



A SKETCH OF AUSTRALIAN CONSTITUTIONAL HISTORY

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ALTHOUGH CAPTAIN JAMES COOK and his HMS *Endeavor* landed on the shores of Botany Bay in April 1770 and claimed the continent for Britain, it was not until after the American Revolution that the British seriously turned their colonizing eyes toward the fatal shore. Prisons and prison ships in England were overflowing in the late eighteenth century and the loss of the thirteen American colonies closed off what had been a popular place for Britain to send its convicts. When no suitable place was found for a penal colony in Africa, Botany Bay was selected in 1786. The First Fleet, composed of roughly 850 convicts and the requisite military guards and officers under the command of Governor Arthur Phillip, arrived on the shores of what became New South Wales in January 1788. The first free settlers arrived some five years later. From the First Fleet's arrival to 1824, New South Wales operated as a military settlement and penal colony. Ultimate authority over the colony theoretically rested with

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the British Crown and Imperial Parliament in London, where the Crown delegated authority to appointed Governors through Royal Commissions. The Crown and Parliament could not escape, however, what Geoffrey Blainey called the “tyranny of distance.”¹ New South Wales, a colony that encompassed half the continent in 1788, was some 20,000 kilometers from Britain. It took eight months for British ships to complete the voyage to Australia. Telegram service between Australia and Britain did not come until 1872. This tyranny of distance meant that until a colonial legislature was established in 1823, the governor exercised near dictatorial power.

Although New South Wales was established as a penal colony, all statutory and common laws of England that were applicable to settlement conditions came into force with the First Fleet’s landing. To help enforce this law, the British Parliament created the colony’s first criminal court in 1787. The act charged judges to decide cases “according to the known and established laws of England.”² Civil jurisdiction was extended shortly thereafter. The first equity jurisdiction was extended in 1814. Most colonial judges were members of the armed services and lacked training in non-military law.

The first significant constitutional development in the new settlement occurred in 1823 when New South Wales became a full British colony and its governmental institutions were statutorily defined in the *New South Wales Act*.³ The Imperial Parliament recognized the need for a local lawmaking body in the colony, but it claimed that there was insufficient time to put together a representative assembly. Instead, the act enabled the Crown to appoint residents to a Legislative Council. The Council’s powers were rather anemic. It was prohibited from enacting laws that violated or contravened the laws of England, a legal concept known as the repugnancy doctrine. Only the Governor had the power to put bills before the Council for consideration. Moreover, before any bill took

¹ Geoffrey Blainey, *THE TYRANNY OF DISTANCE: HOW DISTANCE SHAPED AUSTRALIA’S HISTORY* (Macmillan 1968).

² NEW SOUTH WALES COURTS ACT (27 Geo. III, c.2).

³ NEW SOUTH WALES ACT 1823 (4 Geo. IV, c.96).

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effect the Chief Justice of the Supreme Court was required to review and certify that it was not inconsistent with the laws of England. On the judicial front, the 1823 Act established a new Supreme Court that exercised civil and criminal jurisdictions, and it provided for the appointment of court officers and admission of lawyers.

The Imperial Parliament passed an act in 1828 that replaced the 1823 *New South Wales Act*. This act, the *Australian Courts Act*,⁴ changed the Legislative Council's procedures and structures (increasing its size for instance) and formally promulgated that all laws of England (common law and statute) were in force in New South Wales as of 1828, so long as they were pertinent in the colony. Historians have noted that Governors and Legislative Councils frequently modified English law for local conditions.⁵

The first half of the nineteenth century brought significant western settlement of the continent. Van Diemen's Land, later renamed Tasmania,⁶ was established as a separate colony in 1825, Western Australia in 1829, and South Australia in 1834. Port Phillip District, later renamed Victoria, was established in 1836 as a settlement and became a separate colony in 1851. The 1840s and 1850s were also years in which governing authority within the colonies shifted somewhat from the governors to the legislatures. Representative government came to New South Wales in 1842, with passage of the *Australian Constitutions Act* (No. 1).⁷ This act provided for a thirty-six member legislative assembly, twelve of whom were appointed by the Crown and the rest elected. The assembly exercised legislative powers, but the Governor retained the veto and ministers were not drawn from the assembly. In the years to come, constitutional reforms established representative legislative assemblies in the other colonies: Victoria (1851), Tasmania (1854), South Australia (1856), and Queensland (1859). By the end of the 1850s, five of the six

⁴ 9 Geo. IV., c.83.

