The Constitution of the Commonwealth of Australia

History, principle and interpretation

This book examines the body of Australian constitutional jurisprudence in an original and rigorous yet accessible way. It begins by exploring the historical and intellectual context of ideas surrounding the Constitution's inception, and closely examines its text, structure, principles and purposes in that light. The book then unpacks and critically analyses the High Court's interpretation of the Constitution in a manner that follows the Constitution's own logic and method of organisation. Each topic is defined through detailed reference to the existing case law, which is set out historically to facilitate an appreciation of the progressive development of constitutional doctrine since the Constitution came into force in 1901.

The Constitution of the Commonwealth of Australia provides an engaging and distinctive treatment of this fundamental area of law. It is an excellent book for anyone seeking to understand the significance and interpretation of the Constitution.

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Foreword

Chief Justice Robert French AC,
High Court of Australia

This book, by four leading constitutional law academics, presents a critical perspective on the development of constitutional law in Australia as an historical and legal narrative. It is a well-known saying, sometimes attributed to Arnold Toynbee, that history is 'just one damned thing after another'. Inadequately presented, constitutional law can seem to the harried student to be just one damned case after another. In this text the authors give an account of Australian constitutional law informed by a large vision of their subject and accompanied by measured critical observations of its development, reflected in decisions of the High Court, over the 115 years since the Constitution came into force. Their presentation is more in the nature of a conversation with the reader, than legal analysis of a long stream of decisions.

The book demonstrates the dynamic character of constitutional law. The text of the Constitution is definitive but necessarily open textured as befits a document designed for an unknown future. Woven into any comprehensive treatment of constitutional law must be the strands of history and of political and social change and the interactions between major institutions that shape and are shaped by the Constitution over many decades. So much appears from the opening quotation from Andrew Inglis Clark:

> The constitutional law of a country may be defined as that portion of its fundamental law which prescribes or determines the structural character of the various governmental organs included in its total political organisation, their relations *inter se*, and the particular powers and functions of each of them.

The introductory chapter gives an account of the origins of the Constitution and the *Constitution Act* and the historical resonances of various elements of the Preamble, particularly the term 'agreement of the people'. It places the Constitution in the development of British constitutionalism, including the emergence of the idea of a 'parlement' in the thirteenth century, the relationship between Crown and parliament, the idea of the supremacy of parliament and the concept of 'parliamentary sovereignty'. The Constitution gives effect to the 'federal' idea in four senses, explained in the opening chapter. The first was derived from the Latin 'foedus', meaning a 'compact', and carried with it the idea of a union of states. The second was that of a new political community, a federal state which was itself to be a union of constituent states. The third was that of a dual system of government with two distinct sets of governing institutions. The fourth

involved the notion of a federal government with general authority over the federation as a whole. Each of those ideas informed strands of constitutional interpretation particularly in relation to the legislative power and the demarcation and limits of that power.

The Commonwealth of Australia was formed by six self-governing Australian colonies of the United Kingdom each with its own constitution deriving authority from an imperial statute. The authors set out the colonial background and describe the emergence of self-government in the colonies. That history culminates with the observation that:

> This status of the six colonies as self-governing and self-constituting political communities was the fundamental presupposition upon which they agreed to federate in 1901, under a Constitution which they each played an equal part in debating, drafting, and approving.

