

The Australian Constitution in Context

Katherine Lindsay

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Professor Gerald Gunther observed, in the ninth edition of his seminal casebook, that 'constitutional law is an important, endlessly intriguing and constantly enjoyable subject'. Perhaps the greatest obstacle to the universal application of that epithet is the impenetrable density and volume of material encountered by students upon their first embrace of constitutional law. For this reason, the greatest achievement of Katherine Lindsay's *The Australian Constitution in Context* is its brevity: a mere 173 attractively typeset pages.

Lindsay's preface speaks of 'modest aims' for this text, intended for student use and 'designed as a resource book, not a descriptive text book.' Without the aspiration or pretence of being a 'comprehensive guide to Australian constitutional law', *The Australian Constitution in Context* is successful in providing an accessible introduction to the text of the *Commonwealth Constitution* and through brief and pertinent case and statute extracts, to other sources of constitutional law.

The first chapter on 'The Constitution and the Democratic Tradition' introduces the *Commonwealth Constitution* and other foundational legislation such as the *Commonwealth Franchise Act 1902* within the historical matrix of liberal democratic theory, which animates the Australian system of government. The chapter discusses the Constitution's relationship to broad concepts such as the separation of powers, representative government, universal electoral franchise and citizenship in contemporary society. The coverage of democratic theory is simplistic, though Lindsay makes judicious use of Hansard excerpts to illustrate her discussion of universal franchise.

Chapter Two is concerned principally with the nature of constitutions and constitutionality. It introduces students to debates about constitutional interpretation, textualism, contemporary meaning and implications, including implied legislative prohibitions, such as that recognised in the free speech cases of the 1990s.⁷ The issue of original intent is discussed in Chapter Three, which is largely historical in its focus upon the Conventions of the 1890s, their implications for constitutional interpretation and information about the 'founding fathers'.

⁷ *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, amongst others.

Particularly noteworthy are Chapters Four and Five, which discuss the High Court and 'landmarks in constitutional interpretation' respectively. Lindsay discusses not only the institutional framework of the High Court (the *Constitution, Judiciary Act 1903* (Cth) and *High Court of Australia Act 1979*) but also the judges and the diversity of judicial appointments, including short comments upon the personal styles of Sir Owen Dixon and Sir Victor Windeyer. A useful select bibliography of judicial biography is provided, as well as a table of High Court justices, including political affiliations and the appointing government of individual justices. Chapter Five provides the text's most extensive discussion of cases. Case studies of the *Engineers' Case*,⁸ *Communist Party Case*,⁹ *Koowarta*¹⁰ and the *Tasmanian Dams Case*¹¹ are undertaken and a time-line of other landmark cases is provided, clearly setting judgments in economic and political context at the time of adjudication.

Chapter Six addresses Australian federalism and begins with a discussion of the controversial issues of States' rights, the 'federal balance' and the division of powers in the context of the repository of sovereignty in the Australian polity. There is also a brief discussion of s 109 inconsistency and a more extensive overview of fiscal federalism, including uniform taxation and the evolution of the s 96 'grants' power. Curiously absent from this chapter is any discussion of *economic* federalism (freedom of interstate commerce and the s 51 powers over trade and commerce and corporations), as well as coverage of inter-governmental immunities.

The final chapter concludes by investigating the s 128 procedure for constitutional change, some historical examples of its invocation and the two issues dominant in contemporary constitutional reform debate: human rights protection and republicanism. The international and comparative perspective adopted by Lindsay in her discussion of rights is commendable; the chapter distinguishes Australian constitutional rights protection from that in the United States and locates the current rights reform debate within the fabric of relevant international instruments and organisations.

Lindsay's consistent chapter format will be useful in guiding students through the text. Each chapter begins by highlighting between three

⁸ *Amalgamated Society of Engineers v Adelaide Steamship Co* (1920) 28 CLR 129

⁹ *Australian Communist Party v Commonwealth* (1951) 83 CLR 141.

¹⁰ *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168.

¹¹ *Commonwealth v Tasmania* (1983) 158 CLR 168.

and four key issues for consideration during the chapter and includes departure points for further research. Treatment of a particular issue is followed by questions, which relate mostly to case and statute excerpts and will help students to engage with the primary sources, demanding critical analysis, which Lindsay considers a 'cornerstone of deep and effective learning in constitutional law.'¹² Furthermore, 'exercises' require students to research beyond the text, often directing them to statutes and journal articles, which in some cases provides practical training in legal research and in others contextualizes and problematizes issues considered in the text.

Despite some surprising omissions, *The Australian Constitution in Context* is a worthy acquisition for social science as well as law libraries and provides a useful introduction to the subject or research departure point for law students. The clarity and brevity of the text, as well as Lindsay's willingness to address the political, economic and social context of constitutional law will make this text particularly useful for students of other disciplines such as public administration and political science, who seek a basic grounding in this most fundamental and important area of law.

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¹² At v.

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