⁵ Enid Campbell, *Colonial Legislation and the Laws of England*, 2 TASMANIAN UNIVERSITY LAW REVIEW 148 (1965).

⁶ The colony's name changed from Van Diemen's Land to Tasmania in 1853.

⁷ 5 & 6 Vict. c.76.

colonies exercised their own legislative powers, which provided some newfound autonomy, at least in theory.⁸

That autonomy was derivative, however, because the colonial courts and legislative assemblies were products of British statutes. As the colonies began to assert greater autonomy in the mid-nineteenth century, the question emerged over the appropriate relationship between colonial laws and the laws of England. To what extent could the two diverge? Could colonial legislatures limit the application of British law in the colonies or enact laws that knowingly differed from British law? The dilemma, of course, was that the Imperial Parliament had not legislated specifically on these questions, so it remained a point of debate especially in the colonial courts. A single judge on the Supreme Court of South Australia, Justice Benjamin Boothby, appointed by the British government in 1853, was a notable protagonist in these debates. Boothby frequently hamstrung the South Australian government in the early 1860s. He argued in judgments spanning a decade that the colonial government consistently exceeded the power vested to it and enacted laws that were repugnant to British law. A second judge on the three-judge Supreme Court often joined Boothby to strike down local laws, frustrating the South Australian government and causing much controversy.⁹

London finally addressed this issue in the 1865 *Colonial Laws Validity Act*,¹⁰ which was applicable in nearly all British colonies. The Act set clear parameters for colonial power. The colonial parliaments were subject to their own constitutions and the Imperial Parliament retained the right and capacity to legislate for the colonies. The repugnancy doctrine was also kept in place, meaning that colonial parliaments could not enact laws that went against any British laws directed at the colonies. They were also prohibited from enact-

⁸ R.D. Lumb, *THE CONSTITUTIONS OF THE AUSTRALIAN STATES* (University of Queensland Press 1977), 1-44.

⁹ Alex Castles, *AN INTRODUCTION TO AUSTRALIAN LEGAL HISTORY* (Law Book Co. 1971), 155-57.

¹⁰ 28 & 29 Vict., c.63.

ing laws that had any effect beyond their borders, a concept known as extra-territoriality. Finally, the Act retained the requirement that all laws receive the Crown's assent. While these features limited colonial power, the Act was seen at the time to expand the colonies' independence. Colonial parliaments were freed from having their legislation struck down in London, unless it violated the repugnancy or extra-territoriality doctrines. In addition, the colonies could amend or repeal the general mass of British law that had not been made operative in the colonies by statute. This included British statutes and other laws that had been received under common law principles. Moreover, they could amend statutes that previous colonial legislatures had enacted. The notion that the *Colonial Laws Validity Act* furthered colonial independence would be upended in the early decades of the twentieth century as it came to be seen as hampering independence.¹¹

THE ROAD TO FEDERATION

The next major constitutional development centered around the protracted effort to join the colonies in some union. Although the first legislation calling for a union of the colonies was introduced in 1850, it would take some fifty years before the colonies formed the Commonwealth of Australia. Historians have identified two reasons for the lengthy timetable. First, the union movement was conducted in a democratic fashion from the outset. What ultimately became the 1901 Commonwealth of Australia Constitution was drafted in a series of constitutional conventions and put before the citizens in two referenda. In addition, a majority in each colonial legislature had to ratify the document before it took effect. Democracy sometimes takes time. The second major reason for the attenuated federation movement was that it began in the 1850s when the colonies faced few external pressures or threats.

The fact that the colonies united in a federation was all the more remarkable given the limited incentives present. By the 1860s each

¹¹ Alex Castles, *The Reception and Status of English Law in Australia*, 2 ADELAIDE LAW REVIEW 1 (1963).

colony was self-governing. There was little national identity to speak of, with citizens' loyalties tied more to their respective colony than some yet undefined continent-wide union. Moreover, the economies that had developed by mid-century often put the colonies in competition with each other. Each had erected tariff and duty schemes on goods from other colonies and abroad that did little to encourage unity. Attempts were made during various Inter-Colonial Conferences from 1863 to 1880 to establish a uniform tariff structure, but to no avail. The two colonial behemoths had competing policies. New South Wales tended to promote free trade, while Victoria insisted on protecting tariffs. Neither colony felt comfortable leaving important trade questions to some unknown federal government.

