

Foundations



Settlement – Federation – Independence – Reconciliation

I. SETTLEMENT

A. Constitutional Consequences

HISTORIANS BELIEVE THAT humans first reached Australia quite early after their dispersal from Africa, around 60,000 years ago.¹ Australia's current constitutional arrangements have relatively recent origins, however. The first of four formative events that are examined in this chapter was British colonisation of the territory that now is Australia within two decades after Captain James Cook claimed possession of 'the whole eastern coast' in 1770 in the name of the British King.²

The first colony was a penal settlement.³ The ships that arrived from England in 1788 under the command of Captain Arthur Phillip in order to establish a permanent settlement at Sydney Cove carried only convicts, marines, officials and their families. Unlike other British colonies to which convicts were transported, there was no civilian population, the Aboriginal peoples aside. In the circumstances, the arrangements for government were necessarily unusual; Phillip and his immediate successors as Governor held sweeping local authority which they exercised without representative institutions of any kind for 35

¹ C Renfrew, *Prehistory* (London, Phoenix, 2007) 102, 129.

² R Hough, *Captain James Cook*, (London, Hodder and Stoughton Ltd, 1994) 158.

³ All Australian colonies except South Australia received convicts at some stage; transportation finally was abolished in 1868.

2 Foundations

years. Nevertheless, even at this stage there was rudimentary provision for adjudication and a skeletal base on which constitutional government eventually would build. After an initial period of indecision on the part of the Imperial authorities, the Commission issued to Phillip, shortly before his departure, encouraged the development of the settlement as a colony and not merely a ‘penal establishment under military government’.⁴ As the character of the population changed through emancipation and an increase in the numbers of free settlers, the rule of law was gradually strengthened⁵ and embryonic institutions of representative government began to emerge in response to demand.

It has sometimes been asked, only partly in jest, whether Australia’s convict origins have affected its national character, with implications for attitudes to authority, including what poet Les Murray has termed Australian ‘ability to laugh at venerated things’.⁶ Whatever the answer, in other respects the manner of British colonisation was formative in Australian constitutional development. The pattern of British settlement determined the territorial organisation of the land mass, initially in the form of colonies and subsequently as the States and territories of the Australian federation. Settlement by the British rather than by any other European power ensured that Australian law had a foundation in English law and that the Australian legal system adopted the principles and practices of the common law tradition. At the same time, assumptions about the basis on which the common law was absorbed into Australia had disastrous consequences for the indigenous inhabitants, of whom there may have been around 500,000 when the first fleet arrived, which provide a rationale for the modern reconciliation movement.⁷ British settlement also meant that the institutional structure of government that developed in Australia would be modelled broadly on the institutions, principles and practices familiar in Britain itself, adapted to suit Australian conditions and preferences including, over time, the perceived necessities of federation.

⁴ V Windeyer, ‘“A Birthright and Inheritance” The Establishment of the Rule of Law in Australia’ (1958–1963) 1 *Tasmania University Law Review* 639, 646.

⁵ D Neal, *The Rule of Law in a Penal Colony: Law and Politics in Early New South Wales*, 2nd edn (Cambridge, CUP, 2002).

⁶ L Murray, ‘Some Religious Stuff I know about Australia’ quoted in J Hirst, ‘An Oddity from the Start: Convicts and National Character’ (2008) 36 *The Monthly*.

⁷ Present estimates lie between 315,000 and 750,000; the numbers may have been higher still: Australian Bureau of Statistics, *Year Book Australia, 2008*, 1301.8.

B. Territorial Organisation

With a total land mass of more than 7.5 million square kilometres Australia is only slightly smaller than the continental United States, excluding Alaska. It is much more sparsely populated, however, with a population of around 21.5 million in 2010. The relatively low population density of 2.6 people per square kilometre can be attributed in part to the terrain, two-thirds of which is arid or semi-arid. The level of its unpredictable rainfall makes Australia the driest continent in the world, apart from Antarctica.

The topography of the country also helps to explain the pattern of settlement and development. The principal original colonies were scattered around the coast in relatively hospitable locations, at considerable distances from each other. The first in time was a huge eastern colony of New South Wales, notionally covering more than half the continent, centred on the first settlement in Sydney from 1788. Over the following 40 or so years, satellite settlements were established along the east coast to the south and the north in what now are the cities of Hobart, Melbourne and Brisbane and which became the capitals of the colonies of Tasmania, Victoria and Queensland respectively. By 1859 all three had separated from New South Wales. Thereafter, for the most part, they developed independently, although under the same imperial umbrella and with a degree of intercolonial co-operation. For a brief period in 1839–40 New Zealand was governed from New South Wales as well, until the Treaty of Waitangi was signed, British sovereignty was formally proclaimed and New Zealand was established as a colony in its own right.⁸

In 1829 another huge colony that now is Western Australia was established to lay claim to the remainder of the continent, centred on settlements in the south-west, one of which eventually became the capital city of Perth. Seven years later Adelaide was founded in the centre of the south coast, as the capital of the first fully free settlement, the Province of South Australia. For more than 40 years from 1863 the extended boundaries of this colony cut a swathe through the centre of the continent, from south to north, incorporating the Northern Territory, for which the town of Darwin was established on the north coast in

⁸ P Joseph, *Constitutional and Administrative Law in New Zealand*, 2nd edn (Wellington, Brookers, 2001) 37–38.

1869. There was no significant change to this territorial organisation of the mainland of Australia and Tasmania after 1863 apart from the separation of the Northern Territory from South Australia in 1911 and the carving out from New South Wales of the Australian Capital Territory, in which the city of Canberra was established, as the seat of federal government in 1911.

The original colonial settlements thus became the principal cities: magnets for population, industry and government, often at the expense of development elsewhere, even where development was feasible. The Australia of the early twenty-first century is a highly urbanised and centralised society, with 65 per cent of the population living in eight cities that in turn are the capitals of the six Original States and two self-governing territories of the Australian federation. Five of the eight constituent units are huge in territorial terms and the two largest, Western Australia and Queensland, cover more than half the continent between them. The distances between State capitals vary from 883 kilometres in the case of the two most populous cities of Sydney and Melbourne, to almost 4,000 kilometres, covering three time zones, which lie between Sydney and Perth.

The territorial organisation of Australia has not gone unchallenged. There have been movements to create new States since federation.⁹ None has succeeded, however, and while the Northern Territory may yet become a State, this would not fundamentally alter the territorial division of the country.¹⁰ Proposals for the federal constitutional recognition of local government as a constituent partner in the federation also have been debated for more than 30 years and this remains a live issue despite rejection at referendum in 1988.¹¹ There are occasional calls for the abolition of federalism altogether, sometimes tempered by proposals to create a larger number of regions, exercising devolved power of some kind.¹² Major structural change nevertheless seems unlikely; and not only because of the innate advantage of the status quo and the difficulty of

⁹ A Twomey, 'Regionalism—A Cure for Federal Ills?' (2008) 31 *University of New South Wales Law Journal* 467, 483–85.

¹⁰ A history of the statehood movement until 2007 is provided in House of Representatives Standing Committee on Legal and Constitutional Affairs, Commonwealth Parliament, *The Long Road to Statehood*, 2007.

¹¹ AJ Brown, 'In pursuit of the "Genuine Partnership": Local Government and Federal Constitutional Reform in Australia' (2008) 31 *University of New South Wales Law Journal* 435, 437–49.

¹² Twomey, 'Regionalism' (2008), n 9 above.

constitutional amendment, outlined in chapter two. This is one of the fault lines of the Australian constitutional system, at which a range of conflicting preferences intersect, over the choices between versions of federalism and unitary government; a controlled and an uncontrolled constitution; parliamentary sovereignty and constitutional checks and balances; and the interests of Australians who live close to the centre of national power in the south-east of the country and those who live further away.

C. Common Law and Legal System

Settlement by Britain in the late eighteenth and early nineteenth centuries left the Australian colonies with a foundation of English law and with legal systems in the common law tradition.

The former incorporated into Australian law a range of English statutes of constitutional significance, including the Magna Carta, the Bill of Rights 1688, the Act of Settlement 1700 and the Habeas Corpus Act 1679, concepts of tenure and estates in property that recognised the ultimate title of the Crown and core constitutional principles derived from judicial decisions.¹³ While most early English statutes have now been repealed by State Parliaments, foundational measures such as those listed above generally have been retained.¹⁴

The introduction of a common law legal system also influenced subsequent Australian constitutional development. The Commonwealth Constitution itself was predicated upon the principles and practices of the common law although, as chapter two shows, the precise nature of the relationship between the two is still being worked out. Until well into the twentieth century, Australian law was part of a more or less unified body of common law that applied throughout the former British Empire. Even after the emergence of distinctive national systems of common law, Australian law continued to be influenced by developments elsewhere in the common law world.¹⁵

¹³ For example, *Case of Proclamations* [1611] 12 Co Rep 74; *Prohibitions del Roy*, [1607] 12 Co Rep 63.

¹⁴ States have enacted Imperial Acts Application Acts for this purpose: see for example Imperial Acts Application Act 1980 (Vic). See generally PM McDermott, 'Imperial Statutes in Australia and New Zealand' (1990) 2 *Bond Law Review* 162.

