

REVIEW ARTICLE*

An Australian Charter of Rights? by MURRAY WILCOX (Australia: Law Book Co Ltd, 1993), pp xxvi + 298. Softcover recommended retail price \$75.00 (ISBN 0 455 21204 X).

Murray Wilcox, a judge of the Federal Court of Australia, has written a book about whether the Australian Constitution should contain an express bill or charter of rights. This book is one of the first of perhaps many comparative works given impetus by the High Court's recent foray into implied constitutional rights.¹ In its decisions in *Nationwide News Pty Ltd v Wills*² and *Australian Capital Television Pty Ltd v Commonwealth*³ in 1992, the High Court recognised that the people of Australia possess a constitutionally implied right⁴ to political discourse.⁵

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- 1 See, for further recent comparative material, E Barendt, "Free Speech in Australia: A Comparative Perspective" (1994) 16 *Syd LR* 149; W Rich, "Converging Constitutions: A Comparative Analysis of Constitutional Law in the United States and Australia" (1993) *FL Rev* 202; W Rich, "Approaches to Constitutional Interpretation in Australia: An American Perspective" (1993) 12 *University of Tasmania Law Review* 150; D Tucker, "Representation-Reinforcing Review: Arguments about Political Advertising in Australia and the United States" (1994) 16 *Syd LR* 274.
- 2 (1992) 177 CLR 1.
- 3 (1992) 177 CLR 106.
- 4 More accurately, the right was described by Brennan J as "an immunity consequent on a limitation of legislative power" (*Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 at 150). See also *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 50-1, 76.
- 5 For analysis and comment on these cases, see E Barendt, "Election Broadcasts in Australia" (1993) 109 *LQR* 168; E Barent, note 1 *supra*; TD Campbell, "Democracy, Human Rights, and Positive Law" (1994) 16 *Syd LR* 195; DZ Cass, "Through the Looking Glass: The High Court and the Right to Speech" (1993) 4 *Public Law Review* 229; M Coper, "The High Court and Free Speech: Visions of Democracy or Delusions of Grandeur?" (1994) 16 *Syd LR* 185; M Coper, "Speak Easy" (1992) 3 *Polemic* 156; P Creighton, "The Implied Guarantee of Free Political Communication" (1993) 23 *UWAL Rev* 163; L Dalton, "Freedom of Political Expression: A Watershed in Australian Constitutional History" (1993) 67 *LJ* 67; MJ Detmold, "The New Constitutional Law" (1994) 16 *Syd LR* 228; NF Douglas, "Freedom of Expression under the Australian Constitution" (1993) 16 *UNSWLJ* 315; KD Ewing, "The Legal Regulation of Electoral Campaign Financing

This work focuses on the lessons that may be learnt from the Canadian Charter or Rights and Freedoms. Unfortunately, it gives the United States position only scant and superficial attention. It accounts for a mere 27 pages. The treatment of the Warren court, the great and controversial interpreter of the Bill of Rights, is hardly adequate; it amounting to a mere paragraph.

The author has sought to justify his approach to the United States model by arguing that "what is significant about the Bill of Rights is its history, not its current interpretation".⁶ He concludes that the Canadian Charter is "much more useful; so its judicial interpretation is important".⁷ The discounting of 200 years of United States experience is unconvincing.⁸

The treatment of the United States position is ironic given the decision of the High Court in *R v Smithers; Ex parte Benson*,⁹ which recognised what was perhaps Australia's first implied constitutional right. In that case, it was held that the Australian people possess an implied right of access to government and to the seat of government.¹⁰ The decision was based on interpretation of the United States Constitution by the United States Supreme Court in *Crandall v State of Nevada*.¹¹

The parallels between the United States and Australian positions brought out by *Smithers* and by more recent decisions such as *Nationwide News* and *Australian Capital Television*,¹² make the benefit of the United States experience to Australia incontestable. This is not to say that the Canadian Charter might not be of greater relevance, but only that the author's treatment of the United States model is

