Foreword

The Honourable Sir Gerard Brennan AC KBE

In his moving eulogy delivered at George Winterton's funeral service, Peter Gerangelos testified 'before the world and the courts of the Almighty to the brilliance and goodness of this special man, to a great scholar, lawyer and teacher, dedicated to his calling, leading member of the great constitutional councils of the nation, and most importantly devoted husband and father, a dedicated son and loving brother'. In the early chapters of this book can be found other tributes from some who have known and loved George: his close friend of the years, Chief Justice Robert French, his former student and current academic Rosalind Dixon, his debating 'mate' in republican issues, Julian Leeser, and his admirer in the politics of the law – or rather, the law of politics – Laurence Maher. These and other authors in this book record their respect and affection for George whom Peter Gerangelos accurately assessed as a 'profoundly good, decent, compassionate and gentle man who is on the side of light'.

I came to know George when he invited me to 'co-teach' with him a course on the High Court of Australia from which I had recently retired. In practice, it was George who did the teaching and who would courteously refer to me from time to time to inquire: 'Do you think that is right?' He drew on his profound knowledge of constitutional history and theory, of politics and personalities, of case law and judicial method to provide his enthralled students with a lively appreciation of the Court's jurisprudence. I respectfully agree with Laurence Maher's assessment that –

> It was in his recognition and exposition of the ways in which history, politics, the Constitution and the law are inextricably intertwined, that George was without peer in his cohort of Australian constitutional scholars …

George Winterton could be judgmental, but his judgments were never *ad hominem*; they expressed only principled conviction. A modest and unassuming colleague, he was an inspiration to his students and a valued mentor to junior academics. All were attracted by the firm integrity of his intellect and the gentle diffidence and charm of his personality.

His writings and his lectures canvassed the changing state of constitutional orthodoxy over the century and more of the Constitution's existence, and this memorial volume in his honour appropriately covers

major constitutional issues up to the present time. It is not surprising that HP Lee, George's frequent collaborator in the publication of constitutional law theses, and Peter Gerangelos have been able to assemble papers of high quality for inclusion in this volume. It will honour George by serving as an insightful reference to the current state of constitutional law and constitutional debate.

It is a tribute to the wisdom and the drafting skills of the Founding Fathers that the Constitution has served us so well in the century past. The question for us now is how that Constitution will serve our nation in the century to come. Assuming, as we must, that Australia will continue with a form of democratic government under the rule of law, the provisions of the Constitution are critical to define the perimeter of legitimate state action. HP Lee quotes George's memorable proposition:

> Once the realm of extra-constitutional power has been entered, there is no logical limit to its ambit; only the constitution can fix the boundaries for the lawful exercise of power. Once the constitution is removed as the frame of reference for the lawful exercise of authority, the only substitute is the balance of political – and, ultimately, military – power in the nation.[1]

It is for the courts to declare the boundaries of power, applying the words of the Constitution to changing circumstances. As Sir Anthony Mason recalls, Dixon J in *Australian National Airways Pty Ltd v Commonwealth*[2] confirmed Alfred Deakin's vision of a dynamic Constitution[3] which can, by interpretation, 'grow and … be adapted to the changeful necessities and circumstances of generation after generation' since it confers 'powers expressed in general propositions wide enough to be capable of flexible application to changing circumstances'.[4] The role of the courts and especially of the High Court in interpreting the Constitution is critical to the operation of the Constitution, for the courts are the organs of government which must identify and evaluate the contemporary circumstances to which those general propositions must be applied.

Sir Anthony Mason reviews the comments made by several of the authors in the following chapters, observing that the High Court emerges from their critical scrutiny 'in rather better shape than I would have expected'. But Jeffrey Goldsworthy calls now for the acceptance of a general theory of constitutional interpretation, favouring what he terms 'moderate

1 G Winterton, 'Extra-Constitutional Notions in Australian Constitutional Law' (1986) 16 *Federal Law Review* 223 at 238-9.

2 (1945) 71 CLR 29 at 81.