¹⁵ A Mason, 'The Break with the Privy Council and the Internationalisation of the Common Law', in P Cane (ed), *Centenary Essays for the High Court of Australia*

There is nothing unusual about the idea that colonisers take with them the law that is familiar at home. In the case of British colonies settled at the turn of the nineteenth century, this familiar colonial technique was given additional impetus by belief in the superiority of the common law and pride in the constitutional protections that it was deemed to confer. The effect of introduced law on an existing population, however, depended on the basis on which sovereignty over the territory was claimed, further complicated, in the case of Australia, by parallel changes in the conception of sovereignty over the critical period.¹⁶ In the late eighteenth century the prevailing classification distinguished between colonies acquired by conquest or cession on the one hand and those acquired by occupation, on the other. In conquered or ceded colonies the existing law remained in place for local inhabitants unless overridden by the law of the new sovereign. In an occupied or settled colony, on the other hand, the territory was ‘uninhabited’ or at least ‘desert and uncultivated’ and English law was ‘automatically there in force’.¹⁷

From the outset, Australia was treated largely as if it fell into the category of land acquired by occupation. For the most part there was no attempt to conclude treaties with the indigenous inhabitants; and the one attempt made, in Victoria, was repudiated by the Governor in 1835 as ‘void and of no effect against the rights of the Crown’.¹⁸ The conflict that followed settlement might well have been categorised as conquest, but there was no formal acknowledgement of the laws of the conquered peoples and of their relationship to the land.¹⁹ English law was simply absorbed to the extent that it was applicable. In New South Wales and Tasmania, reception continued until 1828, when the circumstances of the colonies had begun to normalise and Legislative Councils had been established to make laws for the future.²⁰

(Chatswood, NSW, LexisNexis Butterworths, 2004) 66, 72, noting that the emergence of the Australian common law and the internationalisation of the common law were ‘virtually contemporaneous’.

¹⁶ B Attwood, *Possession* (Melbourne, Vic, The Miegunyah Press, 2009) 76 ff.

¹⁷ W Blackstone, *Commentaries on the Law of England* Book 1, (Dublin, Exshaw et al, 1766) 104–05.

¹⁸ Attwood, n 16, 83–84.

¹⁹ There was some difference in the official attitude in South Australia although not in the result: S Banner, ‘Why *Terra Nullius*? Anthropology and Property Law in Early Australia’ (2005) 23 *Law and History Review* 95, 120–22.

²⁰ Australian Courts Act 1828 (Imp), s.24. The reception dates in the other colonies are WA (1 June 1829) and SA (28 December 1836).

The treatment of the Australian colonies was ‘unusual’ in this respect.²¹ By contrast, colonies settled both earlier and later, in North America and New Zealand, were formally considered to be conquered or ceded or a combination of the two. The explanation may be traced in part to reports taken back to England from Cook’s expedition, after claiming possession of New South Wales in 1770. According to the naturalist Sir Joseph Banks, the land was ‘immense’ but ‘thinly inhabited’ and it was possible that the interior was ‘totally uninhabited’. Before he left for New South Wales in 1787, Phillips himself noted ‘the general opinion’ that there are ‘very few Inhabitants in the Country’.²²

Once the first fleet arrived at Sydney Cove it soon became evident that these assumptions were incorrect. Initially, however, it was unclear that the Indigenous peoples themselves were subject to the common law. But over the course of the nineteenth century, spurred by a more territorial conception of sovereignty, the present understanding of the Australian colonies as settled, with all its attendant legal consequences, gradually hardened into law, until finally confirmed by the Privy Council in 1889.²³ It was rationalised with the earlier tripartite theory by extending the notion of ‘uninhabited’ to include territory that was ‘practically unoccupied, without settled inhabitants or settled law’.²⁴

Reception of the common law on this basis profoundly affected the Aboriginal peoples as they came in contact with it, although in some cases contact was delayed for more than 100 years. It precluded legal recognition of their relationship to land and underpinned their dispossession, without process or attempt at compensation. More than 200 years later, in *Mabo (No 2)*, the understanding of the basis on which sovereignty had been claimed was revised by the High Court of Australia.²⁵ *Mabo* acknowledges the presence of Indigenous peoples at the time of British settlement and accepts that their pre-existing interests in the land can be recognised by the common law unless lawfully extinguished, typically by legislation. The decision does not disturb the claim of sovereignty itself, however, or the monopoly of the common law.

²¹ P McHugh, *Aboriginal Societies and the Common Law* (Oxford, OUP, 2004) 4.

²² Both quotations are taken from Banner, n 19, 99.

²³ *Cooper v Stuart* [1889] UKPC 1.

²⁴ *Ibid*, at [11]. See also G Simpson, ‘*Mabo*, International Law, *Terra Nullius* and the Stories of Settlement: an Unresolved Jurisprudence’ (1993) 19 *Melbourne University Law Review* 195.

²⁵ *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

D. Institutions

Each of the six Australian colonies achieved self-government under a Constitution of its own during the latter part of the nineteenth century. The institutions of government thus established were broadly similar to each other, to those in other comparable British colonies and to those in the United Kingdom itself. The Parliaments were bicameral, although their upper Houses, however conservative, were elected or appointed, rather than hereditary. Governments were drawn from the Parliament and depended on the support or ‘confidence’ of the lower, popularly elected House for continuation in office. The colonial governments in turn advised the Crown in the exercise of its powers, subject to instructions from London to the contrary, thus completing the link between Parliament and executive government that is the hallmark of a system of responsible government. Each colony also had a hierarchy of courts, culminating in a Supreme Court, from which appeal lay to the Privy Council in London.

In some respects, however, even at this early stage Australian institutions had distinctive characteristics. The development of Australian colonial government was influenced by the events and the ideas of the time: the demands of the Chartist movement in England, coinciding with revolutions in continental Europe; the struggle to extend the franchise in the United Kingdom, culminating in the Reform Acts of 1832 and 1867; the spread of utilitarianism through the work of Jeremy Bentham and JS Mill, with its pragmatism and emphasis on outcomes;²⁶ the rise of positivism and the command theory of law, with successive editions of John Austin’s lectures, from 1832;²⁷ the consolidation of parliamentary sovereignty in the writings of AV Dicey towards the end of the century.²⁸ The Australian context was conducive to the embrace of such ideas: new systems of government, on which heavy demands were placed by the need for colonial development and a rapid influx of population following the discovery of gold in the 1850s. Famously, one consequence was substantial progress in the practice of electoral democracy over the

²⁶ M Warnock, ‘Introduction’ in M Warnock (ed), *Utilitarianism and On Liberty*, (Oxford, Blackwell, 2003).

²⁷ WE Rumble (ed), J Austin, *The Province of Jurisprudence Determined* (New York, CUP, 1995) comprising the text of the 5th edition of 1885.

²⁸ AV Dicey, *Introduction to the Study of the Law of the Constitution*, first published 1885.

course of the nineteenth century, with the introduction of universal suffrage for white males in lower Houses of Parliament; the extension of the franchise to white women in two colonies before the end of the century;²⁹ payment of Members; the secret ballot; shorter parliamentary terms; and Saturday voting.³⁰ There is debate about the extent to which the influence of some of these early attitudes continues, with results that are less benign.³¹ On any view, however, electoral democracy remains a dominant focus of the Australian constitutional system.

II. FEDERATION

A. Process

i. Early Interest in Union

The possibility that some or all of the Australian colonies might form a federation of some kind was considered in both London and the colonies themselves as the huge Eastern colony of New South Wales fragmented.³² In many ways, such a course was obvious. Most, although certainly not all, of the settlers had come from Britain, or Ireland. They shared both the challenges and opportunities of living in a huge land of great economic promise with an often harsh terrain and unpredictable seasons more than 19,000 kilometres from the Imperial authorities in London. The United States and, in due course, Canada offered contemporary examples of ways in which unity and local self-government could effectively be combined in broadly similar circumstances. As the century wore on, co-operation between the colonies became increasingly frequent: 83 intercolonial

²⁹ South Australia (1894) and Western Australia (1899).

³⁰ M Sawyer, 'Inventing the Nation Through the Ballot Box', Papers on Parliament 37, Australian Senate, 2001.

³¹ H Collins, 'Political Ideology in Australia: The Distinctiveness of a Benthamite Society' in S Graubard (ed), *Australia: The Daedalus Symposium* (Sydney, NSW, Angus and Robertson, 1985) 147; Cf M Sawyer, 'Comment: The Australian Settlement Undone' (1996) 39 *Australian Journal of Political Science* 35.

³² Evidence for the idea is clear in the 1840s: J Quick and RR Garran, *Annotated Constitution of the Australian Commonwealth* (Sydney, NSW, Angus and Robertson, 1901) 81ff. There may be earlier signs still, dating from the separation of Van Diemen's Land, later Tasmania, in 1825: AJ Brown, 'Constitutional Schizophrenia Then and Now', Lectures in the Senate Occasional Lecture Series 2003–2004, *The Distinctive Foundations of Australian Democracy*, 14–17.

conferences were held between 1860 and 1900, over matters ranging from the overland telegraph to the collection of statistics, the maintenance of lighthouses, quarantine and defence.³³

ii. The Later Federation Movement Begins

Nevertheless, no tangible steps towards federal union were taken until later in the century. In 1885, a form of confederation was established involving four Australian colonies, New Zealand and Fiji, but never New South Wales; and South Australia was a member only for a short period. The Federal Council of Australasia survived until 1900 but weakness in its structure and membership left it with only a minor role in the progression towards federation.

