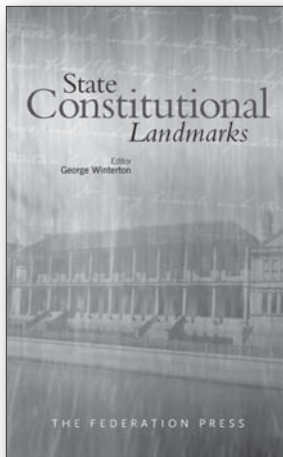


State Constitutional Landmarks

Professor George Winterton (ed) | The Federation Press, 2006



There is nothing more dangerous than a book which contains detailed analyses which confute the reader's dearly held preconceptions. This is such a book. As the editor, Professor Winterton, explains in the Introduction (p 7) the book is one of two volumes¹ both of which are 'predicated on the belief that constitutional issues are of interest to, and comprehensible by, the intelligent layperson if explained in their political and social context'. There is much here to inform and entrance both the general and the specialist reader. More importantly, each of the contributors has the ability to be able to place the potentially 'dry' legal issue in its social and historical context. As soon as the surrounding facts of any of the great controversies are explored, the topic tends to come alive, even for those whose interest in exquisite constitutional questions is attenuated. Equally important, the book revisits crucial state constitutional questions which are still of high relevance even as centripetal forces increase in the polity.

Mr Williams's detailed foray into prosopography on the rise and fall of Justice Boothby (an ill-equipped and pig-headed jurist p 50) in South Australia is a tale fascinating for the insights into the early history of the administration of justice in the colony, the way in which (as today) personality and politics play a large part in judicial office, and its discussion of the origins of the *Colonial Laws Validity Act 1865*.

Professor Booker looks at the important doctrine of the plenary power of the colonial legislatures, with an analysis of the cases leading up to *Powell v Apollo Candle*², a decision beloved of all first year law students. Following a type of inquiry first popularised by Professor AWB Simpson, there is a discussion of the important background facts which give a 'colour' to the issues in the case which a bare reading of the judgment never conveys. There is a copious analysis of the history of 'delegation' in other parts of the British Empire (see for example p 62 footnote 51 looking at the earlier Indian position.)

In his chapter on *Thomas McCawley v The King* (p 69 et seq) Dr Aroney places the vital question of the extent of the legislative sovereignty of parliament in its historical and political context. Once again, there is plenty of prosopographical detail – McCawley had worked his way up from humble beginnings and his involvement with the labour movement is discussed in detail. Once again, local questions of politics and personality played a large part in the source of the dispute and the sectarian influences on the criticisms of McCawley's appointment are a reminder of how much Australian public life has changed for the better (p 76).

Professor Goldsworthy puts *Trethowan's case* in its political and social context. Sir John Peden was the supposed 'inventor' of the entrenching strategy and the concept was 'for a time regarded as so important that the [law faculty] administrative officer used to take visitors to the spot in the library where Sir John was said to have had it'!! Would that the modern-day law school contained such exemplars!! Once again, in short compass, the political intrigues and manoeuvres are discussed in an accessible and interesting style.

For 'rusted on' Labor supporters, Dr Twomey's discussion of the dismissal of the Lang government by Sir Philip Game makes disturbing reading. A true believer tends to think of the demise of the Lang and Whitlam governments as following the same pattern but nothing could be further from the truth. As with previous writings, Dr Twomey has informed the

entire discussion by the most detailed references to the underlying Dominions Office documents. Sir Philip Game comes out of the whole episode with an enhanced reputation (at least for this reviewer). Some things never change, however: Dr Twomey notes with her customary understatement that 'the most bitter letters [complaining about Mr Lang], ... seemed to come from women on Sydney's north shore' who wrote in strong terms of the governor (p 138). One suggested that he was 'Sir Spineless Game' who was 'more of a jelly fish than a man'! In the end, after machinations about the method of payment of state public servants, Lang seems to have left the governor with little choice. As Dr Twomey notes: 'It was therefore curious that Lang preferred dismissal over withdrawal of the circular [in relation to payment of government salaries]. The governor was also surprised by this response, and formed the view that Lang wanted to be dismissed from government' (p 153). It appears in the end that the crucial factor in the dismissal of Mr Lang was his failure to provide any form of legal comfort whatsoever to the governor that his contemplated actions were not illegal (p 157). Dr Twomey provides a second analysis in her discussion of *Clayton v Heffron*. Once again, there is copious reference to secondary sources to put the relevant questions in their social context. The history of the 'House of fossils rescued by rats' (p 168) reads like a political thriller. Finally, Dr Twomey returns to her 'special topic' in a masterful analysis of the making of the *Australia Acts 1986* (Chapter 10). As always, there is a wide-ranging analysis of all the available contemporary documents.