3 Introducing the Bill for the *Judiciary Act 1903*.

4 *Australian National Airways Pty Ltd v Commonwealth* (1945) 71 CLR 29 at 81. See also *Jumbunna Coal Mine NL v Victorian Coal Miners' Association* (1910) 6 CLR 309 at 367-8 per O'Connor J.

originalism'. Whatever might be said of the methodology or technique of the High Court in the various periods of its existence, the present state of constitutional interpretation shows that the Constitution is adequate to deal with many of the current problems, including those which have come to demand solutions at the national or international level.

Perhaps the most urgent issue for Australia today is the economy. In 1988 the Constitutional Commission commented[5] that –

> In economic matters, Australia is not the master of its own destiny. This was made clear during the depression of the 1930s. It is just as clear today, perhaps even more so.

Control of the national economy now rests with the Commonwealth and agencies of its creation. The Commonwealth has made income tax its exclusive domain, and ss 90 and 92 of the Constitution 'taken together with the safeguards against discrimination in s 51(ii) and (iii) and s 88, created a Commonwealth economic union, not an association of States each with its own separate economy'.[6] The concurrent powers of the Commonwealth over currency, banking and insurance (other than State banking and insurance) have been exercised so as to cover those respective fields.[7] The ability of the Commonwealth to impose conditions on State grants (rather than the 1994 Financial Agreement[8]) provides a measure of control over State finances. Thus the Commonwealth has in hand the chief regulatory levers of the national economy, both fiscal and monetary.

The environment is another pressing issue. Peter Johnson is satisfied that the Constitution provides ample powers to sustain the regimes needed to maintain and enhance the environment. This has been made possible by two factors: the High Court's 'generous interpretation' of relevant powers and co-operative arrangements between the Commonwealth and the States.

Industrial relations have long been issues of concern to both governments and the governed in Australia. George Williams and David Hume chart the judicial history of the Commonwealth's industrial relations power and the diminishing necessity for the Commonwealth to rely on that power as High Court decisions revealed a broadening scope of the foreign affairs and corporations powers, culminating in the *Work Choices Case*.[9] The authors correctly attribute this development to the High Court's 'elaborate structure

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5 *Final Report of the Constitutional Commission 1988* (Canberra: Australian Government Publishing Service, 1988), Vol 2, p 773.

6 *Capital Duplicators Pty Ltd v Australian Capital Territory (No 2)* (1993) 178 CLR 561 at 585 per Mason CJ, Brennan, Deane and McHugh JJ.

7 As to the scope of the exception 'State banking', see *Bourke v State Bank of New South Wales* (1990) 170 CLR 276.

8 See now the *Financial Agreement Act 1994*.

9 *New South Wales v Commonwealth* (2006) 229 CLR 1.

of constitutional interpretation' and, without impugning that structure, they query whether there is a danger that it might obfuscate the Constitution.

Aboriginal land rights have been a major issue on the national agenda and Chief Justice French, in a masterly overview of the relevant history, illuminates the constitutional foundation for their recognition. Some other issues of contemporary national concern fall clearly within enumerated powers – for example, defence, foreign affairs and immigration. The Constitution may also affect the exercise of governmental powers which are possessed by either Commonwealth or State.

Human rights are at the heart of a free and democratic society, and several of the chapters in this book are concerned with the state of the law relevant to human rights under the Constitution and its current interpretation. Keven Booker and Arthur Glass discuss the judicial development of rights under a few express provisions of the Constitution. Nicholas Aroney, on the other hand, regards the implied freedom of political communication as a step too far, attributing to extra-constitutional factors the recognition of a freedom which the High Court attributed to the text and structure of the Constitution. Leslie Zines attributes the decision in *Roach's Case*[10] that adult suffrage is required by the phrase 'directly chosen by the people' in ss 7 and 24 to the majority's reliance on 'modern conceptions and evaluations'. HP Lee discusses the constitutional validity of legislation conferring executive power to restrict personal freedom, celebrating 'the spirit of the *Communist Party Case*[11] [as] a clarion call to the judiciary to maintain constitutional fidelity, especially in troubled times'. He draws a troubling comparison between the High Court's decisions in *Al Kateb*[12] and *Thomas v Mowbray*[13] with the approach of the House of Lords in the *Belmarsh Case*,[14] in which Lord Nicholls of Birkenhead commenced his judgment[15] with a declaration that 'indefinite imprisonment without charge or trial is anathema in any country which observes the rule of law'. It is well established, however, that courts interpret a statute whenever possible to preserve fundamental human rights, Gleeson CJ[16] having noted that the principle is 'a working hypothesis … known both to Parliament and the courts … [and] is an aspect of the rule of law'.