What with hindsight can be accepted as the beginning of the final phase was a conference of colonial leaders in Melbourne in 1890 at which all the Australian colonies and New Zealand were represented. The immediate catalyst for the meeting was colonial defence, although intercolonial tariff competition and immigration were other significant factors and federation also drew momentum from developing national sentiment, manifested in the art and literature of the time.³⁴ The Australasian Federation Conference agreed that ‘the best interests and the present and future prosperity of the Australian colonies will be promoted by an early union under the Crown’ and called for a ‘National Australasian Convention . . . to consider and report upon an adequate scheme for a Federal Constitution’.³⁵ In the event, however, agreement on a Constitution required two Conventions and involved a decade of negotiations, characterised by perseverance, pragmatism and laborious balancing of competing interests.

iii. The Conventions

The first Convention met in 1891. Termed the National Australasian Convention, it comprised delegations drawn from the Parliaments of all Australian colonies and New Zealand. A draft Constitution was agreed in just over a month, but the next steps depended on the respective

³³ SG Foster, S Marsden, R Russell (eds), *Federation: The Guide to Records* (Canberra, NSW, National Archives of Australia, 1998) section 1.

³⁴ J Hirst, *The Sentimental Nation* (Melbourne, Vic, OUP, 2000) 15.

³⁵ Quick and Garran, n 32, 120–21.

Parliaments, and these were preoccupied with an economic depression, industrial unrest and other more immediate matters. By 1893, according to contemporary commentators John Quick and Robert Garran, 'the Parliamentary process of dealing with the Commonwealth Bill had broken down hopelessly'.³⁶

In the light of this experience, the next attempt at federation had a more populist cast and left less to the vagaries of parliamentary politics. Federation Leagues were formed, initially in border areas most affected by the divisions between the colonies. At one League event, in the border town of Corowa in 1893, a proposal for a second Convention was adopted.³⁷ This time, however, the process was more carefully designed. The Convention would be directly elected pursuant to enabling legislation in each of the colonies, which also should require the draft Constitution to be put to the voters in the colony for approval. The draft enabling legislation approved by a majority of Premiers 18 months later was more prescriptive still. It called for ten delegates from each colony to be elected to a new Convention; provided for a compulsory adjournment of the Convention for consultation with the colonial Parliaments on the draft Constitution; set out a procedure whereby the draft would be submitted to the voters for approval within the colony; and authorised the transmission of the draft Constitution to the Imperial Parliament for enactment if at least three colonies approved.

This was, more or less, the plan that was followed, although there were setbacks along the way. Four colonies passed Enabling Acts broadly in the form that had been agreed. Ominously, however, the fifth colony, Western Australia, made no provision for a referendum and sent a delegation elected by the Parliament while the sixth, Queensland, temporarily withdrew from the entire process. Once the elections had taken place, the Federal Australasian Convention met in three sessions in 1897 and 1898. As required by the legislation, it adjourned after the first session to enable the colonial Parliaments to comment on the constitutional draft. A final version was approved by the Convention in March 1898 and submitted to referendum shortly thereafter in New South Wales, Victoria, Tasmania and South Australia. It was approved in three colonies, but deemed to be rejected in New South Wales, where

³⁶ Ibid, 150.

³⁷ S Macintyre, 'After Corowa' (1994) 65 *Victorian Historical Journal* 98; D Headon, 'Loading the Gun: Corowa's Role in the Federation Debate', Papers on Parliament 32, Australian Senate, 1998, 20.

local politics had caused the required number of voters in favour to be increased when the Convention did not pay sufficient regard to the concerns about the draft, raised by the Parliament during the adjournment.

iv. Enactment

Under the Enabling Acts, the Constitution could be sent to London for enactment once approved by three colonies. Federal union was impracticable, however, without New South Wales. In an effort to find a basis on which New South Wales would enter a federation, the Premiers met and made a series of changes to the draft, which included the eventual location of the capital in New South Wales, but 'not less than one hundred miles from Sydney'.³⁸ Queensland rejoined the process; and the Constitution as amended was put to the voters in five colonies and passed. Although no action had yet been taken in Western Australia, a delegation of colonial leaders accompanied the draft Constitution to London. A successful, last-minute, referendum in Western Australia, after the imperial legislation was passed but before proclamation of the Constitution itself, enabled Western Australia to join as an Original State,³⁹ but explains its exclusion from the preamble to the Constitution Act. An attempt by New Zealand to retain the option to join the federation as an Original State in the future failed, although the possibility that New Zealand might join on some basis is reflected in clause 6 of the Act.

By the standards of the times, this was a remarkably democratic process, even when allowance is made for the limited franchise, a modest voting turnout⁴⁰ and political masterminding of the popular movement behind the scenes.⁴¹ It has left a continuing mark on the Constitution, both in the referendum requirement for constitutional change and as contested evidence of popular sovereignty as the source of constitutional legitimacy.⁴² Given the imperial setting, it was also a

³⁸ Now s.125 of the Constitution.

³⁹ Commonwealth of Australia Constitution Act 1900 (Imp) s.6.

⁴⁰ H Irving, *To Constitute a Nation*, (Cambridge, CUP, 1997) 152–53.

⁴¹ B de Garis, 'How Popular was the "Popular" Federation Movement?', Papers on Parliament 21, Australian Senate 1993, 101.

⁴² G Winterton, 'Popular Sovereignty and Constitutional Continuity' (1998) 26 *Federal Law Review* 1, 3–5 and the authorities there cited.

notably autochthonous process.⁴³ It was accepted from the outset that federation required imperial legislation. Nevertheless, the Australians understandably sought enactment of the Constitution without change. The United Kingdom government, on the other hand, was determined to protect imperial interests; critically, through maintenance of appeals to the Privy Council. Once more there was compromise, before the legislation finally was passed. The Commonwealth of Australia came into existence on 1 January 1901.

B. Influences

i. Politicians and People

In any constitution-making exercise, process is likely to affect outcome. In Australia, the process gave three distinct groups a role that left its mark on the final Constitution.

The first comprised the governments and parliaments of the colonies. Their influence was diluted by the election of delegates to the second Convention but they provided the legal framework for the process and their support was critical to its final success. The failure of the first referendum in New South Wales in the wake of the equivocal stance of its Premier demonstrated this only too clearly.⁴⁴ In any event, almost all the elected delegates were members of colonial parliaments and while some would seek national office when the Constitution came into effect, many expected to play a continuing role in the governments and parliaments of the new States.

These competing interests dominated negotiations, as delegates sought to ensure that the Constitution established a viable national government but did not detract more than necessary from the capacities of the existing colonies; that it enabled sufficient weight to be given to the views of the national majority, likely to be concentrated for the foreseeable future in the south-eastern States of New South Wales and Victoria, while preserving the 'self-esteem' of the smaller States and

⁴³ More than 30 years earlier, in Canada, the key decisions also were locally made, but through governments and legislatures: J Ajzenstat, I Gentles, P Romney, *Canada's Founding Debates*, (Toronto, University of Toronto Press, 2003) 2–3; AF Bayefsky, *Self-determination in International Law* (Leiden, Martinus Nijhoff, 2000) 472.

⁴⁴ G Bolton, *Edmund Barton* (St Leonard's, NSW, Allen and Unwin, 2000) 171–78.

their peoples through the equality principle; that it did not favour one side or another in the struggle between free trade and protectionism, enabling the new Commonwealth Parliament to decide; and that matters deemed critical by particular, individual colonies were safeguarded. The need to balance these considerations account for the equality of State representation in a powerful Senate that nevertheless lacks full power over financial bills and is the likely loser if the deadlock mechanism is applied (ss 53, 57); an approach to the division of powers between the Commonwealth and the States that left the latter with ‘all their existing powers except those surrendered to the Commonwealth’;⁴⁵ and the failure of the delegates to agree on the all-important issue of the basis on which revenue would be distributed by the Commonwealth to the States after the first few years.⁴⁶

The second group with a determinative role was the Imperial government and Parliament, whose approval was needed to bring the Constitution into effect. Their only public intervention was at the time of enactment, when they secured changes to section 74 of the draft to protect appeals to the Privy Council from Australian courts on at least some constitutional questions. British influence also was felt in other, more subtle ways, however. Detailed memoranda on the draft Constitution were prepared by the Colonial Office in 1897 and discretely fed into the deliberations of the Convention through the Premier of New South Wales. Apart from the already vexed issue of the Privy Council, these drew attention to several provisions that implied Australian authority to enter into treaties, which were duly removed in subsequent drafts.⁴⁷ More generally still, consciousness that the Constitution ultimately needed British approval affected some of the choices that the delegates made.

The final group with a determinative role were the voters in each of the colonies. The difficulty of distinguishing their voice from the rhetoric of their representatives makes it harder to pinpoint their influence reliably. Logically, however, a referendum requirement makes it necessary to try to ensure that a proposal contains nothing objectionable enough to cause

⁴⁵ National Australasian Convention, *Official Record of Debates* (Adelaide, SA, 1897) 12–13.

⁴⁶ C Saunders, ‘The Hardest Nut to Crack’ in *The Convention Debates 1891–1898: Commentaries, Indices and Guide*, G Craven (ed), (Sydney, NSW, Legal Books, 1987) 149.

⁴⁷ Bolton, n 44, 162.

popular majorities to reject the entire measure. In the circumstances of Australian federation, the influence of voters is likely to have been felt at the very least in the consensus character of the Constitution and in the concessions that were made to the interests of individual States, of which the preservation of the voting rights of women in South Australia is only one, benign, example.⁴⁸

ii. Models

All constitutions draw on existing constitutional models, adapting them to local needs. In designing the institutions for the new Commonwealth sphere of government, the framers of the Constitution were influenced primarily by the structure and principles of British government, filtered through Australian colonial experience. Nevertheless, they initially hesitated over the adoption of responsible government, because of concern about the extent to which it was compatible with a powerful Senate in which the States were equally represented, assumed to be a concomitant of federation. The question was left open in the draft of 1891 but was resolved in favour of responsible government in the final Constitution, to the extent of requiring Ministers to be Members of Parliament (s 64).