In the end, domestic economic factors alone were not enough to unite the colonies. The real stimuli came from abroad. The colonies had demonstrated little interest in foreign policy, even after British garrisons pulled out of Australia in 1870. Thereafter, geographic isolation and the British command of the seas were thought sufficient. Attitudes changed, however, as rumors spread of foreign powers establishing presences in the Pacific. Queensland was particularly concerned, for example, when the Germans set up trading posts in New Guinea in the 1870s. France began transporting prisoners to New Caledonia in 1864, which heightened concerns that escapees would wash up on Australia's shore. The colonists, whose anxious demands for greater protections fell on deaf British ears, were advised that their petitions might be more successful if they spoke in a single voice. The need for national defense ultimately led to the first serious efforts at unification.¹²

In 1885, the colonial legislatures and the Imperial Parliament enacted complementing legislation that created the Federal Council of Australasia. This Council met intermittently from 1886 to 1899 to make suggestions for common legislation on a range of issues. It proved a useful forum for inter-colonial discussion, but lack of

¹²Patrick Parkinson, *TRADITION AND CHANGE IN AUSTRALIAN LAW* (Law Book Co. 1994), 148-55.

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funds and authority hamstrung the body from the start. For example, each colony reserved the right to secede from the Council. The Council's legislative sphere was kept purposefully small and it remained dependent upon the colonies for funding. It also lacked authority because New South Wales chose not to join. Political leadership in the "mother colony," especially Sir Henry Parkes, saw the Council's creation as an impediment to a more robust and, therefore, successful federation. Like the American colonies, Australia's first effort at unification failed. The Council disbanded after thirteen years.

Proponents of a stronger federation persevered under the Council's foibles until colonial leaders gathered in Melbourne in 1890 to take up the question anew. They concluded that the time was ripe and that a representative constitutional convention should convene – one fully authorized by all the colonies. The first of these conventions took place in Sydney in 1891, where delegates deliberated on the structures and powers of a new national government. The drafting fell to a small committee led by Queensland's Premier Sir Samuel Griffith. Whereas America's constitutional framers nailed shut the windows in Philadelphia's Independence Hall for privacy, Australia's framers took to the water. Griffith had traveled to the convention on Queensland's official yacht, the *Lucinda*. Final drafting was completed while it cruised the Hawkebury and Pittwater Rivers. The Sydney convention had at its disposal the American, Canadian, and Swiss constitutions, as well as the legislation that created the Federal Council. The two significant issues raised during this first convention would percolate throughout the federation debate: balancing small and large state interests and managing tariff policies. At its conclusion, the convention passed a draft constitution that was sent to the colonial legislatures for consideration.

The colonial legislatures failed to ratify this draft constitution. Some delayed considering it because of approaching elections or changes in government. Others found the federation issue inconsequential. An economic depression in the early 1890s directed attention temporarily away from the federation proposal to shoring up the economy. This downturn ironically underscored the colonies'

economic interdependence and the costs of inter-colonial tariffs and duties. The federation movement was revived then in the mid-1890s, finding its strongest footing when it appealed to security, pocketbook, and heart.

Premiers from each colony met in Hobart, Tasmania in 1895 and agreed that it was necessary to revisit federation in earnest. Each agreed to elect delegates to an 1897 convention in South Australia. Meeting in Adelaide, delegates to this convention produced another constitution that was again returned to the colonial legislatures for approval. Delegates met again that year in Sydney to take up the 286 amendments that the colonial legislatures proposed. An overlapping election in Victoria prevented the Sydney convention from making much progress on the amendments, so delegates reconvened in 1898 to hammer out a final version.

Public referenda then were held in New South Wales, Victoria, Tasmania, and South Australia in 1898 on the proposed constitution. Eligible voters approved it with the requisite margins in all colonies except New South Wales, where opposition to the constitution had been particularly vociferous. Without New South Wales on board, this second constitution faced certain demise. After concessions were made to New South Wales, most notably that the new capital would be located within its borders, a second round of referenda occurred in all colonies from April to September 1899. Approximately 600,000 Australians or 61 percent of eligible voters participated in the referenda. The proposed federal constitution secured the necessary majorities in each colony, with roughly seventy-two percent of all voters supporting federation. The proposed constitution then went to London for the Queen's assent. A delegation from Australia arrived in London in March 1900, anxious to secure the Crown's assent with few changes. London's only objection was to the constitution's nearly complete abolition of appeals from Australian courts to the Privy Council.