The Constitution allows federal judicial power to be vested only in courts, but current authority imposes two restrictions on the vesting of

10 *Roach v Electoral Commissioner* (2007) 233 CLR 162.

11 *Australian Communist Party v Commonwealth* (1951) 83 CLR 1.

12 *Al-Kateb v Godwin* (2004) 219 CLR 562.

13 (2007) 233 CLR 307.

14 *A v Secretary of State for the Home Department* [2005] 2 AC 68.

15 Ibid, 127.

16 In *Electrolux Home Products Pty Ltd v Australian Workers Union* (2004) 221 CLR 309 at 329.

jurisdiction in federal courts: they cannot be vested with either State jurisdiction[17] or with non-judicial power.[18] The first restriction, which precludes an integrated court system, can be eliminated only by constitutional amendment (or, theoretically, by an overruling of current authority[19]). The second restriction might seem at odds with the practical needs of the modern regulatory state, but Fiona Wheeler finds the High Court's flexible definition of judicial power to provide a suitable adjustment between those needs and protection of the rule of law.

The Commonwealth and the States are the constitutional integers of the federation, and they enjoy mutual immunity from taxation imposed on each other's property. Geoffrey Lindell, in a characteristically thoughtful reflection, discusses the immunity of each of these governments from legislative or executive interference by another government albeit there is a degree of uncertainty about the measure of each immunity. Although the States' effective legislative powers have been diminished, the Constitution appropriately protects their continued existence and capacity to function, for the States have two great political strengths: State administrative responsibility for basic services (health, education, local government, local infrastructure, and general law and order) and consequential identification by State residents with their State.

The Constitution has remained unchanged while modern government has been transformed by the concentration of power in the executive government. As Lord Hailsham remarked with a touch of cynicism: 'We live under an elective dictatorship, absolute in theory if hitherto thought tolerable in practice'.[20] The executive depends, of course, on the continued confidence of the lower House of the Parliament and the power of the executive under s 61 is subject to some legislative control, although there may be a measure of executive autonomy as discussed by Peter Gerangelos. But politically the executive government ordinarily secures whatever support it needs from the government party in the Parliament. (In practice, of course, executive power is chiefly wielded by the Prime Minister and the Cabinet who are not mentioned in the Constitution!) In the Australian federation, power is now concentrated in the federal executive government, largely as the result of the Commonwealth's substantial control of tax revenue and executive control of its expenditure. This phenomenon has a number of consequences for democracy in a federation.

First, the independence of State functions has been diminished by the imposition of conditions on the making of State grants under s 96 –

17 *Re Wakim; Ex parte McNally* (1999) 198 CLR 511.

18 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.

19 Cf *Gould v Brown* (1998) 193 CLR 346.

20 *Elective Dictatorship*, Dimbleby Lecture (1976).

conditions which may direct the use of the grant[21] or induce a State to take action which is beyond the powers of the Commonwealth.[22] Moreover, by exercise of the appropriations power the Commonwealth may fund activities outside Commonwealth legislative powers (for example, universities) and control them not by statute but by contract. Thus control of the purse strings may circumvent the constitutional distribution of powers.

