

Australia's Constitution: Time for Change? by John McMillan, Gareth Evans and Haddon Storey (Law Foundation of New South Wales and George Allen & Unwin, Sydney, 1983), pp. v-xv, 1-422. Price \$9.95. ISBN 0 86861 039 9 (paperback).

This book is the centrepiece of a research project sponsored and financially supported by the Law Foundation of New South Wales. During 1981, Senator Gareth Evans while he was the shadow Attorney-General in the Commonwealth Parliament presented a detailed proposal to the Foundation for a research project designed to initiate a 'serious national debate on the possibility of adopting a new Australian Constitution by the 1988 Bicentennial Year'. In accepting the proposal, the Foundation set in train perhaps one of the most extensive reviews of the areas where possible reforms could be made to the Constitution. That research was mainly carried out by Mr John McMillan who was the full-time appointee of the Foundation employed to produce this book. Mr McMillan in the later stages obtained the assistance of Senator Evans and Mr Haddon Storey as co-authors to enable the project to be completed prior to the 1983 session of the Australian Constitutional Convention held in Adelaide. The authors are eminently qualified to write a book such as this. The political experience of Senator Evans at the Commonwealth level and Mr Storey at the State have complemented the analytical and research skills of Mr McMillan.

The stated aims of this book are threefold: 'to expose the problems that appear to exist in the present operation of the Constitution; to identify possible solutions to these problems and to suggest some ways in which constructive debate might actually be encouraged'. Each aim has been met systematically and resourcefully in the pages of this book and all without the need 'to argue for any particular change'.

The authors have astutely realized that the only way in which useful and enduring constitutional change will occur in Australia is if there is support for that change which transcends party political boundaries. This book is a significant contribution to the cause of promoting the necessary spirit of compromise which needs to exist to enable fruitful debate on this topic to be conducted and worthwhile solutions reached.

Two central questions are addressed in the book. First, is there any need for constitutional reform in Australia and secondly, if there is, how could it be best brought about? To answer these questions, the authors have divided the book into five parts. Parts two, three and four are concerned with the first question while part five is directed to the second.

Part one of the book contains some necessary introductory material. Chapter 1 serves the useful function of explaining, in simple and straightforward terms and with some very topical examples, why the Constitution matters and how it affects our daily lives. The chapter concludes with a review of the sorts of people and organizations who have been urging constitutional reform in Australia.

Chapter 2 taken together with Chapters 16 and 17 contains the primary message in the book. It begins by recording the disheartening statistics of constitutional reform in Australia. As all students of our constitutional history know, there have been sixteen constitutional referenda since federation at which thirty-six questions have been put to the electorate. Only eight have satisfied the requirements of section 128 of the Constitution. In the face of these statistics, the authors, not surprisingly, ask whether the Constitution can ever be significantly amended.

They observe that, on analysis, there is still some hope that it may be. The facts demonstrate that twenty-eight of the rejected proposals received the support of not less than forty-five *per cent* of the nation's voters. This being so, it is argued that, since sixty *per cent* of referendum proposals stood a 'strong' chance of being accepted, there is no 'insuperable barrier to constitutional change in Australia'. Perhaps these views would lead one to suggest that the fault then must lie in the additional requirement of a majority of electors in a majority of States which section 128 prescribes. But as the materials provided in this chapter indicate, only four proposals have failed because this requirement was not met. This observation was made recently by the Governor-General, Sir Ninian Stephen, in his opening address to the 1983 session of the Australian Constitutional Convention. Having asked the rhetorical question, may it be that the fault lies less in section 128 than with those who, over the years have sought to put it to work and outlined the fact just stated, Sir Ninian said:

And surely the long record of failure of constitutional change is not due to our legislators being, consistently over the years, wholly out of tune with public sentiment, so that changes proposed time and again by the national Parliament have, in a great proportion of cases, been unacceptable to the people. May it not be that the reason for this record of rejection lies in some failure of communication between legislators and public? In that and in the fact that those advocating rejection of proposed changes have sometimes placed short term material or party political advantage over the long term needs of the nation, treating proposed amendments not on their merits but as no more than an extension of the party political scene, both Federally and in the States.¹

As a reading of Chapter 17 will demonstrate, the authors too are alive to these criticisms.