The issue of Privy Council review was featured prominently in the constitutional conventions. At the 1890 Australasia Federation Conference, a majority of delegates supported the idea of abolishing all appeals to the Privy Council and creating a domestic court with

final authority over all Australian cases. Andrew Inglis Clark abided the conference's preferences. His draft constitution, introduced to the delegates at the 1891 Sydney convention, prohibited appeals from any state courts or federal courts to the Privy Council. The Sydney convention amended, in the end, Clark's draft to allow Privy Council review "in any case in which the public interests of the Commonwealth, or of any State, or any other part of the Queen's dominions are concerned."¹³ The appeal clause underwent further revision at the Adelaide conference in 1897. Inter-colonial business interests fought against restricting Privy Council review at the third and final Melbourne convention in 1898, arguing that restrictions on appeals would discourage British investment in Australia. In the end, the Melbourne convention ratified a Privy Council clause (clause 74) that provided, "No appeal shall be permitted to the Queen in Council in any matter involving the interpretation of this Constitution or of the Constitution of a State, unless the public interests of some part of Her Majesty's Dominions, other than the Commonwealth or a State, are involved."¹⁴

The delegates expected little opposition to the language used in clause 74 because it mirrored the Privy Council provision in the British North America Act. They were flummoxed when Colonial Secretary Joseph Chamberlain objected to clause 74. The negotiations that ensued between Australia's delegates and Chamberlain are well told elsewhere and need not be repeated here.¹⁵ In short, Chamberlain thought Privy Council appeals should remain to ensure uniformity of law throughout the Empire. The compromise reached after much negotiation left constitutional cases involving Australian interests in Australian courts. Cases with wider relevance were open to Privy Council review. The new clause provided the following:

¹³ F.R. Beasley, *Appeals to the Judicial Committee: A Case for Abolition*, 7(1) RES JUDICATAE 399, 401-03 (June 1955).

¹⁴ John Quick & Robert Randolph Garran, *THE ANNOTATED CONSTITUTION OF THE AUSTRALIAN COMMONWEALTH* (Legal Books 1976), 748-50.

¹⁵ See Alfred Deakin, *THE FEDERAL STORY: THE INNER HISTORY OF THE FEDERAL CAUSE, 1880-1900* (Melbourne University Press 1963).

No appeal shall be permitted to the Queen in Council from a decision of the High Court upon any question, howsoever arising, as to the limits *inter se* of the Constitutional powers of the Commonwealth and those of any State or States, or as to the limits *inter se* of the Constitutional powers of any two or more States, unless the High Court shall certify that the question is one which ought to be determined by Her Majesty in Council.¹⁶

Both sides claimed partial victory. The Australian delegates pointed to the fact that their High Court retained review over all constitutional matters and only with the Court's consent could constitutional questions go before the Privy Council. Chamberlain claimed victory in that all non-constitutional matters could be reviewed in London. On July 5, 1900 the British Parliament passed the proposed constitution, titled the *Commonwealth of Australia Constitution Act 1900* (U.K.).¹⁷ Four days later Queen Victoria gave her Royal Assent. The Queen's Proclamation of the Commonwealth was held off until January 1, 1901, however, to give Western Australia adequate time to pass the constitution in a referendum and enact enabling legislation so it too could join the Commonwealth of Australia.¹⁸

AUSTRALIA'S CONSTITUTIONAL FRAMEWORK

The Commonwealth Constitution is a hybrid document that borrows heavily from the American and British constitutional traditions. While the framers reviewed the constitutional practices of Canada, the United States, Switzerland, and Britain, the influences of the U.S. constitutional system and the British political system loomed large. By this I mean that the Commonwealth Constitution reads very much like the American document, while politics operates more in line with the British system. Sir Owen Dixon, Austra-

¹⁶ COMMONWEALTH OF AUSTRALIA CONST. ACT, 63 & 64 Vict., c.12, art. 74.

¹⁷ 63 & 64 Vict., c.12.

¹⁸ David Swinfen, *IMPERIAL APPEAL: THE DEBATE ON THE APPEAL TO THE PRIVY COUNCIL, 1833-1986* (Manchester University Press 1987), 54-87.