Secondly, the fields of Commonwealth-funded activity now rest increasingly in the hands of the federal executive. Although the Constitution, in accordance with fundamental constitutional principle,[23] requires parliamentary appropriation of moneys 'for the purposes of the Commonwealth' before withdrawing them from consolidated revenue,[24] there is authority that authorised purposes extend to 'such purposes as Parliament may determine'. [25] And now, following *Combet v Commonwealth*[26] – the *Work Choices Advertising Case* – a formula in an Appropriation Act which places funds in the hands of a Minister to expend on such purposes as the Minister may determine has been found to be effective.[27]

Thirdly, the concentration of power in the hands of the federal executive has stimulated the importance of an extra-constitutional structure to improve the efficiency of government. The Council of Australian Governments (COAG) and ministerial meetings of Ministers holding similar portfolios have enhanced the delivery of services and the federal funding of the activities of State and Territory administrations.

It is unlikely that any of these developments would be reversed by constitutional amendment. John Williams points to the dismal success

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21 *Victoria v Commonwealth* ('*Federal Roads Case*') (1926) 38 CLR 399; *Second Uniform Tax Case* (1957) 99 CLR 575.

22 *Pye v Renshaw* (1951) 84 CLR 58; but see *Attorney General (Vic) ex rel Black v Commonwealth* (1981) 146 CLR 559 at 592-3.

23 *Auckland Harbour Board v The King* [1924] AC 318 at 326-7.

24 Sections 81 and 83.

25 *Attorney-General (Vic) v Commonwealth* ('*Pharmaceutical Benefits Case*') (1945) 71 CLR 237 at 256 and 274; *Victoria v Commonwealth* ('*AAP Case*') (1975) 134 CLR 339 at 366, 396 and 417; *Combet v Commonwealth* (2005) 224 CLR 494 at 522. The narrower view was put by Owen Dixon KC (as he then was) after reviewing the American authorities in his evidence before the 1929 Royal Commission on the Constitution: '[The Constitution] restricts the power of Parliament to appropriate money to the subjects assigned to Federal legislative power. The function of appropriating money seems to be treated as an exercise of the power of law-making, and not as a separate power' (Report of the Royal Commission on the Constitution, Canberra, 1929, at 780). Further elucidation of 'purposes of the Commonwealth' is now to be found in the reasons for judgment of the High Court in *Pape v Commonwealth* [2009].

26 (2005) 224 CLR 494.

27 Although as Gleeson CJ pointed out ((2005) 224 CLR 494 at 523): 'The higher the level of abstraction, or the greater the scope for political interpretation, involved in a proposed outcome appropriation, the greater may be the detail required by Parliament before appropriating a sum to such a purpose'.

record of referenda to amend the Constitution, perhaps due to difficulty in explaining complex issues to the electorate. This may be an explanation for the failure of the republic referendum in 1999. Amendments may have been more easily effected by vote of a convention of delegates elected in each State.

However that may be, John Williams observes that George Winterton's greatest legacy, 'surprisingly for a man of orthodox tendencies and metronomic precision', may be his leadership in the quest for an Australian republic for both Commonwealth and States by a s 128 referendum. George's proposals, in a form that might not have been his final thoughts, are recalled by Peter Gerangelos.

The essential problem in the republic debate is not how to elect or dismiss a President but how to control the exercise of a President's powers. I respectfully agree with George's proposal that the Constitution should provide constitutionally that a President act only on ministerial advice except in the exercise of the so-called 'reserve powers', including the power to dismiss a government. But how to control the exercise of reserve powers, especially in the case of a popularly elected President? If the current conventions are not to have the force of law, the President would be free to disregard them. If they are to be given the force of law, the validity of an exercise of reserve power would be justiciable before the High Court, with resultant delay perhaps to the prejudice of the national interest. This may be the unsolved riddle in George's proposed s 60A.

The solution,[28] which enlivened some delightful lunches with George, is to provide a speedy consultation by a President with a small, but distinguished, Council of State whose approval of the President's proposed exercise of a reserve power would place it beyond judicial or parliamentary review.

The chapters of this book which follow illuminate some of the most important issues of contemporary constitutional law and provide a foundation for speculation on future developments. The book reflects the scholarship, intellectual integrity and practicality that were the characteristics of a great Australian who was held in high respect and affection by the contributing authors.

28 I have set out this proposal in some detail in *The Sixteenth Lucinda Lecture* (2009) 35(1) *Monash University Law Review* 1.