
Introduction

I New Questions

This book is about the Australian constitutional crisis of 1975. It is, more precisely, about the continuing legacy of the crisis in contemporary constitutional law. Uncovering that continuing legacy is not easy work. It has been obscured by the standard narratives, told and re-told over the last 40 years, which portray the crisis as an exceptional moment, an aberration from the constitutional tradition rather than a manifestation of that tradition's deepest commitments.

The facts of the crisis were, to be sure, quite extraordinary. On coming to power in 1972, Prime Minister Gough Whitlam's Labor government faced persistent opposition from a hostile Senate. The Senate blocked major legislative reforms and ultimately determined to force early elections by withholding the government's financial supply. Whitlam acceded to the Senate's demands once, calling a double dissolution election in 1974 following which he was returned to government. When Whitlam refused to advise a second early election in 1975, the Governor-General, Sir John Kerr, decisively intervened to break the deadlock by dismissing the government from office.

Underneath these extraordinary facts was a more enduring question of principle. It was the very question that animated the conflict between Whitlam and the Senate in the first place: what are the legitimate processes of informal constitutional change in Australia? Whitlam, from well before 1975, had been engaged in an ambitious programme of constitutional transformation outside existing procedures for formal constitutional amendment. By ordinary lawmaking, rather than by referendum, Whitlam sought to weaken prevailing understandings of a federal balance and to expand the power and responsibilities of the central government in order to deliver social welfare programmes on an unprecedented national scale. He relied on novel interpretations of federal power, coercive conditions on state finances and the appointment of sympathetic judges.

Australia's constitution is a hybrid one, combining and adapting both British and American institutions and forms. Emphasising the British inheritance, Whitlam staked the legitimacy of his creative efforts on the fact that he commanded the confidence of the House of Representatives, which he portrayed as the institution enjoying constitutional priority and superior democratic legitimacy. The Senate, ultimately backed by the Governor-General, emphasised American aspects of the hybrid arrangements. In resisting Whitlam's innovations, it rejected the notion that the House of Representatives was anything more than a co-equal institution. It sought to enable the people themselves to determine the legitimacy of Whitlam's informal constitutional agenda. It asserted a power to deny supply as a way of forcing elections that would function as referendums. Whitlam was a constitutional innovator and the Senate claimed to be the constitutional preserver of its time. I do not, by using the language of 'innovation' and 'preservation', mean to pass any judgment on the issues that divided Whitlam and the Senate. Whitlam and the Senate invoked incompatible theories of informal constitutional change, but each theory plausibly drew support from conflicting aspects of Australia's hybrid constitution.

This was the true constitutional crisis. How can the Australian people make their constitutional law? Is it enough, as Whitlam said, for them to elect a transformative national government? Or is there a more complex procedure by which an informal constitutional agenda is to be subjected to further tests to ensure that it is supported not only by the elected government but by the people themselves?

These are not among the standard questions that constitutional lawyers ask about the 1975 crisis. We worry instead about the precise extent of the power of the Senate to block supply, or of the power of the Governor-General to dismiss a Prime Minister. Our standard narratives portray the crisis as one about these particular institutions, proceeding as if all that was at stake were technical questions about their peculiar powers. In truth, what was at stake in the crisis was a much larger question about legitimating informal constitutional change. The disputed powers of the Senate and the Governor-General were dramatically pressed into the service of the conflict over that larger question, but those powers and the underlying question are not the same thing. In following the standard narratives, we focus on the weapons used and not the war itself.

This is a mistake of some significance. When Brian Galligan wrote of the crisis in 1980, he perceived a misguided tendency to understand the events of 1975 as a product of 'the interactions and personalities of the

three strong-minded public figures involved'.¹ He stressed the greater importance of institutional questions, over and above questions of personality, because it was only in an institutional analysis that 'enduring problems ... [were] to be found'.² For Galligan, the important problems, now thoroughly familiar, were those of the Senate's financial powers and the Governor-General's reserve powers. Aspiring to build upon Galligan's early insight, I contend that deeper questions of constitutional form are more important still than the institutional questions. Just as 'public personalities are transient actors',³ so too may the precise institutional locus of persistent constitutional problems vary over time. Only by looking beyond the now familiar institutional questions about the Senate and the Governor-General, and by asking a different set of questions, will we be able to recognise repetitions or iterations of the constitutional crisis that might not involve the same configuration of institutions.