There follows the story of the movement to federation, including the Conference of Colonial Premiers in 1883, the Australasian Federation Conference in 1890, the Drafting Conventions of 1891 and 1897–1898, the popular referenda, the enactment of the *Commonwealth of Australia Constitution Act* by the British Parliament in 1900, and the coming into force of the Constitution on 1 January 1901. The opening chapter also provides an overview of Commonwealth institutions, fundamental principles informing the Constitution and constitutionalism in practice. Under the latter heading the historical narrative post-federation is foreshadowed with the observation that the practical operation of Australia's constitutional system of government is primarily shaped by the interaction between its governing institutions, Commonwealth and State, influenced by the electoral process and popular elite opinion, the scrutiny of the media and many other public and private bodies and institutions. The initial approach to constitutional interpretation by the High Court giving effect to the Constitution as a federal compact between the States and the shift, after the *Engineers Case* in 1920, to treating the Constitution as a British statute conferring powers upon the Commonwealth, to be interpreted as widely as the language used could sustain, is outlined. The gradual cutting of legal and political ties to the United Kingdom and Australia's evolution to full nationhood is reflected in the evolution of its constitutional system of government. The interpretive methods of the High Court are set out and the various methodological 'isms' are mentioned, including originalism, literalism, textualism, structuralism, progressivism and intentionalism. The general perspective of the book is designated by the authors as 'documentarian'. That is to say their goal is to explain the law of the Constitution as interpreted by the High Court and to evaluate that interpretation in light of the Constitution considered as an authoritative document focusing upon its text and structure and understood in the light of its enactment history.

Each of the nine chapters that follows the introductory chapter is an essay on one of the themes opened in that chapter. The legislature and the legislative power of the Commonwealth, in their federal setting, are discussed in Chapters 2–5

inclusive entitled 'The Parliament', 'Legislative power', 'Demarcations of power' and 'Limits on power'. An historical grounding is maintained by reference back to the Convention Debates and early commentaries on the Constitution, particularly those of John Quick and Robert Garran. Those references help to remind the reader of the broad purposes of the founders, which are properly taken into account by those who have the task of interpreting and applying the Constitution in response to the concrete demands of a world which is very different from that of the late nineteenth century. The founders' vision was not a narrow one. There was much of statesmanship in the Convention Debates and the sense of an unimagined and unimaginable future into which the new nation would be projected. That awareness was well evidenced by Sir John Downer at the 1898 Convention when, speaking of the future judiciary of the Commonwealth, he said:

> With them rests the obligation of finding out principles which are in the minds of this Convention in framing this Bill and applying them to cases which had never occurred before, and which are very little thought of by any of us.

A similar perspective was famously reflected in the observation of another leading member of the Convention, Andrew Inglis Clark, who said of the Constitution:

> It must be read and construed, not as containing a declaration of the will and intentions of men long since dead, and who cannot have anticipated the problems that would arise for solution by future generations, but as declaring the will and intentions of the present inheritors and possessors of sovereign power, who maintain the Constitution and have the power to alter it, and who are in the immediate presence of the problems to be solved.

The historical purposes served by those who drafted the Constitution began to play an explicit part in interpretation after the High Court in *Cole v Whitfield* discarded its self-denying ordinance against consulting the Convention Debates. In that case in which the Court finally brought order to the jurisprudence of s 92, it said:

> Reference to the history of s 92 may be made, not for the purpose of substituting for the meaning of the words used the scope and effect – if such could be established – which the founding fathers subjectively intended the section to have, but for the purpose of identifying the contemporary meaning of language used, the subject to which that language was directed and the nature and objectives of the movement towards federation from which the compact of the Constitution finally emerged.

The self-denying ordinance had its origins in *Municipal Council of Sydney v Commonwealth* in which Griffith CJ described the Convention Debates as 'no higher than parliamentary debates' and 'not to be referred to except for the purpose of seeing what was the subject-matter of discussion, what was the evil to be remedied, and so forth.' The latter qualification, which on its face accepted purposive use of the Convention Debates, may not have been given sufficient weight in the decades that followed before *Cole v Whitfield* was decided.