in Australia: A Preliminary Study" (1992) 22 *UWAL Rev* 239; KD Ewing, "New Constitutional Constraints in Australia" (1993) *Public Law* 256; BF Fitzgerald, "Proportionality and Australian Constitutionalism" (1993) 12 *University of Tasmania Law Review* 263; A Fraser, "False Hopes: Implied Rights and Popular Sovereignty in Australian Constitution" (1994) 16 *Syd LR* 213; I Fullagar, "The Role of the High Court: Law or Politics" (1993) 67 *LJL* 72; M Gronow, "Freedom of Political Expression Cases Reviewed" (1993) 67 *LJL* 68; MD Kirby, "Constitutional Protections for Free Speech" (1992) 66 *ALJ* 775; HP Lee, "The Australian High Court and Implied Fundamental Guarantees" (1993) *Public Law* 606; Note "Implying Guarantees of Freedom into the Constitution: *Nationwide News and Australian Capital Television*" (1994) 16 *Syd LR* 288; W Rich, "Converging Constitutions", note 1 *supra*; DA Smallbone, "Recent Suggestions of an Implied 'Bill of Rights' in the Constitution, Considered as Part of a General Trend in Constitutional Interpretation" (1993) 21 *FL Rev* 254; D Speagle, "*Australian Capital Television Pty Ltd v Commonwealth*" (1992) 18 *MULR* 938; M Stokes, "Constitutional Commitments not Original Intentions: Interpretation in the Freedom of Speech Cases" (1994) 16 *Syd LR* 250; D Tucker, note 1 *supra*; D Tucker, "Privacy Protection and the High Court" (1993) 67 *LJL* 69; G Williams, "Civil Liberties and the Constitution - A Question of Interpretation" (1994) 5 *Public Law Review* 782; S Zifeak, "The Constitution and Freedom of Speech" (1993) 67 *LJL* 70; L Zines, "A Judicially Created Bill of Rights?" (1994) 16 *Syd LR* 166.

6 MR Wilcox, *An Australian Charter of Rights?*, Law Book Co (1993), p ix.

7 *Ibid* at ix.

8 See *ibid* at 26-27.

9 (1912) 16 CLR 99.

10 *Ibid* at 108, 109-10, 119. See *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 60, 73-4.

11 (1867) 73 US 35.

12 See *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 at 232. Compare E Barendt, note 1 *supra* at 164-5.

unsatisfactory. Perhaps the last word should be given to Dickson CJ of the Canadian Supreme Court, who argued in *R v Simmons*.¹³

While we must, of course, be wary of adopting American interpretations where they do not accord with the interpretive framework of our Constitution, the American courts have the benefit of two hundred years experience in constitutional interpretation. This wealth of experience may offer guidance to the judiciary in this country.

Indeed the High Court has come a long way since Knox CJ, Isaacs, Rich and Starke JJ asserted in the *Engineers case*.¹⁴

we conceive that American [and for that matter Canadian] authorities, however illustrious the tribunals may be, are not a secure basis on which to build fundamentally with respect to our own Constitution.¹⁵

The Court's approach has developed to the extent that in *Australian Capital Television*,¹⁶ it had regard not only to decisions of the Supreme Court of the United States and the Supreme Court of Canada, but also to judgments of the European Court of Human Rights and the Supreme Court of Israel.

The short shrift traditionally given by the High Court to United States and Canadian precedents arose out of the differences perceived between those systems of government and that of Australia.¹⁷ The traditional approach has been slowly displaced, in part because of the Court's recent interest in issues concerning human rights. Human rights are fundamental rights not tied to a system of government. Consequently, differences in the structure of other polities should not hamper the use of foreign judicial decisions in interpreting and enforcing Australian rights. This is implicit in the reasoning of the High Court in *Australian Capital Television* and makes *An Australian Charter of Rights?* highly relevant.

This book is divided into three parts and four appendices. Part One is entitled "The United States Experience", Part Two "The Canadian Charter of Rights and Freedoms" and Part Three "Australia". The four appendices contain the United States Bill of Rights, the Canadian Charter of Rights and Freedoms, the draft Bill of Rights proposed for Australia by the Australian Constitutional Commission and the author's suggested modifications to this draft Bill of Rights. The appendices represent a useful reference source.

At times this book resembles a collection of extracts and quotes rather than a presentation of the author's ideas. Several sections of the work contain more

13 [1988] 2 SCR 495 at 516; 55 DLR (4th) 673 at 689. Quoted in note 6 *supra* at 45.

14 *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 at 146.

15 Compare the following cases decided by the High Court prior to the *Engineers case*: *D'Emden v Pedder* (1904) 1 CLR 91 at 112, 113; *Owners of ss Kalibia v Wilson* (1910) 11 CLR 689 at 721; *New South Wales v Commonwealth* (1915) 20 CLR 54 at 79; *Duncan v Queensland* (1916) 22 CLR 556 at 603, 633.