Indeed, the central unresolved question about informal constitutional change has arisen, and will continue to arise, in new and sometimes surprising institutional guises. The book is equally about the progression, through the subsequent decades, of the ideas that were staked out in the contests of the Whitlam years. From 1975 to 1986, the constitutional conflict continued in disputes over the role and legitimacy of Lionel Murphy, who had moved from Whitlam's Cabinet to the High Court in 1975. As a continuing symbol of Whitlam's constitutional agenda long after the dismissal, Murphy became a focal point for renewed agitation of unresolved questions about the legitimization of informal constitutional change. From 1987 to 1995, the same conflict re-emerged in the context of the High Court, led by Sir Anthony Mason, itself deliberately expanding its power of judicial review and, not unlike the Senate of the 1970s, asserting its own distinctive claim to speak on behalf of a sovereign people. From 1993 to 1999 the conflict played out once again, this time in shaping the failed republican efforts to sever Australia's remaining ties with the British constitution. In this conflict, the conservative Prime Minister of the time, John Howard, emerged somewhat counter-intuitively as Whitlam's most articulate successor – constitutionally allied, even if ideologically opposed.

At present, these episodes are treated as discrete events in Australian constitutional history. I reject that view. They are properly seen as the artifacts of a continuous and continuing articulation of contested

¹ B.J. Galligan, 'The Kerr–Whitlam Debate and the Principles of the Australian Constitution' (1980) 18 *The Journal of Commonwealth & Comparative Politics* 247, 249.

² Ibid.

³ Ibid.

constitutional principles that the Whitlam affair precipitated in the 1970s. In the incompletely realised revolution of the Mason Court, and in the republican movement that stalled in the Howard years, we find that the reverberations of the constitutional crisis still move us. But so long as the seminal crisis of 1975 is perceived as one simply about the powers of two particular institutions, rather than more broadly about competing methods of informal constitutional change, the deep continuities of its legacy will not properly be understood.

New questions about the constitutional crisis are central to the purpose and scope of the book. The standard narratives treat the crisis as though it might be possible simply to identify our constitutional norms, measure the events of 1975 against them, and deduce a conclusion about who was right and who was wrong. If only we could identify the 'correct' or 'true' constitutional norms, so the standard narratives proceed, we would be able to deduce the 'correct' or 'true' conclusion about the events of 1975. This is to misunderstand that the constitutional crisis has itself become a necessary part of our constitutional identity and tradition. It is not merely an object of constitutional law – something to be assessed against exogenous constitutional standards. It is a source of constitutional law – not in the sense that it supplies any clear rule or authoritative norm, but in the sense that the deepest commitments of the Australian constitutional tradition can no longer be comprehended as though they were divorced from the claims and counterclaims of 1975.

In fact, I very deliberately offer no view on the merits of the various actions taken by the protagonists of 1975. My aim is not to resolve lingering issues about the powers of the Senate and the Governor-General, nor to defend any of the partisan positions that have been deeply entrenched ever since they were taken up four decades ago. In my view, the primary aim of constitutional theory is not to resolve disagreement. It is to inspire disagreement and thereby create for the future new ways of thinking about persistent constitutional problems. Readers who seek an adjudication of 1975 ought to look elsewhere. Readers who are open to a fresh perspective on 1975, and its centrality to understanding recent constitutional history, may wish to persevere.

Historic portraits of Australia's former Prime Ministers hang in Canberra. The most recent of them are in Members' Hall at the centre of Parliament House. Spanning several generations of national leadership, the portraits depict a solemn constitutional continuity. Portraiture conventions have

lent to the Prime Ministers an air of timelessness. Although the portraits have, over time, 'tended to become less formal and capture more of the personality of the sitter',⁴ traditional, even cautious, figurative representation means that Norman Carter's Edmund Barton (1901–1903) could be Ivor Hele's Robert Menzies (1939–1941; 1949–1966) could be Robert Hannaford's Paul Keating (1991–1996), notwithstanding the very different times in which each of them lived. A continuous artistic tradition portrays the Prime Ministers as the faithful guardians and exponents of a continuous constitutional tradition. Art imitates life, so the saying goes.