After summarizing what are seen as the main influences affecting voting patterns at referenda, including the content of the proposals, and the prevailing political environment, the authors proceed to review three preconditions for constitutional change. First, the need to create a popular and political momentum for constitutional reform. As the authors correctly note, consensus between political parties is not necessarily enough, since constitutional reform can only be accomplished if the electorate supports the proposal in the manner prescribed by section 128. They conclude that what such electoral support presupposes is 'some educated understanding of why constitutional reform in Australia is important, a recognition of the issues involved, and a lowering of the barriers of suspicion about the process of change'. This book will greatly assist any reader to attain the required understanding.

Secondly, the machinery for initiating change needs to be improved. In the authors' view such machinery, to be effective, should provide a forum where both the issues and reform options can be thoroughly ventilated and one in which the protagonists can 'forge some consensus about the constitutional areas in need of reform and the type of reform that is desirable'. They sagaciously point out that the methods used to date to initiate reform proposals have not met these criteria. The Constitutional Convention, in particular, is criticized for producing perhaps as much discord as consensus. The validity of this criticism would be evident to anyone who read the reports of the proceedings of the recent session of the Constitutional Convention. Nonetheless, the authors concede that the Convention model (albeit perhaps not in its present form) is the most suitable medium to facilitate both the initiation of viable reform proposals and their proper debate.

The third precondition to successful constitutional reform is said to be the obtaining of substantial consensus between Australia's major political parties both at Commonwealth and State level. Although the authors acknowledge that this will be a difficult task given the adverse tendencies evident in our political system, they see some hope of success where there is wide community support for the process of constitutional reform. This book significantly enhances the chances of that consensus arising both within the Australian community and amongst our major political parties.

Part two, comprising Chapters 3 to 6, deals with Australian Federalism. Those chapters cover comprehensively the development of Australia's brand of federal government, the division of legislative powers enshrined in the Constitution and Commonwealth-State financial relations. Chapter 3 concludes, after a review of the history of federalism, with a summary of the five main perspectives from which the problems of federalism are approached: shoring up the States, expanding Commonwealth power, restructuring the federal system completely and rearranging the powers and responsibilities of the Commonwealth and the States. The problems of the present division of legislative powers are canvassed in Chapter 4; it reviews to whom the Constitution gives legislative power over matters such as the national economy, the regulation of business, industrial relations, resource development, and the environment and conservation, and makes it clear that the division of powers made in the 1890's does not comfortably accommodate the practical realities of modern life in the 1980's. The difficult area of Commonwealth-State financial relations is discussed in Chapter 5 which highlights the dependence of the States on the Commonwealth, especially since the imposition in 1942 of the uniform taxation system.

Part three concentrates on the institutions of our national government. The complex area of Australia's residual legal and constitutional links with Britain is discussed in Chapter 7 while Chapter 8 focusses on the form our constitutional structure could take, namely, monarchy or republic. The emotive issue of the role of the Governor-General is reviewed in a most objective fashion in Chapter 9.

¹ Reported in (1983) 57 *Australian Law Journal* 373, 374.

Having looked at the powers of the Governor-General, the authors detail the arguments for and against whether we need such a functionary at all, before turning to the questions relating to the reform of the Governor-General's role: should he be an elected official, should his powers be limited or perhaps modified?

The constitutional problems associated with the executive and the legislature are canvassed in Chapters 10 and 11. Topics of current interest which are considered include the usefulness of the nexus provision in section 24 of the Constitution, the proposals for extending and fixing the term of the House of Representatives and providing for simultaneous elections. Chapter 13 is devoted to the Australian judicial system. Most of the issues discussed here are of a non-controversial nature but two at least have sparked considerable interest in recent times at least among lawyers: investing the High Court with jurisdiction to give advisory opinions and the creation of a national court system. As to the latter, the essential elements of the three main models, namely those of Sir Owen Dixon, Sir Francis Burt and Sir Laurence Street are usefully summarized and the arguments supporting the establishment of such a national judicial system and those against it are fully canvassed.

Part four is entitled 'Rights and Freedoms'. It contains two chapters; Chapter 14 deals with section 92 of the Constitution and its limiting effect on the power of both the Commonwealth and the States and Chapter 15 analyzes the controversy which has long raged in Australia as to whether we need a Bill of Rights.