In the chapter entitled 'Limits on power' there is discussion of the absence in the Australian Constitution of a bill of rights of the kind found in the United States Constitution. The prevailing view at the time of the Conventions was, as the authors put it, that 'appropriately operating systems of representative and responsible government at a Commonwealth and State level would, on the whole, provide adequate protection for civil and political rights'. The authors also point to the historical fact that the framers of the United States Constitution had taken a similar approach in 1787 but were forced by Antifederalists to agree to the insertion of the ten amendments known as the Bill of Rights in order to enable the Constitution to go forward. On the other hand, the nineteenth century perspectives of the Convention delegates were not necessarily directed to extensive legislative provisions, executive powers and regulatory activity associated with the rise of the bureaucratic State in the twentieth and twenty-first centuries. That phenomenon however might be thought to have had an influence on invocation of the implications from the Constitution imposing limits on legislative power, particularly the implied freedom of political communication and the line of cases concerned with the institutional integrity of the national judicial system.

The foundry of judicial review of legislative action and indeed of constitutional implication was the demarcation of power between Federal and State Parliaments and the constitutional guarantees and prohibitions supporting that demarcation. That feature of the Constitution is discussed in Chapter 4 entitled 'Demarcations of power'. The perennial question of inconsistency of State and Commonwealth laws under s 109, not without difficulty in its practical application, is comprehensively discussed, as is the recently revisited question of the limits of Commonwealth power to impair the capacity of the States to fulfil their constitutional functions. The issues raised by demarcation are perennial. The authors, in their conclusion to that chapter quote Sir Owen Dixon's observation that '[t]he foundation of the Constitution is the conception of a central government and a number of State governments separately organized'. As they then observe:

> Constructing such a system of partly independent, partly interdependent, self-governing political communities requires a complex set of rules demarcating their respective powers and ensuring their capacity to exercise them.

The Executive as an institution and the executive power conferred by s 61 of the Constitution warrant two separate chapters. There is an important discussion in that context about the relationship between responsible government and federalism. As the authors observe, '[r]esponsible government is fundamental to an understanding of the structure of the executive, as well as to an understanding of the "executive power of the Commonwealth" …'. The tension between responsible government and a bicameral parliament with two Houses of equal standing was appreciated by the founders and their concerns are recounted in the chapter on the Executive. The authors quote Sir Richard Baker who observed:

> The essence of responsible government is the existence of one chamber of predominant power. Now, how are we to reconcile two irreconcilable propositions.

The executive power which has been the subject of close consideration in recent decisions of the High Court is comprehensively discussed in Chapter 7. The authors there observe presciently:

> At the time of writing, it is not possible to predict with any certainty how this particular issue will develop. It nevertheless will ensure that the issue of the ambit of the executive power of the Commonwealth will continue to constitute a major, if not the major, focus of attention in Australian constitutional law and policy.

As with the Executive and executive power, the authors devote two chapters respectively to the judicature and judicial power. The objectives of the creation of a federal judicature by Chapter III of the Constitution are put in historical perspective. They were the creation of a general court of appeal and of a judicial arm of government essential to an effective federal system.

Three core concepts are identified which are central to an understanding of the way in which the federal judicial system works. They are federal jurisdiction, Commonwealth judicial power and the concept of the 'matter' in respect of which federal jurisdiction is conferred. The heads of federal jurisdiction, the investing of federal jurisdiction in State courts and the expanding reach of federal jurisdiction, are covered in Chapter 8. The facilitation by decisions of the High Court of an understanding of the Australian judiciary as 'an integrated judicial system with the High Court at its apex' is acknowledged. Separation of judicial powers from other powers is discussed and its significance for federalism, rights-protection and the independence of the courts as providing a check on the other arms of government. The authors observe:

> Under each rationale, judicial independence and impartiality operate as the core functional attributes that are needed by the courts. Whether the courts are seen as protecting the federal compact, protecting liberty or operating as a check on the other arms of government, the judiciary is required to be independent and impartial, and independence and impartiality are said to be advanced by a separation of judicial power.