One painting noticeably breaks the happy continuity. Clifton Pugh's arresting depiction of Gough Whitlam (1972–1975) demands one's attention quite unlike any of the others. On either side of it hang smaller portraits of Billy McMahon (1971–1972) and Malcolm Fraser (1975–1983). Both by Ivor Hele, those paintings pointedly recall the same artist's commanding 1954 portrait of Menzies, which hangs on the opposite wall. They equally recall the long political era that Menzies defined. The Historic Memorials Committee purchased Hele's portrait of Fraser only because Fraser himself rejected the first commission by Bryan Westwood. Fraser thought that Westwood made him appear 'very intimidating'.⁵ He wanted to be remembered as a faithful servant of the tradition, not as a constitutional aggressor.

The Pugh, on the other hand, wedged between such self-conscious assertions of continuity, records Whitlam's transparent challenge to the constitutional tradition. Painted in 1972, after 23 years of conservative government and just as Whitlam came to power on his platform of constitutional transformation, the portrait captures an ascendant Whitlam – 'a man who knew he was a winner'.⁶ It is not the Prime Minister who was refused supply and unceremoniously sacked less than three years later. Pugh's Whitlam looks uncomfortable to be confined within the edges of the hardboard. He is striving, rather than satisfied. Exaggerated hands, almost disincorporated, reach out in appeal to the viewer. They say, in

⁴ Kylie Scroope, "'Faithful Representations': 100 Years of the Historic Memorials Collection' (2012) 57 *Papers on Parliament: Lectures in the Senate Occasional Lecture Series, and other Papers* 89, 99.

⁵ Ibid 102. See also Jane Hylton, *Ivor Hele: The Productive Artist* (Wakefield Press, 2002) 32–3; letter to the author from Carol Mills, Secretary of the Department of Parliamentary Services, Parliament of Australia, and Secretary to the Historic Memorials Committee, 2 August 2013 (on file with the author).

⁶ Traudi Allen, *Clifton Pugh: Patterns of a Lifetime* (Nelson, 1981) 108.



Figure 1: Clifton Pugh (1924–1990) *The Hon. Edward Gough Whitlam AC QC*, 1972. Historic Memorials Collection, Parliament House Art Collection, Department of Parliamentary Services, Canberra, ACT.



Figure 2: (L–R) Ivor Hele (1912–1993) *The Rt Hon. Robert Gordon Menzies KC*, 1955; Ivor Hele (1912–1993), *The Rt Hon. William McMahon CH*, 1973; Ivor Hele (1912–1993) *The Rt Hon. John Malcolm Fraser AC CH*, 1984. Historic Memorials Collection, Parliament House Art Collection, Department of Parliamentary Services, Canberra, ACT.

Pugh's own words, 'give me a go'.⁷ Accentuating Whitlam's transformative ambition is Pugh's own stylistic innovation, some say confusion. Pugh named Kandinsky and Picasso as his major influences. He sought 'the meshing of figuration and non-figurative abstraction'.⁸ So the Whitlam portrait, in one critic's assessment, suffers from 'the need to patch a likeness ... and combine this relic of realism with the essentially non-realistic approach demanded by the mainstream of twentieth-century aesthetics'.⁹ It is 'wrecked by the resulting spatial confusion'.¹⁰ A Parliament House attendant expressed the sentiment in fewer words: 'It's an abortion'.¹¹ And yet the same portrait enjoyed remarkable popularity among the general public and won the coveted Archibald Prize.¹² It captures simultaneously Whitlam the popular, the iconoclast and the contradiction. Clifton Pugh was no Carter, Hele or Hannaford and Gough Whitlam was no Barton, Menzies or Keating.