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lia's celebrated High Court Chief Justice (1952–1964), alluded to this hybrid quality in a 1942 speech before the American Bar Association. "The men who drew up the Australian Constitution had the American document before them; they studied it with care; they even read the standard books of the day which undertook to expound it. . . . Indeed it may be said that, roughly speaking, the Australian Constitution is a redraft of the American Constitution of 1787 with modifications found suitable for the more characteristic British institutions and for Australian conditions."¹⁹ The U.S. Constitution was at the forefront of their minds, almost too much as Dixon lamented. "The framers of our own federal Commonwealth Constitution . . . could not escape from its fascination. Its contemplation dampened the smoldering fires of their originality."²⁰

Several similarities exist between the American and Australian constitutions. The Australians drafted a written constitution that enumerates the national government's powers and duties, like the American document. Both are built upon federalist principles that divide power between state and national governments. Both Senates provide equal state representation and six year terms for senators. Each document promulgates those powers granted to the national legislature, with all residual powers reserved to the states. Both also incorporate separation of powers principles at the national level, such that powers are divided between a legislature, an executive, and a judiciary. Australia's constitution draws this tripartition of powers in the British tradition, in that it retains the Queen of England as head of state. The legislature is composed of the Crown, the Senate, and the House of Representatives. The executive is composed of the Crown, a Governor-General who acts on the Crown's behalf, and Ministers of the Crown, including the Prime Minister. The judiciary is composed of the High Court and other courts that Parliament creates.

¹⁹ Owen Dixon, *Two Constitutions Compared*, in JESTING PILATE AND OTHER PAPERS AND ADDRESSES (Law Book Co. 1965), 101-02.

²⁰ Owen Dixon, *The Law and the Constitution*, in JESTING PILATE AND OTHER PAPERS AND ADDRESSES (Law Book Co. 1965), 44.

Retaining the British Crown as head of state is just one of many ways in which Australia's constitution exhibits its British heritage. Operating alongside the separation of powers system is the practice of responsible government. Responsible government places executive authority in a ministry whose members come from the legislature, blurring the line that separates legislative and executive power. All ministers are responsible to Parliament and the electorate. The executive can be dismissed after losing an election or losing a vote of confidence in the House of Representatives. The practice of responsible government operates in Australia by convention. The words "Cabinet" and "Prime Minister" appear nowhere in the constitution, nor are there provisions requiring the Prime Minister and Cabinet to be appointed from the party or coalition of parties commanding a majority in the House of Representatives. Section 64 is the only constitutional provision alluding to it, which requires ministers to be members of the Senate or House of Representatives.²¹ Given that most delegates to the four constitutional conventions in the 1890s were colonial parliamentarians, whose governments operated for decades under responsible government traditions, it is not surprising that this convention was never explicitly mentioned in the constitution.

The constitution also exhibits its British heritage by containing no bill of rights. This absence was not due to oversight or ignorance. The framers were familiar with the U.S. Bill of Rights and the constitutional law that had developed around it by the end of the nineteenth century. Much of the scholarship on Australia's constitutional conventions intimates that the bill of rights option was fully aired and explored and that the framers explicitly rejected it.²² The convention records indicate, however, that delegates to the 1891 and

²¹ A caveat regarding Section 64: the clause actually gives a three-month grace period for ministers to secure seats as senators or representatives. It states, "After the first general election no Minister of State shall hold office for a longer period than three months unless he is or becomes a senator or member of the House of Representatives."

²² F.C. Hutley, *The Legal Traditions of Australia as Contrasted with Those of the United States*, 55 AUSTRALIAN LAW JOURNAL 63 (1981).

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1897-1898 conventions never debated the merits of a bill of rights per se. The limited debate that did occur revolved around a handful of rights-oriented provisions. Delegates seemed far more concerned about preserving states' rights than the rights of individuals.²³

The few enumerated constitutional rights are there largely because of Andrew Inglis Clark, an early participant in the federation movement and delegate to the 1891 Sydney convention. Clark, an admirer of the U.S. constitutional system and friend to Oliver Wendell Holmes, Jr., prepared the draft constitution that served as a starting point for deliberation at the 1891 convention.²⁴ Several components of Clark's draft survived the 1891 convention and those that followed. Key structural provisions and a handful of rights contained in Clark's draft survived in some form to appear in the 1901 Constitution. Clark also lobbied throughout the 1890s for the constitution to include some version of the U.S. Constitution's Fourteenth Amendment, specifically its due process and equal protection clauses. In the end, a convoluted, watered-down provision prohibiting discrimination based on state citizenship was enacted, but the phrases "due process," "equal protection," and "privileges and immunities" appear nowhere in the text.²⁵