The defining distinction of judicial power as involving the determination of rights rather than their creation provides a conceptually neat framework for differentiating between judicial and non-judicial power. There is a cautionary observation in the judicial power chapter about an over rigid distinction constraining the federal parliament when designing government institutions and allocating decision-making authority, particularly in the modern regulatory State where non-judicial bodies are increasingly entering fields occupied previously by judicial decision-makers. The practical application of that caution may be debated. Separation of powers must operate in a practical environment, but within the framework of principle. The authors properly draw attention to the existence of historically based judicial functions which have not involved the determination of pre-existing rights. They are perhaps not so much an example

of the difficult proposition that 'the exception proves the rule' as they are of the historical untidiness of the law.

The line of cases deriving from the decision of the High Court in *Kable v Director of Public Prosecutions (NSW)* is considered at some length with the conclusion offered that despite the inapplicability of the federal separation of power principles to State parliaments and the absence of an entrenched separation at the State level, the distinctiveness of State judicial systems has, in various ways, been eroded.

The last chapter concerns the States, their role in the federation and the functioning of State Constitutions, including manner and form provisions and their intersection with the Australia Acts. The authors refer to the late Professor George Winterton's description of State Constitutions as 'constitutional "Cinderellas"'. They rightly say, however, that a proper understanding of the Commonwealth Constitution and the basis on which it was formed requires a familiarity with the State constitutional landscape. The Commonwealth Constitution can only be properly comprehended alongside an appreciation of the Constitutions of the States.

This book is a valuable addition to the body of Australian constitutional scholarship. Not everybody will agree with every aspect of the analyses which it offers. It would be much less interesting if they did. What it offers is an invaluable and engaging conversation about Australia's Constitution, where it has come from, where it is today and where it is going.

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Peter Gerangelos is Professor of Constitutional Law at Sydney Law School where he teaches constitutional law at both undergraduate and advanced levels. A former Principal Solicitor in the Office of the Australian Government Solicitor, he is author of *The Separation of Powers and Legislative Interference in Judicial Process: Constitutional Principles and Limitations* (Hart Publishing, 2009) and lead author of *Winterton's Australian Federal Constitutional Law: Commentary and Materials* (3rd ed, Thomson Reuters, 2013). He continues to be a consultant to legal counsel in constitutional cases in Commonwealth jurisdictions.

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James Stellios is an Associate Professor at the Australian National University College of Law. His primary research interest is constitutional law and he has published widely in that field. His publications include *The Federal Judicature: Chapter III of the Constitution* (LexisNexis, 2010), and he is the author of the 6th edition of Professor Leslie Zines' classic work, *The High Court and the Constitution*. He is also a practising barrister at the NSW Bar and has appeared in a number of constitutional cases.

Preface

This book is about the history, principles and interpretation of the Australian Constitution. It is based on the conviction that federalism is one of the Constitution's most important organising principles. The Constitution itself refers to the Australian polity as a 'federal commonwealth', by which was meant that the Commonwealth of Australia was to be federal in its foundations, its institutions and its powers, and that its development into the future would be dependent upon its federal character and design. As to its foundation in 1901, the Australian Constitution is based upon the consent of the people of the six colonies that would become the constituent States of the federation. As to its institutions, the Commonwealth of Australia consists of a Parliament that represents the people of the States (in the Senate) and the people of the Commonwealth as a whole (in the House of Representatives), an Executive Government that is responsible to that Parliament, and a federal supreme court, called the High Court of Australia, that is responsible to ensure that the Parliament and the Executive Government function within the bounds of the Constitution. As to its powers, the Commonwealth Parliament is limited to making laws with respect to a list of specified matters, the executive powers of the Commonwealth are said to extend only to the maintenance and execution of the Constitution and of laws enacted by the Commonwealth Parliament, and the judicial power of the Commonwealth is again limited to specified matters. At the same time, the Constitutions, institutions and powers of the States are preserved and continued, subject only to certain overriding provisions of the Commonwealth Constitution, validly enacted Commonwealth laws, certain activities of the federal Executive, and decisions of the High Court of Australia on appeals from State courts.

