BOOK REVIEW

JOHN PYKE*

H P Lee and George Winterton (eds), *Australian Constitutional Landmarks* (Cambridge University Press, 2003) xxxvii + 424 pp

As the title suggests, most chapters of this book deal with one, or a group, of the landmark cases in the interpretation of constitutional principles in this country. (Others deal with the formation of the Commonwealth Constitution, the influence of the Privy Council on its interpretation, and two political 'incidents' – the dismissal of the Whitlam government and the controversy about the behaviour of Murphy J). In their preface the editors state that they hope to explain constitutional landmark cases 'in their political, social or industrial contexts', and that by doing so they 'hope to bring these cases and controversies to the attention of an audience beyond the narrow circle of constitutional lawyers'.

They have achieved the first part of that aim – each chapter begins with a much fuller account of the background to the case or cases under discussion than what generally appears in a constitutional law text. Some of the landmark cases call particularly for an explanation of the political context before they can be fully understood, and this is admirably provided. George Winterton's two chapters, on 'the dismissal' and the *Communist Party Case*,[1] are particularly comprehensive in this respect. Briefer, but still very useful, explanations of the political background are provided in Cheryl Saunders' chapter on the *Uniform Tax Cases*,[2] Leslie Zines on the *Tasmanian Dam Case*,[3] Peter Johnston on the *Bank Nationalisation Case*,[4] and Harry Evans on *Fitzpatrick and Browne*.[5] For other landmarks, the necessary context is the earlier history of the interpretation of some section of the Constitution that was reinterpreted in the landmark case. This is provided in Keven Booker's and Arnold Glass' chapter on the *Engineers Case*,[6] Fiona Wheeler on *Boilermakers'*,[7] Dennis Rose on *Cole v Whitfield*,[8] and Marilyn Pittard on the *Social Welfare Union Case*.[9] In one series of cases the relevant background is the interaction between the founders' intention when they excluded

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

2 *South Australia v Commonwealth* (1942) 65 CLR 373; *Victoria v Commonwealth* (1957) 99 CLR 575.

3 *Commonwealth v Tasmania* (1983) 158 CLR 1.

4 *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1.

5 *R v Richards; Ex parte Fitzpatrick and Browne* (1955) 92 CLR 157.

6 *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129.

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

8 (1988) 165 CLR 360.

9 *R v Coldham; Ex parte Australian Social Welfare Union* (1983) 153 CLR 297.

'aboriginal natives' from the race power in para 51(xxvi) and the intention of those who removed the exception in 1967, and this is also well explained by Justice Robert French.

However, what audience will be encouraged to read these chapters by this fuller explanation of the background? The editors' words quoted above suggest that they may be aiming at a broad audience of literate laypersons. Such readers should certainly find Winterton's two chapters readable and interesting, and, but for an unexplained reference to the Commonwealth having 'demurred' in the *Second Uniform Tax Case*, the same could be said for the Saunders chapter. However, this member of the 'narrow circle' found himself wondering whether lay readers would gain much from many of the other chapters. Most of them do seem to presuppose a certain level of pre-existing knowledge of the legal system and legal terminology. Sometimes a topic is discussed in two chapters, but there is no linkage. For example, the book would have benefited – and the lay reader certainly would have been helped by – some editorial linkage or authorial cross-referencing between Booker and Glass's general discussion of constitutional implications (at the end of the *Engineers* chapter) and H P Lee's chapter on the '*Free Speech' Cases*.[10] Perhaps the more likely audience is the broader, but still restricted, circle of lawyers who do not specialise in constitutional law, and who feel that they would like to refresh their knowledge of this subject, by reading a more contextualised account of the landmarks than the one they may have received years ago in law school.

The aim of most of the chapters is purely expositional, so there is relatively little critique. However, three chapters stand out, for those already within the 'narrow circle' or those drawing closer to it with the help of the book, by presenting some reasoned critique of the existing state of the law. Booker and Glass point to some difficulties in justifying and applying the doctrine of intergovernmental immunities; Rose, while agreeing that the general thrust of *Cole v Whitfield* makes sense, sees problems with the application of the test, as stated in that case, to future problems; and Geoffrey Lindell, in a chapter on the 'Murphy affair' discusses possible improvements to the process of deciding whether there is a case for removing a judge.

In their introduction the editors rightly concede, as editors of a work of this nature must do, that many other cases could have been picked for inclusion in the book – but, so far as landmark cases about the interpretation of the *Commonwealth* Constitution goes, they have chosen well. However, there are arguably two significant omissions. First, some of us might have thought that 'Australian Constitutional Landmarks' included some of the cases, such as *McCawley*[11] and *Trethowan*,[12] about the effect of *State* Constitution Acts, and the history of attempts to reform the unrepresentative 'upper' houses that the States inherited from the colonial era. They do indeed score a brief mention in Sir Gerard Brennan's chapter about the influence of the Privy Council on Australian constitutional doctrines. However, not all readers will share his approval[13] of the 'liberal approach' of the Privy Council – there are those of us who regret that in *McCawley* the Council missed the opportunity to promote the doctrine of

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10 The major 'landmarks' are *Nationwide News v Wills* (1992) 177 CLR 1; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106; and *Lange v Australian Broadcasting Corporation* (1997) CLR 520, but other cases are threaded into the discussion.

11 *McCawley v The King* [1920] AC 691, reversing *McCawley v R* (1918) 26 CLR 9.

12 *Attorney-General (NSW) v Trethowan* (1931) 44 CLR 394; affirmed [1932] AC 526.

13 H P Lee and G Winterton (eds), *Australian Constitutional Landmarks* (Cambridge University Press, 2003) 329.

constitutionalism to a higher place in State constitutional law, and who hope that one day the High Court will return to the sensible and logical doctrine that it had developed in *Cooper*,[14] that a law inconsistent with a State Constitution Act is invalid.

The other significant omission is an overview chapter. The editors remark, in the introduction, that 'the cases are evenly divided between those resulting in the expansion of Commonwealth power and those reducing it'. Ignoring any doubts about the accuracy of this claim,[15] this ignores an important issue – *on what sort* of issues has the Commonwealth won, and *on which* has it lost? The un-revealed theme of the book is that the principle of federalism has not been nearly as strong a limit on Commonwealth power as some thought it would be at federation, but that limits implied from the general structural features of the Constitution – the separation of judicial power and the requirement for politicians to be 'directly chosen' by the people – have been much more significant than anyone would have anticipated in 1901. The editors quote, without dissent, the frequently-made remark that the High Court has effectively amended the Constitution by some of its decisions; yet it is possible to argue that these two features – centralism and some powerful constitutionalist doctrines – are in fact pretty clearly *there* in the text, if it is read with a modern eye. A chapter explaining this bifurcated pattern in the decisions, and exploring the arguments for and against these developments, would have made the book make much more sense to a general reader. As it is, it is highly recommended to readers in the 'broader circle' referred to above – lawyers who are not constitutional specialists – but, sadly, I doubt that it will find much of a general readership.

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14 *Cooper v Commissioner of Income Tax (Q'ld)* (1907) 4 CLR 1304. By 4:3 majority, the High Court followed this approach in *McCawley v R* (1918) 26 CLR 9.

15 On my count the book discusses five cases, or groups of cases, where Commonwealth claims to power were clearly upheld, one case — *Cole v Whitfield* (1988) 165 CLR 360 — where the Commonwealth was not directly involved but indirectly benefited from the reinterpretation of the Constitution, and one where the Commonwealth's claims were generally upheld with minor limitations, as against only four where the Commonwealth clearly lost.