The adoption of other features of executive government was more straightforward. Formal executive power would continue to be held by the Queen, but exercisable by a Governor-General, as her representative (s 61). The Governor-General in turn would receive formal advice through an Executive Council, of which all Ministers would be members (s 62–64). The Constitution provided only for the ‘dignified’ institutions of executive government. Consistently with the distinction famously drawn by Walter Bagehot thirty years earlier, the ‘efficient’ institutions of Cabinet and Prime Minister were left to unwritten rules and political practice.⁴⁹

The driving purpose of the Constitution, however, was to establish a federal form of government, for which British arrangements offered no assistance. For this purpose, the Australians turned to existing federal systems of government, in the United States, Canada, Switzerland and Germany. Information about all of them was available to Convention delegates and all had some influence on the outcome: Canada and

⁴⁸ Commonwealth Constitution sections 41, 128.

⁴⁹ W Bagehot, *The English Constitution* (London, Chapman and Hall, 1867) 13.

Germany on the allocation of particular powers to the Commonwealth; Switzerland on the adoption of the referendum for constitutional change.

The most influential of all was the Constitution of the United States with which some of the Australian framers were personally familiar and which was accessible to all of them through the writings of James Bryce.⁵⁰ From the United States the Australians adopted a conception of a federal system of government that matches Madison's analysis in *Federalist 39* surprisingly well, given the differences in the relationship between the legislature and the executive in the two countries.⁵¹ The manner in which the Australian Constitution was made; the composition of the institutions of national government; the operation and scope of Commonwealth powers; and the procedure for constitutional change reflect a blend of national and (con)federal elements broadly comparable with those for which Madison had argued so persuasively more than 100 years earlier. In following the United States model so closely, the Australians also adopted parts of the structure and even the text of the United States Constitution, thereby laying the foundations for the emergence of an Australian doctrine of separation of powers.

They departed from it, however, in some critical respects. The most significant was the combination of federalism and responsible government, which profoundly affected the dynamics of Australian government and also triggered a range of differences in detail, including limitation of the financial powers of the Senate and a procedure for the resolution of deadlocks (ss 53, 57). Other departures from the American prototype included provision for a minimum of six senators from each State; the direct election of Senators (s 7); and the creation of a High Court as a final court of appeal in all questions of State as well as Commonwealth jurisdiction (s 73).

Nor did the Australians adopt a bill of rights. This was less remarkable at the time than it may seem to twenty-first century eyes. In the English constitutional tradition of the nineteenth century, rights were secured through representative institutions and common law courts. The framers of the Commonwealth Constitution therefore saw neither a need for a

⁵⁰ J Bryce, *The American Commonwealth* (1888); for the influence of Bryce and other federal theorists on the Australians see N Aroney, 'Imagining a Federal Commonwealth: Australian Conceptions of Federalism, 1890–1901' (2002) 30 *Federal Law Review* 265.

⁵¹ A Hamilton, J Madison and J Jay, *The Federalist*, WR Brock (ed), (London, JM Dent, 1992) 191.

bill of rights, nor any particular connection between rights protection and federation. On the other hand, a small amount of rights-talk did take place in the Conventions, in the context of a proposal that would have elaborated the concept of citizenship in a united Australia by combining elements of the privileges and immunities clause (Art 4, s 1) and the XIV amendment of the Constitution of the United States. It is clear from the debate on this proposal that a desire to be able to continue to enact discriminatory laws was a factor in the lack of Australian interest in constitutional rights protection, at least if it involved equality guarantees.⁵²

C. Significance

The federation movement of the 1890s achieved its primary goal of bringing all six Australian colonies together under a national Constitution through a distinctively participatory process. The magnitude of the achievement appears even greater after more than a century of experience of the difficulty of constitutional change of a much less complex kind.

In at least two respects, however, the achievement was more ambiguous and contested. The first concerns the democratic credentials of the Constitution. On one view, these were impressive; a culmination of the tradition of democratic experimentation that had emerged in the colonies over the latter part of the nineteenth century. Responsible government was secured; both Houses of the Commonwealth Parliament would be directly elected; constitutional change required approval by popular vote; and the voting rights already secured by women in two colonies would be preserved in terms that made the early extension of the franchise to women in the Commonwealth sphere almost irresistible. James Bryce described it as the 'high-water mark of popular government'.⁵³ Writing in 1902, shortly after the Constitution came into effect, Harrison Moore claimed that its 'great underlying principle' was 'that the rights of individuals are sufficiently secured by ensuring, as far as possible, to each a share, and an equal share, in political power'.⁵⁴

⁵² M Lake and H Reynolds, *Drawing the Global Colour Line* (Cambridge, CUP, 2008) 139.

⁵³ J Bryce, *Studies in History and Jurisprudence, Vol 1* (New York, OUP, 1901) 536, cited in *McGinty v Western Australia* (1996) 186 CLR 140, 271, Gummow J.

⁵⁴ W Harrison Moore, *The Constitution of the Commonwealth of Australia*, 1st edn (London, John Murray, 1902) 329.

On the other hand, implementation of the federal principle diluted majoritarian democracy in a variety of ways. The most obvious was the equal representation of States in the Senate. The composition of the Senate could be rationalised on pragmatic grounds as the necessary price for the participation of all colonies, securing a 'nation for a continent and a continent for a nation'. In time it came to be welcomed, at least by some, as a source of checks and balances in a constitutional system that otherwise tends to concentrate power. Nevertheless, the Senate was a source of controversy from the outset, exposing underlying disagreement within Australia about how government should be structured and political decisions made.

Even if the complications of federalism are left aside, the progressive character of the Constitution from the perspective of democracy became less obvious over the course of the twentieth century as standards changed. The absence of core political rights sparked decades of litigation about the extent to which some constitutional protection can be derived from the spare provisions establishing the elected institutions. More shocking still, with hindsight, are provisions authorising discrimination on grounds of race; now tamed by constitutional change and political practice but still reflected in the Commonwealth power to make laws for 'the people of any race' (s 51(xxvi)). This feature of the Constitution may have added to its appeal to the electorate of the 1890s, on the threshold of the implementation of policies designed to preserve a white Australia. By the twenty-first century, however, its remnants are an embarrassing reminder of earlier currents of thought.

The contribution of the Constitution to what might now be called nation building was ambiguous as well. Given Australia's continuing colonial status, agreement on a federal Constitution was a remarkable and farsighted achievement, which extended Australian autonomy and laid the ground for future independence. The process by which the Constitution was made effectively confined British intervention to matters of imperial concern. Appeals to the Privy Council were limited further than the Imperial authorities preferred. The new Constitution could be altered by Australians, in contrast to the British North America Act 1867, which required change to be effected through the Imperial Parliament. The Commonwealth and the States were collectively empowered to exercise some of the powers of the Imperial Parliament in relation to Australia, in terms that ultimately would be relied upon to sever the remaining colonial restrictions on the States (s 51 (xxxviii)).

The term 'Commonwealth' was deliberately adopted as 'the noblest word ever invented to designate a free state', despite its republican connotations, which had to be explained away.⁵⁵

On the other hand, because colonial status was taken as a given, the Constitution was written for a polity that was not yet independent. Independence was achieved well after federation by a lengthy, laborious and highly technical process. And while the Constitution was sufficiently flexible to enable this to occur without textual change, its origins have left significant traces: in the form of the Constitution and the authority for it; in the institution of the Monarchy; in the absence of an explicit constitutional conception of citizen; and in the preservation in the Constitution of procedures for imperial control, now fallen into disuse.

III. INDEPENDENCE

A. The Challenge

In most countries independence following a period of colonisation is a catalyst for a new Constitution. While this was not the case in Australia, independence was a critical event nonetheless, in constitutional terms. Quite apart from the intrinsic significance of the acquisition of statehood, independence caused the Commonwealth Constitution to be understood in new ways and its fallout continues to do so. The manner in which independence was achieved—gradual and pragmatic, without fanfare or symbolism—is characteristic of Australian constitutionalism and, indeed, has helped to form it. There are current features of the Australian constitutional system that can be understood only as products of a process of this kind.

Australia was part of the second British Empire and its first steps towards independence were shared with others in a similar situation: Canada, New Zealand and South Africa. By the time of Australian federation, Imperial policy towards what soon would be recognised as Dominions⁵⁶ reflected a willingness to concede progressive measures of self-government, replacing diminishing imperial control with voluntary ties of other kinds. Grandiose schemes for imperial federation died by

⁵⁵ Edmund Barton, quoted in Bolton, n 44, 79; Quick and Garran, n 33, 311–14.

⁵⁶ The term was used between (about) 1907 and 1947: KC Wheare, *The Constitutional Structure of the Commonwealth* (Oxford, Clarendon Press 1960) 6–17.

1917, if not before.⁵⁷ Instead, the empire became a commonwealth and the former colonies became independent members of it, recognising a common allegiance to the British Crown.⁵⁸

It is important for present purposes to understand what was involved in acquiring independence in these circumstances. Internally, it required the abandonment of controls formerly exercised by the United Kingdom over the institutions of government of its colonies. These took a variety of different forms. The colonial parliaments were bound by Imperial laws directed to their colonies; the Privy Council provided a final avenue of appeal from colonial courts; the Governors-General were appointed on British advice and provided a mechanism through which the British government could intervene if imperial interests were threatened. Externally, independence meant statehood, with all the trappings of it: full capacity to conduct international relations, including the ability to act extraterritorially and to exercise authority over a territory and a people through the mutual rights and obligations of citizenship.