To construct such a federal system, many other constitutional principles were also recognised as essential to its fundamental design. These include the rule of law, representative democracy, responsible government, judicial review and the separation of powers. However, even these principles, important as they may be, are shaped by the federal structure and design of the whole. The rule of law, which requires that all government power must be authorised by law – principally the law of the Constitution – is shaped by the federal imperative of ensuring that both the Commonwealth and the States operate within their constitutionally-defined limits. Judicial review functions in tandem with the rule of law, for according to it the courts have the constitutional responsibility to adjudicate in cases where it is alleged that these constitutional limits

have been trespassed. Representative democracy is also qualified by federalism. The democratic principle that the legislative and executive powers of government are exercised by persons who represent the people is qualified by the idea that there is more than one manifestation of 'the people' – the people of the constituent polities and the people of the federation as a whole – and that a federal democracy ensures that both are recognised as locations of authentic self-governance. The closely related principle of responsible government poses a potential challenge to the idea of federal democracy, however, to the extent that it is insisted that the Executive Government ought to be accountable only to the people of the Commonwealth as a whole (in the House of Representatives), and not the people of the States (in the Senate). But while the Constitution, in laying the foundations for the operation of responsible government, accords a certain priority to the House of Representatives in respect of proposed laws imposing taxation or appropriating moneys for expenditure, it affirms the general principle that apart from certain important exceptions, the powers of the Senate are equal to those of the House. The separation of powers also has a qualified operation under the Australian Constitution, partly because responsible government requires that the powers of the Executive Government are exercised on the advice of Ministers of State who are members of the Parliament and have the support, at least, of the House of Representatives. Yet even here, it is the very existence of the Senate as an essential component of the Parliament which ensures that the legislative will of the Parliament is not necessarily identical with that of Government Ministers. Moreover, the separation of the judicial from the political branches of government, although related closely to the principle of the rule of law generally, is considered vital in the federal system, for it ensures that disputes about whether the Commonwealth or the States have transgressed constitutional boundaries will be determined by courts that are independent of both parties to the dispute.

These are the leading principles, as we understand them, which animate the Australian Constitution. In this book, we seek to exposit the meaning of the Constitution by placing the document in its historical and intellectual context, explaining the concepts and principles that it embodies, and critically analysing the High Court's interpretation of the Constitution in a manner that follows the Constitution's own logic and method of organisation. We begin, in Chapter 1, with an introduction to the Constitution which explains the political development of the Australian colonies prior to federation, the historical origins of the Constitution itself, its fundamental principles and key institutions, and the vital role of the High Court in interpreting the Constitution to resolve disputes over its meaning and application. We then turn, in Chapters 2 and 3, to a detailed description of the Commonwealth Parliament and its powers, focusing on its component parts (the Queen, the Senate and the House of Representatives) and its internal procedures and privileges, and the nature and scope of its legislative powers. Throughout these and the following chapters, we explain, analyse and evaluate the High Court's interpretation of the Constitution in the many cases