Australia's constitution provides very few rights. Section 41 secures the right to vote in federal elections. Section 80 provides for jury trials in cases involving Commonwealth law. Section 92 guarantees freedom in interstate trade and Section 51(xxxi) guarantees payment on just terms for Commonwealth acquisition of property. Section 116 prohibits the Commonwealth from establishing a religion, imposing any religious observances, or passing laws that pro-

²³ L. Zines, *The Federal Balance and the Position of the States*, in OFFICIAL RECORD OF THE DEBATES OF THE AUSTRALASIAN FEDERAL CONVENTION: THE CONVENTION DEBATES 1891-1898: COMMENTARIES, INDICES AND GUIDE, VOL. 6 (Legal Books 1986), 75.

²⁴ James Warden, M. G. Haward, et al., *AN AUSTRALIAN DEMOCRAT: THE LIFE, WORK, AND CONSEQUENCES OF ANDREW INGLIS CLARK* (Centre for Tasmanian Historical Studies 1995).

²⁵ John La Nauze, *THE MAKING OF THE AUSTRALIAN CONSTITUTION* (Melbourne University Press 1972), 227-32.

hibit the free exercise of religion. Finally, Section 117 prohibits discrimination based on state residence.

Several reasons were at the heart of their opposition to an American-style statement of rights. First, they thought it unnecessary because the parliaments and the common law were thought adequate. Sir Owen Dixon captured this sentiment when he wrote:

The framers of the Australian Constitution were not prepared to place fetters upon legislative action, except and in so far as it might be necessary for the purpose of distributing between the States and the central government the full content of legislative power. The history of their country had not taught them the need of provisions directed to the control of the legislature itself. The workings of such provisions in [the U.S.] was conscientiously studied, but wonder as you may, it is a fact that the study fired no one with enthusiasm for the principle. With the probably unnecessary exception of the guarantee of religious freedom, our constitution makers refused to adopt any part of the Bill of Rights of 1791 and a fortiori they refused to adopt the Fourteenth Amendment.²⁶

If an unfettered parliament somehow offended these rights, the polling booth was the place for recourse, not the courts. However, a variety of drawbacks to this traditional approach have been identified.²⁷ A second reason for rejecting a bill of rights was that it was not a priority for Australia's framers. In fact, many colonial delegates considered it an anathema because it could hamstring their legislatures from passing laws that preserve and manage the non-European labor market. Thus, Section 51(xxvi) originally vested the Commonwealth Parliament with power to enact laws with regard to "the people of any race, other than the Aboriginal race in any

²⁶ Owen Dixon, *Two Constitutions Compared*, in *JESTING PILATE AND OTHER PAPERS AND ADDRESSES* (Law Book Company 1965), 100-12, at 102.

²⁷ See Hilary Charlesworth, *The Australian Reluctance About Rights*, in *TOWARDS AN AUSTRALIAN BILL OF RIGHTS*, Philip Alston (ed.), (Centre for International and Public Law, Australian National University and the Human Rights and Equal Opportunity Commission 1994), 21-54; and George Williams, *HUMAN RIGHTS UNDER THE AUSTRALIAN CONSTITUTION* (Oxford University Press 1999).

state, for whom it is deemed necessary to make special laws.” One could read beneficence into this clause – protecting against racial discrimination – but its practical consequence was just the opposite. Australian industry at the time of federation was heavily dependent upon Chinese labor, and the framers did not want the constitution to shackle labor practices in nascent industries. Quick and Garran write that this section empowered the Commonwealth “to localize [Chinese laborers] within defined areas, to restrict their migration, to confine them to certain occupations, or to give them special promotion and secure their return after a certain period to the country whence they came.”²⁸ Indeed, one of the first laws enacted in the new federal parliament was the *Immigration Restrictions Act 1901*, which prohibited anyone from immigrating into the country who was unable to write out a fifty word dictation in a European language.²⁹ A third reason why Australia’s framers rejected a bill of rights is that they were concerned about rights, but not for individuals. They were most intensely interested in what rights the colonies would retain in a federation. Given that bills of rights, at least in the American example before them, typically dealt with the vertical relationship between individuals and their governments, not between governments, it was not prioritized.³⁰

Given this mixture of British and American constitutional influences, scholars describe Australia as a “Washminster” system.³¹ It

²⁸ Quick & Garran, *THE ANNOTATED CONSTITUTION OF THE AUSTRALIAN COMMONWEALTH* (Legal Books 1976), 622.

