services. The High Court has had to determine whether ‘other like services’ includes, for example, radio and television (it does) or newspaper publication (it doesn’t) but, while some tricky definitional issues may arise, it is clear that the section is open-ended. Up-dating through interpretation is permitted and is effectively all that is needed.

Similarly, many sections of the Constitution include the expression ‘until the Parliament otherwise provides’. This means that certain procedures or a particular exercise of power were constitutionally required when the Commonwealth began, but that the Parliament could subsequently pass Acts altering them in any way it wished. For example, section 30 states that the qualifications of electors for Commonwealth Parliament are to be based on the States’ franchise laws, until the Parliament otherwise provides. The new Commonwealth Parliament (elected under State laws) passed its own *Electoral* and *Franchise Acts* in 1902. Under the *Franchise Act*, among other things, women were henceforth able to vote in Commonwealth elections, even though they were not yet eligible in all the States.

Other parts of the Constitution are out of date because they were only meant to be temporary, to make the transition from the pre-federation arrangement (where the colonies were separate, self-funding, and self-governing) to the post-federation arrangement (where they are semi-autonomous States of the Commonwealth of Australia). Section 88, for example, says that ‘Uniform duties of customs shall be imposed within two years after the establishment of the Commonwealth.’ That section was out of date as soon as there was a national customs rate for all imports into Australia (by the end of 1901). It has no further relevance.

Over the years, still other parts have become ‘dead letters’ because they refer to Australia’s imperial relations with Britain, and the British empire no longer exists. Section 59, for example, says that ‘The Queen may disallow any law within one year from the Governor-General’s assent’. That section (which was never actually used) ceased to operate in the 1930s after the UK Parliament

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passed an Act ending any British interference in the laws of the self-governing parts of the empire.

Other parts have always been mysterious

Many of the Constitution's dated parts once meant exactly what they say, but no longer do, or no longer have any force. This, however, explains only a small part of the mystery that is Australia's Constitution.

First, we need to understand the task the framers of Australia's Constitution faced. They did not set out to be misleading. They had the very difficult job of finding a clear and succinct way of describing complex things. They had to balance precision in language with a comprehensive coverage of all the things that were necessary in creating a new nation, at the same time as providing for the Constitution's operation in the future. They brought together parts of the English constitutional tradition with American federal principles and Australian practices. They had to make sure their words were legally sound. They had to respond to a set of complex demands and expectations.

But the reality is that many sections of the Constitution *never* meant what they say, nor have they ever said what they mean. A good number were never even intended to. The Constitution has the classic features of the modern mystery – it is full of false clues, characters who are not what they appear, hidden evidence, trails that lead to dead ends. Unless we know this, we cannot answer the controversial national questions of our times. We cannot understand our own Constitution.

People love mysteries. Many (who knows?) may be satisfied with an unintelligible Constitution; some may even believe that the majesty of the law is kept intact through mystery. The secret of the English constitution, it was said in the nineteenth century, was the penumbra that surrounded it; to let in too much daylight would destroy its 'magic'. But the English constitution is unwritten and it lacks the overriding power of Australia's. There is surely something a little bizarre about a powerful, written Constitution – one that determines the laws under which we all live – falling into

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this category. Even the best of mysteries need unravelling at some point.

What this book is about

The principal purpose of this book is to delve into the mysteries of Australia's Constitution. It unravels some, and shows that others can only be understood *as* mysteries. It does not either advocate or oppose change, or concern itself with how the Constitution might be amended, but it sets out things just as they are. Nor is it a comprehensive guide to the Constitution or constitutional law in detail, but an exploration of the constitutional answers to pressing national questions.

Its focus is the controversies that have shaken Australia in recent years, as a lens through which to explore fundamental questions about the whole Constitution. The prominence of some of the topics of controversy does not necessarily correspond to their degree of constitutional importance. Many people in Australia would hold that the practices surrounding the office of Governor-General, for example, are relatively unimportant in the scale of things. The constitutional arrangements for Australia's fiscal relations, or its international standing, may indeed be more important, having a greater impact upon our lives than the appointment or removal of the Queen's representative. But the fact is, the office of Governor-General has attracted an enormous amount of attention over the last few years, and to explain the constitutional side to the story takes a good deal of time. Even if this seems disproportionate to the importance of the office, it cannot be skimmed. It is, as will become clear, also a useful window onto much else in the Constitution.

This book does not suggest that the Constitution can be made 'easy'. Some parts of it are almost impenetrable. To explain the meaning of other parts can be challenging, and to follow the explanation may take patience. Readers who want to know the constitutional answers to only one or two questions should dip in where it interests them. Others should take a deep breath, throw their shoulders back, and imagine themselves setting out on a journey, not quite as daunting as that from Hobbiton to Mordor, but one that also

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requires a taste for detailed description and enigmatic language, tolerance of difficult moments, faith, and perseverance.

Several things to note before beginning

There are several different forms of law in Australia. These sit within a hierarchy. First, there is the ‘common law’: the body of law found in the judgments of courts, but not set down in any other legal document. Secondly, there is the law that is made by parliaments. That is known as ‘statute law’; it is found in Acts of Parliament, also called statutes or legislation. Acts of Parliament frequently sit alongside the common law, but they can always override or supplant it, so long as that is their clear intention. At the top of the hierarchy is the Constitution. It is not made by, nor can it be altered by either judges or by legislation. It can trump any Act. ‘Constitutional law’ is the body of the decisions that are made when the constitutional validity of an Act or government action is disputed in the courts.

When the Australian colonies federated in 1901, they gave the name ‘Commonwealth’ (meaning ‘common good’) to the new Australian nation. The Constitution is, therefore, called the ‘Commonwealth Constitution’, as is the Parliament and the Government, and so on, of Australia. The term ‘federal’ is also used for this national level. For example, we almost always talk of ‘federal elections’ and often of the ‘federal parliament’, ‘federal government’, and so on. It means the same thing as Commonwealth. The ‘Commonwealth’ of nations (best known today through the Commonwealth Games) which was formed in the inter-war years out of the old British empire, is something completely different. Australia is a member of that Commonwealth. It is also a *Commonwealth* in its own right.

There is a copy of the Constitution at the back of this book. It begins with the heading *An Act to constitute the Commonwealth of Australia*, and is followed by eight ‘Covering Clauses’, numbered 1 to 8. Number 9 reads: ‘The Constitution of the Commonwealth shall be as follows.’ Then follow sections 1 to 128, in simple numerical order. A reference to a ‘section’ of the Constitution is to this particular list. The Covering Clauses are clearly distinguished as ‘clauses’.

So much for the history, sections and clauses, but what about *the vibe*?

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Those who have seen the Australian film comedy *The Castle* will remember Dennis Denuto, the incompetent but well-meaning solicitor, who resorts to talking about ‘the vibe’ of the Constitution because he needs to find a particular section in it, but cannot read roman numerals. (Those who have not seen the film should treat themselves and get it out on video!) Whether or not there is a ‘vibe’ remains an open question. But it is true, as Denuto found, that in a couple of places there *are* sub-sections in roman numerals. Section 51, for example, has thirty-nine, numbered from (i) to (xxxix). The numbering should not dismay, however; content-wise, the list is succinct, and mostly simply expressed.

The reader may indeed be pleasantly surprised to see how brief the whole Constitution is, and how short most of the individual sections are. Along with the relatively ‘ordinary’ language, this is one of its real strengths as a written document. But one doesn’t have to read the whole thing, brief as it is, nor become an expert in constitutional law to get a sense of how the Constitution operates in Australian life. It is sufficient to know five things.