Steps along what became the path to independence were taken even before federation. Federation itself hastened the process by creating a larger and therefore stronger Australian voice. The independence movement gathered pace in the early years of the twentieth century, with the Imperial Conferences that were held regularly from 1897 as the principal medium. With hindsight, Dominion involvement in the First World War made change inevitable, with independence the most likely outcome. What has been characterised as ‘rapid progress from autonomy to equality’ culminated in the Imperial Conference of 1926, at which it was recognised that Great Britain and the Dominions were ‘autonomous communities within the British Empire, equal in status, in no way subordinate to each other in any aspect of their domestic or external affairs’.⁵⁹ The resolutions of the Conference and the legislation subsequently enacted by the British Parliament as the Statute of Westminster 1931 gave effect to this statement of principle, by releasing

⁵⁷ J Darwin, ‘A Third British Empire? The Dominion Idea in Imperial Politics’, in WR Louis (ed), *The Oxford History of the British Empire Vol. 5*, (Oxford, OUP, 1999) 64, 68.

⁵⁸ SA de Smith, *The New Commonwealth and its Constitutions* (London, Stevens and Sons, 1964) 9–13.

⁵⁹ Darwin, n 57, 69; key excerpts from the ‘Balfour Declaration’ of 1926 are reproduced in C Howard and C Saunders, *Cases and Materials on Constitutional Law* (Melbourne, Vic, Law Book Co., 1979), 30.

the Dominions from colonial constraints on their actions, in ways that are described in the next section.

It has been argued that Australian independence dates from 1931, because the Statute of Westminster put Australia in a position in which it could claim independence for itself.⁶⁰ The argument is plausible and the date as good as any, if a single date must be found. It also has the advantage, from the standpoint of national pride, of locating independence earlier, rather than later in the century.

In fact, however, mopping up the residual legal constraints on power derived from colonial status took Australians another 50 years. In part this was because the Commonwealth, with New Zealand, was slow to take up the opportunities offered by the resolutions of the Imperial Conference and the Statute of Westminster.⁶¹ But in larger part it was due to the distinctive position of the States in the Australian federation vis-à-vis the former Imperial power.⁶² After federation, the States retained the direct link with the United Kingdom, through their Governors, that they had enjoyed as independent colonies. By contrast, in Canada, the Lieutenant Governors of the Provinces were appointed by the Governor-General. The somewhat unusual Australian arrangement was hard fought during the Conventions. Once settled, however, it had significant implications. It underlined the conception of federation as a system of government in which sovereignty is divided and encouraged the perception of the United Kingdom as a bulwark for the States against Commonwealth encroachment on their constitutional autonomy. In consequence, the States moved separately and much more slowly to remove the outward manifestations of their colonial status in a process that was not complete until the enactment of the Australia Acts in 1986.

⁶⁰ G Winterton 'The Acquisition of Independence' in R French, G Lindell and C Saunders (eds), *Reflections on the Australian Constitution* (Sydney, NSW, Federation Press, 2003) 42.

⁶¹ Darwin, n 57, 69, noting that the Statute of Westminster was 'comprehensively ignored' in these two countries.

⁶² See generally A Twomey, *The Chameleon Crown* (Sydney, NSW, Federation Press, 2006).

B. Commonwealth

i. Executive

The Commonwealth Constitution creates the position of Governor-General as the representative of the Crown in the Commonwealth sphere (s 2), able to perform the functions of Head of State locally. At the time of federation, the Governor-General was appointed by the Monarch on the advice of the British Government and acted as its representative for some purposes.⁶³ The Constitution confers the general executive power of the Commonwealth on the Monarch, while providing that it is 'exercisable' by the Governor-General (s 61), to whom the Monarch may also assign additional powers (s 2). The Commonwealth Parliament is defined to comprise the Monarch and while the Governor-General is empowered to assent to legislation, bills may also be reserved for the Monarch's assent or disallowed once assent has been given (ss 1, 58–60). These latter procedures were typical mechanisms for imperial control, exercised on British advice.

The effect of these provisions was dramatically changed by agreement between governments in 1926 and 1930, effectively altering the applicable constitutional conventions. The Imperial Conference of 1926 recognised that the logical consequence of the 'equality of status' of its members was that the British government should no longer intervene in decisions taken by either the Monarch or the Governor-General in relation to a Dominion and that, at least by inference, both should act on the advice of the relevant Dominion government.⁶⁴ One of several ambiguities in the way in which this was put caused King George V to balk at Australian advice to appoint Isaac Isaacs, as the first Australian Governor-General in 1930.⁶⁵ Isaacs was appointed, however, and the Imperial Conference of 1930 made it clear that the Monarch should act on the advice of Dominion Ministers 'also in this instance', although it was expected that 'informal consultation' would take place first.⁶⁶

⁶³ G Winterton, 'The Evolving Role of the Australian Governor-General' in M Groves (ed), *Law and Government in Australia* (Sydney, NSW, Federation Press, 2005) 44–45.

⁶⁴ Balfour Declaration, n 59.

⁶⁵ LF Crisp, 'The Appointment of Sir Isaac Isaacs as Governor-general of Australia 1930' (1964) 11 *Australian Historical Studies* 254.

⁶⁶ Imperial Conference 1930, *Summary of Proceedings*, extracted in Howard and Saunders, n 59, 33.

These developments secured independence by removing the capacity of the British government to intervene in Commonwealth decision-making while leaving the institutions of both Monarch and Governor-General in place. Subsequent developments adjusted the symbolism of this arrangement in ways that presented the Monarch as more of an Australian institution while enhancing the role of the Governor-General vis-à-vis the Monarch. Under Commonwealth legislation, in 1973, the Queen adopted the style and title of 'Queen of Australia' in relation to Australian affairs.⁶⁷ Every Governor-General since 1965 has been Australian and it is inconceivable that a non-Australian would be appointed now. Through a combination of judicial decision and political practice it has become accepted that all the executive power of the Commonwealth is 'exercisable' by the Governor-General under section 61⁶⁸ and that the Monarch retains no further power to assign to the Governor-General under section 2.⁶⁹ When asked by the Speaker to intervene in the controversy that followed the dismissal of the Commonwealth Government by the Governor-General in 1975, the Queen declined to do so, on the grounds that 'The Australian Constitution firmly places the prerogative powers of the Crown in the hands of the Governor-General'.⁷⁰ By the end of the twentieth century, there was sufficient confusion about the respective roles of the Monarch and the Governor-General for debate to occur about which of them was the de jure, as opposed to the de facto, Australian Head of State.⁷¹

ii. Legislative

At the time of Federation, the Commonwealth Parliament was unable to legislate inconsistently with laws of paramount force of the then

⁶⁷ The current style and titles refers also to 'Her other Realms and Territories, Head of the Commonwealth': Royal Style and Titles Act 1973 (Cth). Cf the Royal Style and Titles Act 1953 (Cth), which referred to the Queen of the 'United Kingdom, Australia and Her Other Realms and Territories'.

⁶⁸ *Barton v Commonwealth* (1974) 131 CLR 477.

⁶⁹ Two assignments of power in 1954 and 1973 were revoked by the Queen in 1987 on the advice of the Prime Minister on the grounds that they had not been necessary: Constitutional Commission, *Final Report, Summary* 1988, (Canberra, NSW, AGPS, 1988) 18.

⁷⁰ Letter from the Queen's Private Secretary to the Speaker, reproduced in Howard and Saunders, n 59. 125.

⁷¹ G Winterton, 'Who is Australia's Head of State?' (2004) 7 *Constitutional Law and Policy Review* 65.

sovereign British Parliament: a common law principle given statutory force through the Colonial Laws Validity Act 1865. This impediment to independence could be overcome only by further legislation, which was enacted by the British Parliament, with the agreement of all the Dominions, in 1931. At the Commonwealth's request, the key provisions of the Statute of Westminster would take effect in relation to Australia only when adopted by the Commonwealth Parliament.⁷² A Statute of Westminster Adoption Act (Cth) finally was passed in 1942, with retrospective effect from the outbreak of the war in 1939.

The Statute released the Dominion Parliaments from restrictions on their power to legislate inconsistently with British law and authorised them to repeal or amend existing laws that applied to them. British laws establishing the Constitutions of Canada, Australia and New Zealand were excepted, to preserve their overriding effect. The constitutional continuity thus assured left its mark on the conception of a Constitution in Australia, which is explored further in the next chapter.

The Statute of Westminster kept open the possibility that a Dominion might seek British legislation in the future, for reasons of convenience. To reconcile this possibility with Dominion independence section 4 provided that such legislation would not be enacted without the request and consent of the Dominion concerned. In 1986, section 1 of the Australia Acts took the further and final step of denying that future United Kingdom legislation could 'extend, or be deemed to extend' to Australia, as part of its law. To the extent that these provisions purport to inhibit the actions of future British Parliaments, they present some difficulty from the standpoint of a theory that denies the power of a Parliament to limit its own authority, consistently with a conception of sovereignty as 'continuing'.⁷³ Whatever the relevance of this theory in the United Kingdom, however, it does not affect the position in Australia, where the courts would now refuse to give effect to British law, either as a straightforward application of section 1 of the Australia Act (Cth)⁷⁴ or as a corollary of the fact of Australian independence.