²⁹ A.C. Palfreeman, *THE ADMINISTRATION OF THE WHITE AUSTRALIA POLICY* (Melbourne University Press 1967).

³⁰ Helen Irving, *TO CONSTITUTE A NATION* (Cambridge University Press 1999), and George Williams, *HUMAN RIGHTS UNDER THE AUSTRALIAN CONSTITUTION* (Oxford University Press 1999).

³¹ Elaine Thompson, *The Washminster Mutation*, In *RESPONSIBLE GOVERNMENT IN AUSTRALIA*, Patrick Moray Weller and Dean Jaensch (eds.), (Australasian Political Studies Association 1980), 32-40; Dean Jaensch, *PARLIAMENT, PARTIES AND PEOPLE: AUSTRALIAN POLITICS TODAY* (Longman Cheshire 1991); yet see E. Thompson, *The Constitution and the Australian System of Limited Government, Responsible Government, and Representative Democracy: Revisiting the Washminster Mutation*, 24(3) *UNIVERSITY OF NEW SOUTH WALES LAW JOURNAL* 657 (2001).

blends American and British practices: federalism, separation of powers, and a written constitution from the American system, and responsible party government with no entrenched bill of rights from the British system.

AUSTRALIA'S JUDICIAL SYSTEM

The American influence is also seen in the constitutional provisions for a federal judiciary. Chapter III vests judicial power in the High Court, currently composed of seven justices, and other courts that Parliament creates or vests with federal jurisdiction. The High Court exercises both original and appellate jurisdictions, but unlike the U.S. Supreme Court, it also serves as the final appellate court for federal *and* state matters. Whereas a federal or constitutional question must arise for the U.S. Supreme Court to intervene, that is not the case for the High Court. It serves as the final arbiter for all state matters, including state constitutional law.³²

Much of the constitution's language concerning the High Court's original and appellate jurisdictions was borrowed from Article III of the U.S. Constitution. The Court's original jurisdiction extends to matters arising under treaties (Section 75(i)), affecting counsels or ambassadors (Section 75(ii)), where the Commonwealth is a party (Section 75(iii)), between the states (Section 75(iv)), and in which writs of mandamus or other injunctions are sought against officers of the Commonwealth (Section 75(v)). Parliament also has the authority under Section 76 to vest additional original jurisdiction in the High Court. Most original jurisdiction cases concern Sections 75(iii), (iv) and (v).³³ Together, Sections 75 and 76 define an extensive original jurisdiction, such that some scholars have voiced concern that it could distract the Court from fulfilling its appellate functions.³⁴ One mechanism for limiting the Court's original juris-

³² R.D. Lumb, *THE CONSTITUTIONS OF THE AUSTRALIAN STATES* (University of Queensland Press 1977).

³³ David Jackson, *Practice in the High Court of Australia*, 15 *AUSTRALIAN BAR REVIEW* 1 (1997).

³⁴ Zelman Cowen and Leslie Zines, *FEDERAL JURISDICTION IN AUSTRALIA* (Oxford University Press 1978), 4.

diction caseload is its power to remit cases to lower courts. In practical terms, proceedings commenced under the Court's original jurisdiction are normally remitted unless they raise constitutional questions.

The lion's share of the High Court's workload comes under its appellate jurisdiction. This jurisdiction extends to judgments of any justice or justices exercising the High Court's original jurisdiction (Section 73(i)), any other federal court, courts exercising federal jurisdiction, or state Supreme Courts (Section 73 (ii)). The High Court has mechanisms here too for controlling which cases it reviews. In this sense, the Court's appellate power is discretionary. Since reforms to the *Judiciary Act* in 1984, no appeal may proceed to the High Court without the Court first granting "leave to appeal" or "special leave to appeal."³⁵ The "leaves to appeal" are issued when the full High Court agrees to review decisions from single High Court judges or panels of High Court judges exercising original jurisdiction. On the other hand, "special leaves to appeal" are issued for cases that come to the Court under its appellate jurisdiction. Both mechanisms filter out cases that the Court does not wish to review for various reasons.

What criteria are used to determine which cases are granted leave? The 1984 reforms state that the Court may consider any matter it thinks relevant, but it "shall have regard" to whether the case involves a question of law that is "of public importance ... or [where] a decision of the High Court, as the final appellate court, is required to resolve differences of opinion between different courts, or within the one court, as to the state of the law."³⁶

Australia's constitutional framers enacted provisions enabling Parliament to create other federal courts in addition to the High Court, including federal trial courts. Not until 1977 did Parliament create the Federal Court of Australia, a national court of first instance composed of roughly fifty judges who sit throughout the

³⁵ JUDICIARY AMENDMENT ACT (No. 2) 1984.