If Pugh reminds us that Whitlam was somehow different, it is only a fleeting reminder. Regular elections (and the odd party-room spill) continue to give us 'former' Prime Ministers and their portraits. The Historic Memorials Committee makes room for them in Members' Hall by removing the older paintings to be hung in a museum at Old Parliament House.¹³ Before long, Whitlam will disappear. Continuity in Members' Hall will be restored. As Whitlam 'reced[es] into history', the 'lived experience' of the 'rising generation' will prove inadequate to comprehend him or the enduring constitutional meaning of his government and its dismissal.¹⁴

Kerr, Whitlam and Fraser are all deceased. Those who came of age in the Whitlam years are now 60 or 70 years old. I was born after Fraser left office

⁷ 'Hang my portrait of Kerr: Clifton Pugh plea to govt', *The Advertiser* (Adelaide), 6 December 1978, 1. See also Sally Morrison, *After Fire: A Biography of Clifton Pugh* (Hardie Grant Books, 2009) 369.

⁸ Morrison, above n. 7, 160.

⁹ Ibid 337.

¹⁰ Ibid.

¹¹ Ian Hancock, *Events and Issues that Made the News in 1973*, National Archives of Australia (2015) www.naa.gov.au/collection/explore/cabinet/by-year/1973-events-issues.aspx.

¹² Allen, above n. 6, 108; Morrison, above n. 7, 338.

¹³ Wall text, Members' Hall, Prime Ministers of Australia, from the Historic Memorials Collection, Parliament House, Canberra.

¹⁴ Cf. Bruce Ackerman and Jennifer Nou, 'Canonizing the Civil Rights Revolution: The People and the Poll Tax' (2009) 103 *Northwestern Law Review* 63, 63–4. See also *Insight: Whitlam Dismissal Not Highly Relevant to Australians who Reached Maturity after 1975* (Special Broadcasting Service, 9 November 1995).

and have no meaningful recollection of any Prime Minister before Howard. As lived experience runs out, a community needs received memories and histories to make sense of its past. The inheritors of a tradition share for that purpose a canon, typically of texts but perhaps also of looser narratives of events, which come to be accepted as 'indispensable to an understanding of the shape, and shaping, of the tradition'.¹⁵ A constitutional community,¹⁶ as the inheritor of a constitutional tradition, is no exception. The collection of texts and stories which comprise its 'constitutional canon' is not preordained, but is rather a product of discourse, or communal choices, about 'what (and who) is given voice; who privileged, repeated and invoked; who silenced, ignored, submerged, and marginalized'.¹⁷

These choices influence not only historical understanding but also future development. Constitutional law being a discursive practice, its norms emerge only from the agitation of claims and counterclaims and the articulation of arguments which may or may not be found to be persuasive. A constitutional community is defined by its members' common adherence to a constitutional tradition and that tradition is shaped by the canon. The canon informs, in both enabling and disabling ways, the kinds of claims and arguments that can plausibly be maintained within the constitutional community. It therefore promotes some constitutional developments while it inhibits others.

In a sense, the book is about the place of the 1975 crisis in the constitutional canon. To what extent and for what purposes are the events of 1975 given voice in contemporary constitutional law? To what extent and for what purposes are they silenced? I have a fairly clear answer to these questions: the constitutional crisis has so far been almost wholly excised from our constitutional canon, but it ought not to have been.

We have come to regard the events as exceptional and aberrational, so that they are seen to merit study only for a very confined purpose of addressing the standard questions about the precise institutional dysfunctions exhibited in 1975. The events are not typically thought to merit study for any wider purpose, such as understanding *non-dysfunctional* concerns of contemporary significance. More than that, as I will explain, we

¹⁵ Suzanna Sherry, 'The Canon in Constitutional Law' in J.M. Balkin and Sanford Levinson (eds.), *Legal Canons* (New York University Press, 2000) 374, 385, quoting Henry Louis Gates Jr, *Loose Canons: Notes on the Culture Wars* (Oxford University Press, 1992) 32.

¹⁶ See especially Paul W. Kahn, 'Community in Contemporary Constitutional Theory' (1989) 99 *Yale Law Journal* 1.