⁷² A Twomey, 'Federal Parliament's Changing Role in Treaty Making and External Affairs' in G Lindell and R Bennett (eds), *Parliament—The Vision in Hindsight* (Annandale, NSW, Federation Press, 2003) 62.

⁷³ HLA Hart, *The Concept of Law*, 2nd edn (Oxford, OUP, 1994) ch.7; cf the distinction between 'strong' and 'weak' forms of continuing sovereignty in J Goldsworthy, 'Abdicating and Limiting Parliament's Sovereignty' (2006) 17 *King's College Law Journal* 255, 259.

⁷⁴ *Sue v Hill* (1999) 199 CLR 462, 492.

iii. Judicial

One of the lesser goals of federation had been to establish a final court of appeal within Australia on all questions of Australian law. Following the negotiations in London, the final text of the Constitution allowed appeals from the High Court to the Privy Council in all matters except constitutional questions about the respective limits of Commonwealth and State power 'inter se' and gave the Commonwealth Parliament authority to further limit appeals to the Privy Council by laws to be reserved for the Monarch's assent.⁷⁵ Section 74 did not deal with appeals from the Supreme Courts of the States, which continued as before.

On federation, therefore, appeals lay to the Privy Council from most decisions of the High Court as well as from the Supreme Courts of the States. Decisions of the Privy Council were binding in Australian law, causing decisions of the House of Lords to be treated as binding as well.⁷⁶ All this unravelled gradually in the wake of independence. Appeals from the High Court to the Privy Council effectively ceased, through exercises of the legislative power to 'limit' appeals in 1966 and 1975.⁷⁷ Until the passage of the Australia Acts in 1986, this created an unsatisfactory situation whereby appeals might be taken directly to the Privy Council from State courts, by-passing the High Court altogether. In 1978 the High Court declared that it was no longer bound by Privy Council decisions.⁷⁸ In 1986 it was provoked by a suggestion that a Supreme Court was 'constrained' by decisions of the English Court of Appeal to note that 'the precedents of other legal systems' are not binding in Australian law but are 'useful only to the degree of the persuasiveness of their reasoning'.⁷⁹

⁷⁵ Under s.74, appeals in the protected category of 'inter se' questions may be taken with a certificate from the High Court itself; it is clear that no further certificates will be given, however, even if an appeal on this basis is still open: *Kirmani v Captain Cook Cruises* (1985) 159 CLR 351.

⁷⁶ Mason, n 15. 69.

⁷⁷ Privy Council (Limitation of Appeals) Act 1966 (Cth); Privy Council (Appeals from the High Court) Act 1975 (Cth). The Acts are a valid exercise of the power: *Attorney-General (Cth) v T&G Mutual Life Society Ltd* (1978) 144 CLR 161.

⁷⁸ *Viro v The Queen* (1978) 141 CLR 88.

⁷⁹ *Cook v Cook* (1986) 162 CLR 376, 390.

iv. Statehood

On independence, Australia became a state for the purposes of international law with responsibility for its own international relations. Its emergence onto the world stage was as gradual as every other aspect of its progress towards independence; it is clear, however, that for some time after federation Australia lacked this attribute of statehood and that the United Kingdom conducted international relations on its behalf. When change came, at some undefined point after the First World War, external sovereignty moved from one to the other with relative ease, through acquiescence on the part of both governments and recognition by the international community.⁸⁰ As part of the package, section 3 of the Statute of Westminster offered the Dominion Parliaments authority to make extraterritorial laws.

Internally, however, matters were more complicated, raising questions about how these new international responsibilities would be accommodated by a federal Constitution that necessarily was written without them in mind, revisionist views to the contrary.⁸¹ The answers were found through judicial interpretation, obviating the need for constitutional change. The general executive power of the Commonwealth was held to authorise the making of treaties and other forms of international agreement⁸² and the external affairs power of the Commonwealth Parliament was held to authorise their implementation, irrespective of subject-matter.⁸³ The Commonwealth thus filled the vacancy left by the withdrawal of the United Kingdom and became the only sphere of Australian government with international status. The justification for the conclusion, that '[t]he colonies never were and the States are not international persons'⁸⁴ has settled for Australia a question that is alive in some other federations about the extent of the capacity of constituent units to engage in external affairs. The transformation was complete when, in 1999, the High Court held that the United Kingdom is itself a 'foreign power' for the purposes of section 44(i) of the Constitution, which precludes Australians with dual citizenship from holding a seat in the Commonwealth Parliament.⁸⁵

⁸⁰ Twomey, 'Federal Parliament's Changing Role', n 72 above.

⁸¹ cf *New South Wales v Commonwealth (Seas and Submerged Lands case)* (1975) 135 CLR 337, 373.

⁸² *R v Burgess; ex parte Henry* (1936) 55 CLR 608.

⁸³ *Victoria v Commonwealth (Industrial Relations Act case)* (1996) 187 CLR 146.

⁸⁴ *Seas and Submerged Lands case*, n 81, 373.

⁸⁵ *Sue v Hill* (1999) 199 CLR 462.

Statehood also implies a people, who owe allegiance to the state and to whom it owes protection in return. The status of Australia at the time of federation, however, left the idea of its people oddly inchoate. A proposal to recognise Australian citizenship in the Constitution was considered but rejected at the Conventions. Australian citizenship did not emerge as a distinct legal status until 1949 and then only in statutory form.⁸⁶ A purely statutory basis for citizenship, however, sits uneasily alongside a Constitution that envisages a role for ‘the people’, delimits a Commonwealth power by reference to ‘aliens’ (s 51(xix)) and provides some protection for a ‘subject of the Queen’ (s.117). In the course of a spate of litigation prompted by the potential mismatch of these provisions in an independent Australia it has become settled that the reference to a ‘subject of the Queen’ now means ‘the Queen in right of Australia’⁸⁷ and that ‘alien’ and ‘citizen’ are effectively dichotomous concepts that between them exhaust the range of possibilities.⁸⁸ What remains unclear is the extent to which, in these circumstances, the Constitution provides some protection for the scope and incidents of citizenship, through the meaning attributed to the term ‘alien’ or as an implication from the text and structure of the Constitution as a whole.⁸⁹

C. States

i. Lingering Colonial Ties

At the time of federation, the Australian States were subject to the same colonial restrictions on their legislative, executive and judicial capacities as the Commonwealth. They did not, however, progress towards independence in the same way or at the same pace as the Commonwealth. They were not participants in the Imperial Conferences and the declarations of 1926 and 1930 did not apply to the relationship between the Monarch, State Governors and State Ministers. Unlike the Canadian Provinces and largely of their own volition the Australian States were

⁸⁶ Nationality and Citizenship Act 1948 (Cth); cf H Irving, ‘Still Call Australia Home: The Constitution and the Citizen’s Right of Abode’ (2008) 30 *Sydney Law Review* 131, 142, distinguishing British subjects and ‘Australian British subjects’.

⁸⁷ *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28, 39, 87.

⁸⁸ *Koroitamana v Commonwealth* (2006) 227 CLR 31, 38, 46.

⁸⁹ G Ebbeck, ‘A Constitutional Concept of Australian Citizen’ (2004) 25 *Adelaide Law Review* 137.

not released from the colonial constraints on their legislative powers by the Statute of Westminster.

While the Commonwealth arguably was independent from 1931, therefore, the States clearly were not.⁹⁰ The Governors continued to be appointed by the Monarch on the advice of the British Government; the Monarch acted on British advice in relation to State affairs and thus as the Monarch of the United Kingdom rather than of Australia; the British Government retained some responsibility for the actions of Governors; the States were subject to British laws of paramount force and were restricted in their capacity to legislate extraterritorially; and appeals continued to lie to the Privy Council from State courts exercising State jurisdiction.

The separate paths to independence taken by the Commonwealth and the States are a remarkable demonstration of both the pragmatism of Australian constitutionalism and the depth of the institutional dualism of the Australian federation. This history also helps to explain why, in the late 1990s, it could so readily be accepted that the proposal for a republic that was put to referendum would deal only with the position of the Crown in the Commonwealth sphere, leaving the links between the States and the Crown to be sorted out later if the referendum succeeded.⁹¹

Whatever the outward form of the relationship between the States and the United Kingdom, it was not to be expected that the British government would continue to treat as colonies polities that were constituent parts of an independent Australia. Over the course of the twentieth century, practice adapted to this reality and both the Monarch and the Governors typically acted in accordance with the advice of the relevant State government in State affairs. As recent scholarship has shown, however, the underlying ambiguity in the position of the States was exposed by a series of events in the 1970s, some of which also involved Commonwealth interests, in which the Queen acted on British advice rather than on the advice of either the Commonwealth or the State concerned.⁹² This was acceptable to neither the Commonwealth nor the States and provided new stimulus to negotiations to sever the remaining colonial ties with the United Kingdom.⁹³

⁹⁰ See generally Twomey, *The Chameleon Crown*, n 62.

⁹¹ Constitution Alteration (Establishment of Republic) 1999.

⁹² Twomey, *The Chameleon Crown*, n 62, chs. 8–12.

⁹³ For the wider, British Commonwealth context in which these negotiations were conducted, see PC Oliver, *The Constitution of Independence* (Oxford, OUP, 2005).

ii. *Australia Acts*

The mechanism used was the Australia Acts 1986 (Cth and UK). These removed the British government as a source of advice in relation to State affairs (ss 7, 10); released State Parliaments from the overriding effect of (most) British laws of paramount force (s 3); severed appeals from State courts to the Privy Council (s 11); and authorised the States to enact legislation with extraterritorial effect, in ambiguous terms that enabled the restriction to be reinstated as a limit derived from their position as constituent units within a federation (s 2(1)).⁹⁴ The opportunity also was used to terminate the authority of the United Kingdom to legislate for Australia in the future (s 1). This in turn made it necessary to include a procedure whereby the Australian Parliaments acting collaboratively could alter both the Australia Acts and the Statute of Westminster (s 15).

