

BOOK REVIEWS

Australian Constitutional Landmarks EDITED BY H.P. LEE & GEORGE WINTERTON
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£60]

The publication of this collection coincided with the centenary celebrations of the High Court of Australia in October 2003. It celebrates the High Court's pivotal role in the development of the Australian Constitution. Like many other books of this genre—Lord Denning's *Landmarks in the Law* (London: Butterworth, 1984), Brian Simpson's *Leading Cases in the Common Law* (Oxford: Clarendon Press, 1995), Kulshreshtha's *Landmarks in Indian Legal History and Constitutional History* (Lucknow: Eastern Book Co, 1968), and Sir Guenter Treitel's *Some Landmarks of Twentieth Century Contract Law* (Oxford: Clarendon, 2002)—the editors have assembled sixteen essays to explain the selected constitutional landmarks “in their political, social or industrial contexts”. In doing this, the editors also hope to bring these cases to the “attention of an audience beyond the narrow circle of constitutional lawyers.”

Determining which cases to highlight is often difficult and the editors tell us that while scholars will differ over what cases should constitute a proverbial “Hall of Fame”, cases had to be omitted to keep the collection within reasonable limits. I am not an expert in Australian constitutional law, but the editors appear to put together a well-chosen and evenly-balanced selection. I was a little disappointed to see two important cases which are often cited outside Australia omitted: *McCawley v. The King* [1920] A.C. 691 (on constitutional supremacy and amendments) and *Huddart Parker Pty. Ltd. v. Moorehead* (1908-1909) 8 C.L.R. 330 (on the nature of judicial power). Perhaps their background stories do not make for interesting reading, but this is but a mere quibble. Not all the chapters concern landmark cases; some involve key provisions in the Constitution or key political events, such as the dismissal of Prime Minister Gough Whitlam in 1975 or personalities like Justice Lionel Murphy. In their introduction, the editors declare (at pp. xxxv-xxxvi):

The constitutional controversies canvassed in this work illustrate very clearly the Court's pivotal role in the growth of the Commonwealth of Australia. This can be demonstrated by speculating how different Australia's history would have been if the High Court had reached the opposite result in these cases: the Communist Party would have been banned; the private banks would have been nationalised; Australians would be paying both Commonwealth and State income tax: Commonwealth laws could not bind State Governments or their

instrumentalities; professional employees would not be governed by Commonwealth industrial awards; and Australians would enjoy no freedom of political communication.

The book begins with John Williams's highly-readable and at times nail-biting chapter on the crafting of the Australian Constitution. The intrigue of constitution-making and the cast of characters—a veritable “Who’s Who” of the Australian legal firmament make this chapter all the more fascinating. Kevin Booker and Arthur Glass⁷ show that while tax is seldom thought of as a state-forming process, it was crucial to the forging of the Commonwealth in the *Engineers’ Case* (1920) 28 C.L.R. 129. Cheryl Saunders follows with a breezy account of the *Uniform Tax Cases* (*South Australia v. Commonwealth* (1942) 65 C.L.R. 373; and *Victoria v. Commonwealth* (1957) 99 C.L.R. 575), where the High Court shifted taxation powers to the Commonwealth when confronted by an urgent need for federal wartime revenue. Chapter 4 by Peter Johnston describes the courtroom drama behind attempts to fend off Ben Chifley’s bank nationalisation laws. Johnston characterized this battle as a personal battle between two legal giants: Garfield Barwick and Herbert Vere Evatt.

The *Communist Party Case* (1951) 83 C.L.R. 1, which author/editor George Winterton describes as “the most important case in Australian constitutional law” is the subject of Chapter 5. Once again, the colourful Herbert Evatt features, challenging the Menzies government’s attempt to outlaw the Communist Party. The High Court demonstrated its independence by ruling in his favour and in the process earned great credibility and respect for itself. The next chapter by Harry Evans discusses the *Browne and Fitzpatrick Case* (*R v. Richards; Ex parte Fitzpatrick and Browne* (1955) 92 C.L.R. 157) which involved the separation of powers and the High Court’s refusal to intervene in Parliament’s power to punish for contempt and defamation. Fiona Wheeler’s chapter on the *Boilermakers’ Case* (*R v. Kirby; Ex parte Boilermakers’ Society of Australia* (1956) 94 C.L.R. 254) describes the High Court’s decision to strike down federal legislation establishing the Conciliation and Arbitration Court. Robert French’s chapter on the “Race Power” is an insightful consideration of Australia’s approach to race, that “darker aspect of the early Australian psyche.” The chapter also considers important recent decisions like *Mabo v. Queensland (No. 2)* (1992) 175 C.L.R. 1 and *Kartinyeri v. Commonwealth* (1998) 195 C.L.R. 337. Former Chief Justice Sir Anthony Mason considers the *Double Dissolution Cases* and how this unusual procedure was employed in 1914 and 1974. George Winterton returns in Chapter 10 to examine Sir John Kerr’s controversial dismissal of Whitlam’s Government in 1975; and Leslie Zine’s chapter on *Tasmanian Dams Case* (*Commonwealth v. Tasmania* (1983) 158 C.L.R. 1) describes the contest between legislative powers of Tasmania and the Commonwealth under section 51 of the Constitution.

Geoffrey Lindell’s chapter on political attempts to remove Justice Lionel Murphy from the bench for misconduct in attempting to pervert the course of justice in the case against Morgan Ryan (a lawyer said to be associated with organized crime). Lindell considers the various problems with the constitutional power to remove federal judges and makes for great reading. Sir Gerard Brennan assesses the contributions of the Privy Council to Australian constitutional law while Dennis Rose provides a critical assessment of the 1988 decision of *Cole v. Whitfield* (1988) 165 C.L.R. 360 in relation to section 92 of the Constitution which provides for free trade and commerce. In Chapter 15, Marilyn Pittard writes about the labour relations

power and H.P. Lee rounds off the collection with an insightful and highly-readable account of the High Court's recognition of an implied freedom of political communication through two key decisions (*Nationwide News Pty. Ltd. v. Wills* (1992) 177 C.L.R. 1; and *Australian Capital Television Pty. Ltd. v. Commonwealth* (1992) 177 C.L.R. 106).

This an excellent collection. Besides the well-crafted chapters, political cartoons from various sources bring a lighter touch to the weighty issues they illustrate. I recommend this book to anyone wanting to learn more about Australian constitutional law. I am, however, unsure if this book—with its complex subject-matter and technical discussions—will circulate widely outside legal circles. It should.

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