¹⁷ Judith Resnik, 'Constructing the Canon' (1990) 2 *Yale Journal of Law and the Humanities* 221, 221.

typically proceed as though invoking 1975 for a wider purpose will more likely create problems than solve them. The constitutional community tacitly understands that reflecting on the 1975 crisis, other than in relation to the standard questions, is of limited utility and best avoided.

As I have already said, however, the 1975 constitutional crisis was not simply about the precise institutional powers of the Senate and the Governor-General. It was about the legitimate methods of making informal constitutional law. The role and authority of the people in legitimating informal constitutional change remains, without exaggeration, the constitutive question of our time. Now, 40 years since the last successful referendum (and nearly 20 years since the last unsuccessful referendum), informal constitutional development is surely the modality of the future, if it is not already the modality of the present. That is not to predict that we could never see formal constitutional change where nothing less than formal change would suffice – Aboriginal recognition and republicanism come to mind. But it is to predict that the future almost surely holds another Whitlam, another Murphy, another Mason, another Howard. The future almost certainly holds new episodes of informal constitutional change and new patterns of institutional conflict in the face of that change. We should neither be surprised by those episodes when they occur, nor regard them as necessarily exceptional or aberrational events.

On several occasions since 1975, the constitutional community has had to confront the question of how the people can legitimately make informal constitutional law: whether change is sufficiently legitimated by the people functioning as electors voting in periodic polls, or whether there is a more complex procedure for eliciting a more definitive expression of popular assent. But the excision of 1975 from the constitutional canon means that we fail to appreciate that question's contemporary origins and we fail fully to comprehend its persistence through time. Divorcing the question from both its past and its future, we deprive ourselves of the resources to answer it. The extraordinary events of the Whitlam years have so far assumed their place in constitutional history as an *object* of claim and counterclaim, but have come to be regarded as an aberration upon the tradition. They are not understood as a legitimate *source* of constitutional principle – not yet a part of the constitutional canon, demanding sustained reflection by successive generations who attempt to articulate constitutional meaning for their own times. The new questions posed in this book open a conversation, or rather tune in to a continuing but somewhat muted conversation, about those competing modalities of constitutional change.

II The Plan

The plan of the book is quite straightforward. After a chapter explaining some aspects of informal constitutional change and the competing accounts of its legitimacy in Australia, the book unfolds more or less chronologically from 1972 to about 1999. I say 'more or less' chronologically because there is some backwards and forwards tracking as I weave into the analysis relevant earlier and later events. In broad outline, though, I begin with the Whitlam years, and then trace the relevant progression of constitutional thought through the Murphy Affair, the Mason Court and Howard's referendum on a republic. The chronological plan supports the broadly socio-legal ambition of the book: I seek to describe and explain the actual development of constitutional thinking, and its continuities and discontinuities, by reference to the claims and counterclaims advanced by the key historical figures at different points in time.

Consistent with that socio-legal ambition, I do not attempt to proffer commentary on current, or even very recent, constitutional issues or controversies. In a concluding chapter, I will gesture towards some of those issues and controversies and say something about their relationship with my thesis, but I have made a deliberate choice to focus on the twentieth century, which unlike the twenty-first century can now be viewed with some distance and detachment.

A more detailed outline of the chapters is as follows.

Chapter 2 is about informal constitutional change. I will explain how informal change outside of the prescribed referendum procedure is possible, because of the capacity for ordinary law fragments such as legislation, judicial decisions and political conventions to acquire a constitutional character or dimension. The main point of the chapter is to identify competing accounts of how such informal change is legitimated. When is it legitimate for political actors and institutions to assert a right to use *ordinary* law-making procedures to achieve *constitutional* change? On one view, the authority conferred by an electoral majority voting in ordinary elections is sufficient to legitimate an agenda for informal constitutional change, provided that the agenda has been clearly put to the electors. On another view, a constitutional innovator is required to generate more decisive evidence of the people's actual assent, and multiple institutions (even, or especially, counter-majoritarian institutions) can and should frustrate an agenda for informal constitutional change until that decisive evidence is manifest.

The difference between these two accounts of constitutional legitimisation mirrors a difference between two conceptions of self-government or