The Australia Acts are important constitutional documents in their own right, with implications for the meaning and operation of the Constitution that are examined in subsequent chapters. Two features are particularly relevant for present purposes, however, and are treated here.

The first concerns their form. There are two Acts. One was enacted by the Parliament of the United Kingdom, acting pursuant to the Statute of Westminster with the request and consent of the Commonwealth, which in turn acted on the request and consent of the States pursuant to what was understood to be the requirements of convention.⁹⁵ The other, in substantially identical terms, was enacted by the Commonwealth on the request of the States in experimental use of the power in section 51(xxxviii) of the Constitution. The use of two Acts reflected disagreement between governments about whether independence should and legally could be secured by Australia acting alone. Reliance on both sources of authority enabled the question to be avoided in the short term.

With the wisdom of hindsight, however, it is obvious that legislation enacted by the Commonwealth Parliament pursuant to a power required to be exercised consistently with the rest of the Constitution might have different legal effects to an Act in the same terms passed by another Parliament under no such constraints. The question of which Act operates in Australia has now been answered in favour of

⁹⁴ *Union Steamship Company of Australia v King* (1988) 166 CLR 1.

⁹⁵ Australia (Request and Consent) Act 1985 (Cth); the Australia Acts (Request) Acts 1985: all States.

the Australian version, following the insistence by the High Court in 2003 that ‘constitutional norms, whatever . . . their historical origins, are now to be traced to Australian sources’.⁹⁶ It is desirable that this is so, in the interests of the integrity of the Australian constitutional system, notwithstanding concerns that have been raised about the validity of parts of the Australian Act.⁹⁷

The second feature of the Australia Acts that requires attention here concerns the source of advice to the Monarch on State affairs. Removal of the British government from Australian constitutional arrangements meant either that State advice would be channelled to the Queen through the Commonwealth or that the Queen would receive advice directly from the States. As a compromise, section 7 of the Australia Acts, enables a State Premier to advise the Monarch directly about the appointment and dismissal of a Governor but otherwise provides that, with minor exceptions, the powers of the Monarch in relation to a State are exercisable only by the Governor of the State. The section appears inadvertently to have entrenched the position of State Governor as a representative of the Queen and will need to be changed if and when Australia becomes a republic. By accepting that State Premiers can directly advise the Monarch, the outcome also threatens to bring to a head the long-suppressed question of whether there is one Australian Crown, seven Australian Crowns or a new conception of a federal Crown devised for the particular circumstances of Australia⁹⁸ in a further demonstration of the pragmatism of the Australian approach to constitutional law.

IV. RECONCILIATION

A. Causes

The relationship between Aboriginal and other Australians goes to the constitutional foundations of Australia in another way. The integrity of

⁹⁶ *Attorney-General (WA) v Marquet* (2003) 217 CLR 545, 570–71.

⁹⁷ These are explored in L Zines, *The High Court and the Constitution*, 5th edn (Annandale, NSW, Federation Press, 2008) 421–32. For an examination of how the UK version might be used to alter the Commonwealth Constitution without a referendum see G Lindell, ‘Why is Australia’s Constitution Binding—The Reasons in 1900 and Now, and the Effect of Independence’ (1986) 16 *Federal Law Review* 29.

⁹⁸ Twomey, *The Chameleon Crown*, n 62, ch.21; cf G Winterton, ‘The Evolution of a Separate Australian Crown’ (1993) 19 *Monash Law Review* 1.

the political community is a critical issue in the constitutional arrangements of any state. By contemporary standards integrity requires inclusion on terms of equality, accompanied by mutual respect. In Australia's case integrity, understood in this way, was undermined from the outset by assumptions about the character of the original settlement described earlier in this chapter. The problem thus created was exacerbated by the policies and practices of successive generations of Australians, some of which were given effect through the Constitution and the general law. The 'collapse of faith in race thinking'⁹⁹ in the aftermath of the Second World War led to a 'profound revolution in sensibility' in Australia as in most other western countries by the end of the 1960s.¹⁰⁰ The spate of disparate changes that have since occurred can helpfully be analysed under the rubric of reconciliation although the term was not used for this purpose until 1991.¹⁰¹ To the extent that reconciliation involves a new beginning or at least a 'recasting of the present as a point of origin'¹⁰² it remains a work in progress to which the Constitution may hold a key.

British settlement of Australia from 1788 brought together two peoples whose interests were diametrically opposed and whose cultures, including laws, were mutually incomprehensible. The most significant immediate consequence was that the newcomers treated indigenous culture as irrelevant to the legal organisation of the colony. Characterisation of the colonies as settled rather than conquered or ceded avoided the necessity for treaties and enabled the importation of a new, comprehensive legal system under which the dispossession of the Aboriginal people occurred.

The profound cultural dislocation that followed has been graphically described as 'verigo in living'¹⁰³ and is a moving cause in the continuing social and economic disadvantage of most Indigenous Australians.¹⁰⁴

⁹⁹ Lake and Reynolds, n 52, 350.

¹⁰⁰ R Manne, 'Pearson's Gamble, Stanner's Dream' (2007) 26 *The Monthly*.

¹⁰¹ Council for Aboriginal Reconciliation Act 1991 (Cth); Royal Commission into Aboriginal Deaths in Custody, *National Report*, 1991, ch.38; G Nettheim, 'Making a Difference: Reconciling Our Differences' (2001) 5 *Newcastle Law Review* 3, 21.

¹⁰² EA Christodoulidis, "'Truth and Reconciliation" as Risks' (2000) 9 *Social Legal Studies* 179, 199.

¹⁰³ WEH Stanner, *White Man Got No Dreaming* (Canberra, NSW, ANU Press, 1979) quoted in G Brennan, 'Reconciliation' (1999) 22 *University of New South Wales Law Journal* 595, 596.

¹⁰⁴ For the complexity of this issue, however, see N Pearson, 'White Guilt, Victimhood and the Quest for a Radical Centre' (2007) *Griffith Review* 16

Even after it became accepted that at the time of British settlement the Aboriginal peoples had a ‘subtle and elaborate system [of law] highly adapted to the country’, the official view of the status of settlement and the logic of its consequences remained.¹⁰⁵ Inevitably, the incomprehension and sense of superiority of the dominant majority was matched by the ‘distrust, enmity and anger’ of this small but significant minority.¹⁰⁶ The challenge of developing a shared view of national history in these circumstances is exemplified in a trivial way by the choice of the day on which the first fleet arrived in 1788 as the principal national holiday.

It is something of an irony that the majority community not only failed to recognise the distinctive interests of the Aboriginal peoples but also failed to accord them formal equality, consistently with its own philosophical tenets. Until the latter part of the twentieth century, Indigenous citizens were denied the vote federally and in the three States and Territories in which most of them lived.¹⁰⁷ The Commonwealth Constitution excluded them from its ambit by providing that they should ‘not be counted’ in calculating the numbers of people for constitutional purposes.¹⁰⁸ The ‘aboriginal race’ also was expressly excepted from the power in s 51(xxvi) to make laws for “[t]he people of any race . . . for whom it is deemed necessary to make special laws’, although for reasons that seem to have been related to the perceived purpose of the power rather than with particular intent to discriminate against them.¹⁰⁹ In addition, over this period, Aboriginal Australians were subject to a range of other discriminatory policies. One had consequences that still reverberate: the forcible removal of part-aboriginal children from their families throughout the first half of the twentieth century, on a scale that left most families affected.¹¹⁰

¹⁰⁵ *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141, 267.

¹⁰⁶ Royal Commission into Deaths in Custody, n 101, 38.4.

¹⁰⁷ For details, see M Goot, ‘The Aboriginal Franchise and its Consequences’ (2006) 52 *Australian Journal of Politics and History* 517.

¹⁰⁸ s.127; see also s.25, which contemplates their continuing exclusion from voting in State elections. For the effect of s.127, see G Sawyer, ‘The Australian Constitution and the Australian Aborigine’ (1966) 2 *Federal Law Review* 17, 25–30.

¹⁰⁹ R French, ‘The Race Power: A Constitutional Chimera’ in HP Lee and G Winterton (eds), *Australian Constitutional Landmarks* (Cambridge, CUP, 2003) 180, 185.

¹¹⁰ Human Rights and Equal Opportunity Commission, *Bringing Them Home: Report of a National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children and their Families* (1997) ch.2.

B. Progress

The relationship between Indigenous and other Australians has altered in important ways since the 1960s.

i. Formal Equality

One group of changes has tackled the most obvious instances of departure from formal legal equality. These have been the easiest both to conceive and implement. The federal franchise was extended to Aboriginal citizens in 1962 and remaining restrictions on their rights to vote were removed in all States by 1965.¹¹¹ The two provisions in the Constitution expressly excluding Aboriginal people from their operation were amended by referendum in 1967, with uncharacteristically huge majorities.¹¹² Removal of the exclusion of ‘the aboriginal race in any State’ from section 51(xxvi) ensured that the Commonwealth had power to make laws for Indigenous Australians, but at the questionable cost of subjecting them to a power to make laws by reference to race, which need not be used for their benefit.¹¹³

More generally, Australia became a party to the International Convention on the Elimination of all Forms of Racial Discrimination in 1975 and implementing legislation was enacted by the Commonwealth Parliament in the same year. The Racial Discrimination Act overrides inconsistent State law and has been a vehicle for precluding discrimination against Indigenous people under State legislation.¹¹⁴ A by-product of the inevitable challenge to the validity of the Act confirmed that Commonwealth power extended to the implementation of international treaties at least where, as in this case, the subject was of ‘international concern’.¹¹⁵ On the other hand, the Act has the status only of ordinary legislation where the Commonwealth is concerned. It has been overridden

¹¹¹ Commonwealth Electoral Act 1962 (Cth). Voting was not made compulsory, as for other Australians, until 1983; R Parkinson and M Sawyer, *Elections: Full, Free and Fair*, (Annandale, NSW, Federation Press, 2001) 161–2.