that have been decided since the Court was established in 1903. In Chapter 4 we turn to the demarcations of Commonwealth and State power, principally through the Constitution's provisions for the resolution of inconsistencies between Commonwealth and State laws and the rules that the High Court has developed for determining cases where it is alleged that the Commonwealth is unconstitutionally interfering with the due performance by the States of their constitutional functions, or the States are unconstitutionally interfering with the Commonwealth. In Chapter 5, likewise, we review the various 'limitations' on the powers of the Commonwealth and the States. (In the main, we deliberately do not refer to them as 'rights'). Chapters 6 and 7 turn to the Executive Government and the executive power of the Commonwealth. They explain the operation of the system of responsible government in the relationship between the Queen, the Governor-General, Ministers of State (including the Prime Minister and Cabinet) and the Parliament; they discuss the relationship of responsible government and federalism; and they critically assess the High Court's jurisprudence concerning the nature and scope of the executive power of the Commonwealth. Chapters 8 and 9 do much the same thing in relation to the courts and the judicial power of the Commonwealth. The federal court system, and its relationship to the State court systems, is explained; the principle of the separation of judicial power is expounded and its operation in relation to both federal and State courts is examined; the nature and scope of federal jurisdiction is explained; and specific principles, such as requirements of due process and jury trial, are elucidated. Finally, Chapter 10 turns to the constitutions, governing institutions and powers of the States. Their continuing status and role within the federation is explained; their histories, institutional structures, and legislative powers are examined; and the chapter concludes by elucidating the role of the people of the States and the Commonwealth in the ongoing amendment of the Constitution. The book thus seeks to follow, as closely as possible, the original design and structure of the Constitution itself, with its successive chapters on the Commonwealth Parliament, the Commonwealth Executive, the Commonwealth Judicature and the States.[1]

Through all these chapters, one basic theme emerges. It is that although the design of the Constitution is plainly to establish a political community that is 'federal' in its foundations, its institutions, its powers and its future development, many of the Commonwealth's activities and many of the High Court's decisions have contributed to a centralisation of power in the Commonwealth in a manner and to a degree that is in certain respects in tension with the Constitution's fundamental design as envisioned by its founders. We recognise that the task of constitutional interpretation is a vast and taxing undertaking, and we acknowledge the care and skill with which members of the High Court

1 That is, Chapters I, II, III and V of the Constitution. We found it convenient to deal with various matters of Finance and Trade (Chapter IV) where they were relevant to an exposition of the Executive Government and the powers of the Parliament. We have also touched on New States (Chapter VI) and Alteration of the Constitution (Chapter VIII) in our discussion of the States.

approach this very daunting responsibility. We aim in this book to expound the Court's varied reasoning in the cases in a manner that does justice to the gravity and complexity of the task. We seek to explain the historical development of the Court's jurisprudence from its very beginnings, and from its intellectual foundations, with careful regard to the many intriguing, and sometimes very significant, nuances in the various judgments. We note that some of the older and more neglected cases contain insights of great significance, and we observe many important conflicts in constitutional assumptions, interpretive methods and conceptions of the judicial role among the justices of the Court. Our task as legal academics is to critique the work of the Court; our obligation is to do so courteously, generously and in a manner that is well-informed. Whether we have succeeded in doing so is for others to judge.

This book is a collective effort. We divided the primary responsibility for particular chapters among ourselves, but also accepted as a mutual responsibility the task of reading and suggesting revisions for each other's chapters. Nicholas Aroney is primarily responsible for Chapters 1 to 5; Peter Gerangelos for Chapters 6 and 7; James Stellios for Chapters 8 and 9; and Sarah Murray for Chapter 10. As will be evident, much of what we have written draws on our prior work. The basic idea for this book derives from the thesis advanced in Aroney's *The Constitution of a Federal Commonwealth*,[2] and the corresponding analysis of the federal court system draws on Stellios's *The Federal Judicature*.[3] Several other prior works that we draw upon are cited in the footnotes, for which we beg the reader's indulgence. Nicholas Aroney gratefully acknowledges the support of the Australian Research Council's Future Fellowship funding scheme: FT100100469. James Stellios acknowledges the benefit he received from the Australian Research Council's Discovery Projects funding scheme: DP140101218.

While this is a long book, it cannot pretend to be an exhaustive treatise, but is rather a principled analysis of the most important themes and trends, although, we trust, a reasonably comprehensive one. The law as stated is current as at 1 November 2014.

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2 Nicholas Aroney, The Constitution of a Federal Commonwealth: The Making and Meaning of the Australian Constitution (Cambridge University Press, 2009)
3 **James Stellios**, *The Federal Judicature: Chapter III of the Constitution* (LexisNexis Butterworths, 2010).