16 See also *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1.

17 See *In Re Income Tax Acts (No 4) (Wollaston's case)* (1902) 28 VLR 357 at 378-88; *Huddart Parker Ltd v Commonwealth* (1931) 44 CLR 492 at 504, 526, 527; *Airlines of New South Wales Pty Ltd v State of New South Wales (No 2)* (1965) 113 CLR 54 at 114-15; WA Wynes, *Legislative, Executive and Judicial Powers in Australia*, Law Book Co (1976), pp 21-4. Compare A Mason, "The Role of a Constitutional Court in a Federation: A Comparison of the Australian and the United States Experience" (1986) 16 *Fl Rev* 1; W Rich, "Converging Constitutions", note 1 *supra*.

quotes than comment.¹⁸ While most of the quotes are apposite, they soon become frustrating. Many extend for a page or more, leaving the reader with the sense that she or he has missed out on the full benefit of the author's opinions. Analysis is sparse with some sections ending with quotes rather than a strong conclusion.

The author's treatment of the Australian experience in the final part of the book is generally unsatisfying. There have been more comprehensive and incisive treatments of the express civil rights in the Constitution.¹⁹ Little more is presented of *Australian Capital Television* and *Nationwide News* than a good summary.

Four substantial issues are addressed in this final part of the book. They are:

- is there a need for a charter?
- is a charter compatible with democratic principles?
- are courts capable of discharging the responsibilities a charter would place on them?
- what would be the effect of a charter on the courts?

The author draws these issues together to conclude that a charter of rights would be a "desirable adjunct to Australian law".²⁰ He proposes a charter based upon that put forward by the Australian Constitutional Commission in 1988.

This work is necessarily coloured by Justice Wilcox's own value system. He makes it clear that he believes the integrity of the judicial system to be more important than a bill of rights. If a charter of rights were to politicise the High Court in the manner of the United States Supreme Court, he argues that any benefits offered by such a charter "would be purchased at too high a price".²¹ Unfortunately, the author neither reconciles this view with his conclusion that Australia should possess a charter of rights nor seeks to elaborate on the trade-off between the two.

Whilst agreeing with Justice Wilcox that a respected and independent judiciary is perhaps the most significant bulwark against arbitrary executive and legislative action, it is fanciful to suggest that a charter of rights might not politicise the judiciary.²² Any court called upon to decide questions of great moral concern, such as freedom of speech as it affects legislation outlawing racial or sexual vilification or a right to privacy as it concerns abortion, could not but engender debate and controversy. Furthermore, one reason for a charter of rights is that it protects the minority from the majority and the weak from the powerful. In

18 See, for example, note 6 *supra* at 231-8.

19 See, for example, M Coper, *Encounters With the Australian Constitution*, CCH Australia (1988) pp 292-324; PJ Hanks, "Constitutional Guarantees" in HP Lee and G Winterton (eds), *Australian Constitutional Perspectives*, Law Book Co (1992); PJ Hanks, *Constitutional Law in Australia*, Butterworths (1991), ch 13; NKF O'Neill, "Constitutional Human Rights in Australia" (1987) *FL Rev* 85; L Zines, *The High Court and the Constitution*, Butterworths (3rd ed, 1992), pp 325-30.

20 Note 6 *supra* at 248-9.

21 *Ibid* at viii.

22 For examples of the uproar produced by the decisions in *Australian Capital Television* and *Nationwide News* and Justice Toohey's subsequent speech ("A Government of Laws and Not of Men?" (1993) 4 *Public Law Review* 158), see the references contained in I Fullagar, note 5 *supra* at 72 n 3.

upholding such a regime, the High Court would necessarily be politicised. A charter of rights, like the Constitution, is after all a political instrument.

The problems with this book are partially compensated by its strong points. Justice Wilcox has presented an informed description of the Canadian experience to an Australian audience and has thereby contributed pertinent comparative material to the debate on an Australian bill of rights. He has also conveyed, through the Canadian model, the dramatic impact that a bill or charter of rights can have on the legal culture of a western nation and how it may give "the courts of a country the opportunity to make a fresh start in the protection of human rights".²³

Although this work has several weaknesses, readers interested in the bill of rights debate in Australia with little or no exposure to the Canadian Charter will find it rewarding. The treatment of the Canadian Charter of Rights and Freedoms grants an insight into the issues that may soon confront our High Court, whether they be in the context of a bill of rights or implied constitutional guarantees.

23 Note 6 *supra*, p 230.