Dr Waugh looks at a more prosaic topic, 'Deadlocks in State Parliaments' (Chapter 7) but one which retains contemporary relevance. Professor Johnston examines the problems of the Western Australian gerrymander in *Tonkin v Brand*. The author notes the change in emphasis over the last 50 years in terms of judicial review, and the increasing importance of Chapter III of the federal Constitution and the 'arising under' jurisdiction (p 234)

Gareth Griffith looks at the fascinating saga of Armstrong and Budd and the former's unique place as the only member to be expelled by a legislative body for his extramural misconduct. The relevant hearing lasted 55 days and a fascinated public 'heard one sensational revelation after another from the witness box' (p 244). How quickly a *cause celebre* fades from recollection! He (with Mr Clune) returns in Chapter 12 to consider the Franca Arena controversy on parliamentary privilege.

The last four chapters deal with more recent controversies; Dr Carney looks at *Egan v Willis*³ and the protection of state papers – an issue which is likely to become of increasing relevance and importance. The decision of the High Court is subjected to astringent review (pages 313 – 325). Professor Wheeler puts the BLF struggle in its historical context and notes its fundamental importance for constitutional scholars, confronting as it

does the boundary between legislative and judicial power (p 379). This provides a context for Professor Lee's discussion of the *Kable* decision, 'a guard-dog that barked but once?'⁴ As Professor Lee notes in thorough analysis, *Kable* generated great expectations which later development has perhaps disappointed although it provides 'protection against extreme laws' (p 414). The basic principle which underlies it is hard to ascertain (see discussion at p 411). Finally, in *McGinty v Western Australia* Dr Peter Gerangelos, who is an expert on the topic, looks at the question of electoral equality in the Westminster tradition and the 'implied rights venture' in the High Court.

The book is beautifully produced with a detailed index. For those who wish to dip into questions of state constitutional law it provides a fascinating and accessible vehicle. It is in the nature of things that (at least for this reviewer) the happenings of long ago are of greater interest than

matters occurring within a professional lifetime. Nevertheless, it is also likely that analyses of more recent controversies will provide the basis for judicial discussion in the future.

Reviewed by Lee Aitken

- ¹ The earlier companion volume is Lee and Winterton, *Australian Constitutional Landmarks* (Cambridge UP, 2003).
- ² (1885) 10 App Cas 282.
- ³ (1998) 195 CLR 424.
- ⁴ Per Kirby J in *Baker v. R* (2004) 210 ALR 1 at 17[54] quoted at page 403.

Verbatim

Handley JA, on being sworn out as a judge of appeal:

Courts are not the only places where language has layers of meaning. A reference for an incompetent employee who was leaving to pursue fresh challenges stated: 'I cannot recommend him too highly or say enough good things about him. I have no other employee with whom I can adequately compare him. The amount he knows will surprise you. You will be fortunate if you can get him to work for you.' There is also a code for school reports which I picked up over the years. If you read that your son is easy going it means he's bone idle. If you read that he's helpful it means he's a creep. If he's reliable, that means he dobs in his mates. If he's forging his way ahead, he's cheating. And if all his work is of a high standard, you know that you and your wife are ambitious, middle class parents.

Slattery QC on the occasion of Hammerschlag J's swearing in ceremony:

Shortly after commencing at Freehills you prepared a draft affidavit for the late Peter Hely QC, as he then was. Hely looked it over, handed it back and commented that it appeared to him you had drafted it in Boer.

Hammerschlag SC (as he then was) cross-examining Mr John Landerer to suggest that, in preparing FAI's response to HIH's 1998 takeover offer, he had not separated his role as chairman from his firm's role as solicitor for the company:

Q: Mr Landerer, I want to suggest to you that as a consequence of your position as chairman and solicitor, your roles in either of those capacities were, from time to time, often blurred?

A: I wouldn't accept that suggestion, sir.

Q: In relation to the Part B, you say, do you, that your non-equity partner in your firm, Mr Mark Houston, looked after that?

A: That's correct.

Q: And you say that you saw no difficulty with that?

A: That's correct, Mr Hammerschlag.

Q: You didn't say to him, 'Houston, we have a problem?'

A: No, I didn't and I don't see what's so funny about that.

Q: 'Neither do I'.