¹¹² The referendum was carried in all States and with a national majority of 90.77%.

¹¹³ *Western Australia v Commonwealth (Native Title Act case)* (1995) 183 CLR 373, 461.

¹¹⁴ *Koonwarta v Bjelke-Petersen* (1982) 153 CLR 168; *Mabo v Queensland (No 1)* (1988) 166 CLR 186.

¹¹⁵ *Ibid*, per Stephen J, 216–217. The qualification no longer applies: *Victoria v Commonwealth (Industrial Relations Act case)* (1996) 187 CLR 146.

by subsequent legislation in pursuit of Commonwealth policy objectives that cannot necessarily be justified as ‘special . . . measures’ within the meaning of Article 2 of the Convention.¹¹⁶

ii. *Land Rights*

A second group of changes go beyond formal equality to recognise the distinctive interests of Aboriginal Australians in relation to land. While statutory land rights regimes began to be put in place from 1976¹¹⁷ the seminal development was the decision of the High Court in *Mabo (No.2)* that the common law of Australia could recognise native title. *Mabo* was followed by the enactment of Commonwealth legislation to clarify the scope of entitlements¹¹⁸ and to manage the claims process, as well as by a wave of litigation, designed to test its limits.

Mabo had symbolic importance for the relationship between Aboriginal and other Australians. It recognised the interests of the Aboriginal peoples in land at the time of British colonisation, in accordance with their own culture; it acknowledged that the basis on which the Australian colonies were characterised as settled was factually false; and it accepted that Aboriginal groups might now claim their land as a matter of right, subject to the considerable conditions that the Court had laid down.¹¹⁹ On the other hand, *Mabo* left untouched the effectiveness of the claim of sovereignty in 1788, exemplified in the notion of the ‘radical’ title of the Crown. The characterisation of the Australian colonies as settled remained undisturbed—a messy conclusion, which also preserved the monopoly of the common law. The *Mabo* principle thus provided no springboard for future claims that other aspects of traditional law had survived British settlement.¹²⁰ Even so, the recognition of native title provoked a political storm, sourced in concern about its implications for non-indigenous property rights, which undermined its contribution to reconciliation.

¹¹⁶ Native Title Amendment Act 1998 (Cth) s.7(3); Hindmarsh Island Bridge Act 1997 (Cth); Northern Territory National Emergency Response Act 2007 (Cth) s.132 (2).

¹¹⁷ The details are provided in M Tehan, ‘A Hope Disillusioned, An Opportunity Lost? Reflections on Common Law Native Title and Ten Years of the *Native Title Act*’ (2003) 27 *Melbourne University Law Review* 523, 529–32.

¹¹⁸ Native Title Act 1993 (Cth).

¹¹⁹ *Mabo (No 2)*, n 25 above, 69–70.

¹²⁰ *Walker v State of New South Wales* (1994) 182 CLR 45.

The practical significance of *Mabo* is similarly equivocal. Native title can be claimed only if a continuing connection to the land can be shown and there has been no supervening act of sovereignty. Given the extent of dislocation of Aboriginal groups over a period of more than 200 years, both conditions are difficult to satisfy. The claims process under the Native Title Act has proved agonisingly slow when claims are contested although agreed outcomes of various kinds have proved more successful. Subsequent decisions of the High Court have further narrowed the scope of the protection afforded to native title under both the common law and legislation.¹²¹ On the other hand, recognition of native title in legal form provides some protection against its further erosion. Importantly, it also has given Aboriginal groups a tangible, if not necessarily equal, bargaining position in their dealings with others over the future of their traditional lands.¹²²

iii. Apology

Mabo made a contribution to reconciliation through its recognition and acknowledgement of Aboriginal culture, with associated intimations of respect. The limitations on the role of a court for this purpose, however, was reflected both in the scope of the decision and in some of the reactions to it. By contrast, an Apology to Australia's Indigenous Peoples, delivered in Parliament by then Prime Minister Rudd in 2008 was sweeping in its terms and ambitious in its objectives.¹²³ The Apology was directed specifically to the 'Stolen Generations' of children removed from their families, many of whom were present for the occasion. More generally, however, it adopted the language and aspirations of reconciliation. The Parliament asked that the apology 'be received in the spirit in which it is offered as part of the healing of the nation'. By 'acknowledging the past' it laid 'claim to a future that embraces all Australians . . . based on mutual respect, mutual resolve and mutual responsibility'. The preamble ended with the following observation:

There comes a time in the history of nations when their peoples must become fully reconciled to their past if they are to go forward with confidence to embrace their future. Our nation, Australia, has reached such a time. And

¹²¹ N Pearson, 'Land is Susceptible of Ownership' in Cane (ed), n 15, 111.

¹²² Tehan, n 117, 564 ff.

¹²³ Commonwealth Parliament, House of Representatives, *Hansard*, 13 February 2008.

that is why the parliament is today here assembled: to deal with this unfinished business of the nation, to remove a great stain from the nation's soul and, in a true spirit of reconciliation, to open a new chapter in the history of this great land, Australia.

The Apology received bipartisan support in the Parliament and in all Australian jurisdictions. It was widely welcomed by Aboriginal leaders. It attracted a groundswell of public support from people all over the country who had gathered in schools, workplaces and public spaces to watch, and applaud, its delivery.

iv. Follow-up

From the standpoint of reconciliation, the effectiveness of the Apology in the long term depends on steps subsequently taken to realise its promise: to build on the goodwill generated in both Aboriginal and non-Indigenous communities; to bridge the gap between the life conditions of Aboriginal and other Australians; and to adopt policies that are genuinely inclusive, based on mutual respect. While some progress has been made, there is disagreement over both its speed and its direction. This has been exacerbated by continuation of a controversial federal 'intervention' in the affairs of Aboriginal people in the Northern Territory,¹²⁴ which involves suspension of the Racial Discrimination Act and discriminates against Indigenous communities, triggering an adverse report from the United Nations Special Rapporteur on Indigenous Rights.¹²⁵

In any event, however, an apology may take too insubstantial a form to provide the final basis for reconciliation. However solemn the occasion, an apology has no legal effect; and while law alone is far from sufficient as an instrument for reconciling communities the support of law may be necessary, for both practical and symbolic reasons, in the Australian context. In this regard, however, the absence of a founding treaty that can be given contemporary meaning presents a particular challenge. While there has been some discussion of a latter-day treaty or 'Makarrata',¹²⁶ the potential for political backlash against what can be portrayed as

¹²⁴ The Intervention was a reaction to the Report of a Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse, *Little Children are Sacred*, 2007.

¹²⁵ J Anaya, *The Situation of Indigenous Peoples in Australia*, an Addendum to a Report to the Fifteenth Session of the Human Rights Council, A/HRC/15/ 4 March 2010.

¹²⁶ S Brennan, L Behrendt, L Stelein and G Williams, *Treaty*, (Annandale, NSW, Federation Press, 2005) 14–16.

an acknowledgement of divided external sovereignty, coupled with the logistical difficulties of identifying appropriate parties, makes this a relatively unlikely option. In the circumstances, the instrument best placed to fill the gap is the Constitution, as the fundamental, national law. What it might say and what processes might be followed to decide what it should say are questions that are yet seriously to be asked.¹²⁷

SELECTED READING

Aroney, N, *The Constitution of a Federal Commonwealth* (Cambridge, CUP, 2009)

Attwood, B, *Possession* (Melbourne, Vic, The Miegunyah Press, 2009)

Chesterman, J and Galligan, B, *Citizens Without Rights* (New York, CUP, 1997)

Cochrane, P, *Colonial Ambition* (Melbourne, Vic, MUP, 2006)

Craven, G (ed), *The Convention Debates, 1891–1892: Commentaries, Indices and Guide* (Sydney, NSW, Legal Books, 1986)

Department of the Senate, *Papers on Parliament*, Nos 30, 32 and 37

Finn, P, *Law and Government in Colonial Australia* (Melbourne, Vic, OUP, 1987)

Hirst, J, *The Sentimental Nation* (Melbourne, Vic, OUP, 2000)

Irving, H, *To Constitute a Nation* (Cambridge, CUP, 1997)

Neal, D, *The Rule of Law in a Penal Colony: Law and Politics in Early New South Wales*, 2nd edn (Cambridge, CUP, 2002)

Quick, J and Garran, RR, *Annotated Constitution of the Australian Commonwealth*, 1901 reprint (Sydney, Legal Books, 1976)

Schreuder, D and Ward, S, *Australia's Empire* (Oxford, OUP, 2008)

Twomey, A, *The Chameleon Crown* (Sydney, NSW, Federation Press, 2006)

¹²⁷ For a request for 'recognition' of Indigenous rights through 'serious constitutional reform' see G Yunupingu, 'Tradition, Truth and Tomorrow' (2009) 41 *The Monthly*.

<http://www.pbookshop.com>