³⁶ Anthony Mason, *The Regulation of Appeals to the High Court of Australia*, 15 UNIVERSITY OF TASMANIA LAW REVIEW 1 (1996).

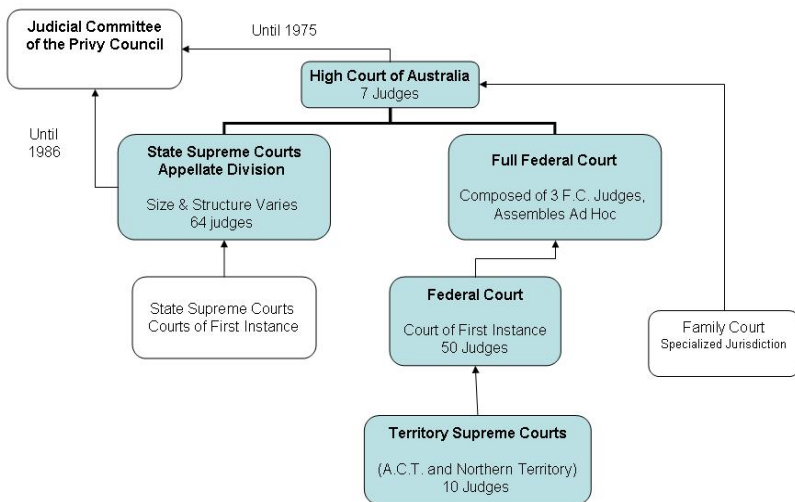
country to hear matters of law and equity. The Federal Court possesses no general jurisdiction, but only that which Parliament assigns to it in over 120 statutes. While it operates as a court of first instance for many criminal and civil matters, it also functions as an intermediate appellate court for cases from single Federal Court judges, the Supreme Court of the Australian Capital Territory (ACT) and Norfolk Island, and decisions from state supreme courts concerning federal matters. This appellate variant, known as the Full Federal Court, consists of three Federal Court judges empaneled on an ad hoc basis. All Federal Court judges serve when needed on the Full Federal Court. The Federal Court's jurisdiction encompasses a bevy of civil and criminal matters, including trade and consumer protection, review of administrative decisions, migration and refugee issues, intellectual property (copyrights, patents, trademarks, and designs), maritime, bankruptcy, anti-discrimination, and corporate law to name a few.³⁷

The court systems within Australia's six states and two territories vary in size and structure. All have courts of first instance and appellate courts. New South Wales, Victoria, and Queensland maintain separate courts of appeal within the state judicial systems. South Australia, Western Australia, and Tasmania do not have separate appellate courts. Instead, they empanel trial court judges to sit in appellate capacities when necessary. Figure 1 provides a hierarchical schematic of the Australian judiciary that ignores this state court variation. The shaded courts are those whose judges exercise some sort of appellate jurisdiction.

All state and federal judges in Australia are appointed. The Crown's representatives at the state and federal levels (state Governors and the Commonwealth Governor-General) technically make judicial appointments, but in practical terms this power falls to the state and federal Cabinets, on the advice of the Attorneys-General.

³⁷ Brian Opeskin and Fiona Wheeler, *THE AUSTRALIAN FEDERAL JUDICIAL SYSTEM* (Melbourne University Press 2000).

Figure 1: Structure of Australia's Judiciary



Filling vacancies on the High Court has required the Commonwealth to engage in some consultation with state governments since reforms in 1979, but much of the appointment process operates by convention. When such a vacancy occurs, the Commonwealth Attorney-General solicits recommendations from each state. The Attorney then distributes a list of names under consideration and consults with state and federal judges, as well as leaders in the legal community. Following this time for input, the Attorney makes a recommendation to the Cabinet, which may or may not be followed, and reports the Cabinet's decision to the Governor-General. It is the Governor-General who formally commissions the judge. The Commonwealth Constitution does not provide guidelines or qualifications for appointment to the High Court or the Federal Court. All High Court judges had life tenure until a constitutional amendment in 1977 set a mandatory retirement age of 70 years. The amendment also enabled Parliament to set a similar requirement for other federal court judges.