Having reviewed the problem areas in our constitutional system, the authors in Part five consider the machinery for and dynamics of constitutional change. The available means to initiate such change are identified in Chapter 16, and at last, the shield of the dispassionate approach is lowered and we can read the authors' own views on the best model to adopt for the purposes of initiating, reviewing and debating constitutional reform options. In this chapter, they advance a new Constitutional Convention as the most efficient and effective forum for the evaluation of constitutional reform in Australia. This new Convention should, according to the authors, be established with the following principles in mind. It should not just be a parliamentarians' Convention but rather it should have some elected delegates to invigorate the proceedings by broadening the expertise and experience available to the Convention and its Committees as well as to ensure that it is seen by the community as 'broadly representative in character'. The total number of delegates suggested is 112 of which thirty-two would be elected. The structure and procedures proposed for this new body should not, it is said, be too novel since discussion of procedural matters would divert the Convention's attention from its real function. Finally, the cost of establishing such a Convention (which should be met by both the Commonwealth and the States) should be kept within reasonable limits. The authors envisage that the new body would meet at least yearly but no more than twice a year and that it should have a small full-time secretariat to assist it in its operations. Moreover, it is suggested that it may be worthwhile, although by no means necessary, for the Commonwealth and the States to give the Convention a legislative basis.

As to the question of implementing any proposal which might gain the required support at the Convention, the authors approve the idea of the Commonwealth giving its undertaking to put to a referendum any proposal which received the support of at least two-thirds of the delegates. Most of the reforms, particularly the notion of elected delegates would, in the reviewer's opinion, go a long way towards correcting the obvious deficiencies in the operation and effectiveness of the current Convention. In particular, it may help remove the tendency evident in some of the proceedings of the most recent session of the Convention to treat it as a parliamentary-like forum to be used for party political advantage.

In the final chapter of the book, the authors argue that we should aim to complete a thorough constitutional review by 1988, Australia's Bicentennial Year, as this is an appropriate symbolic event in our history to which such a major constitutional review should be linked. Realistically, the authors concede that to achieve this goal would require delegates to avoid becoming embroiled in debates about controversial reforms, consensus on which is unlikely to be achieved at least in the short term. Delegates' attention would be better concentrated on those uncontroversial reforms, upon which agreement could be reached. In suggesting such a pragmatic approach, the authors make it clear that they do not intend that debate upon more radical proposals should be stifled or curtailed but only that to achieve their stated aims requires that priorities should be set which enable attainable reforms to be achieved by 1988. These aims are doubtless laudable but, with respect, a mere five years is hardly

sufficient time in which to gain the political support which the authors acknowledge is necessary for the success of the types of reform envisaged. This is heightened by the fact that it would take a not inconsiderable amount of time and effort to re-establish the Constitutional Convention along the lines which have been suggested, especially given that their proposals would require some parallel legislation for the election of delegates to be enacted by the Commonwealth and all six States. I am inclined, therefore, to agree with Professor Colin Howard for the reasons he gives that the year 2001 is both a more realistic and appropriate date to aim for.²

In passing it is perhaps interesting to note that the Hawke Labor government has, since the book was published, introduced several Bills designed to effect some of the reforms canvassed by the authors. These include proposals to remove the nexus provision in section 24,³ to increase the term of members of the House of Representatives to four years and senators' terms to eight years,⁴ to provide for the holding of House of Representatives elections on a fixed date,⁵ as well as for simultaneous elections for both Houses,⁶ to give the High Court jurisdiction to give advisory opinions on the validity of legislation and proposed legislation enacted by the Commonwealth, a State or Territory,⁷ the interchange of powers between the Commonwealth and a State⁸ and finally the deletion from the Constitution of all outmoded and obsolete references.⁹

The strength and utility of this book lie in its impartiality, comprehensiveness and readability. The authors' dispassionate approach manifests itself in the balanced way in which they have either neatly summarized or directly quoted the various viewpoints. In conclusion, therefore, I would recommend this book to all Australians interested in our constitutional development. One can but hope that it gets the extensive readership it deserves.

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² *Sydney Morning Herald* (Sydney), September 1983.

³ Constitutional Alteration (Parliament) Bill 1983.

⁴ Constitutional Alteration (Parliamentary Terms) Bill 1983.

⁵ Constitutional Alteration (Fixed Term Parliaments) Bill 1983.

⁶ Constitutional Alteration (Simultaneous Elections) Bill 1983.

⁷ Constitutional Alteration (Advisory Jurisdiction of High Court) Bill 1983.

⁸ Constitutional Alteration (Interchange of Powers) Bill 1983.

⁹ Constitutional Alteration (Removal of Outmoded and Expended Provisions) Bill 1983.

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