Review of H P Lee and G Winterton (eds), *Australian Constitutional Perspectives*, Sydney: Law Book Company, 1992. HC $78.00, SC $55.00.

This is a significant book of essays which may be compared in terms of its incisive analysis and likely impact on constitutional thought with R Else-Mitchell's *Essays on the Australian Constitution* (Sydney: Law Book Co, 1961) first published three decades ago. The contributors are not mere analysts of the constitutional text but have a lively understanding of the political and social context in which the text has to be applied. They are aware of the pertinent areas of constitutional dispute which must be canvassed by the constitutional adviser, teacher, practitioner and, most pertinently, the High Court whose method of interpretation has changed so dramatically in the last decade.

Appropriately enough, the first essay by Craven considers the role of the High Court. Craven states that literalism, which has been the method of interpretation adopted by the High Court since the *Engineer's* case (1920) 28 CLR 129, is faced with two new challenging theories each with a claim to legitimacy: progressivism, which emphasises an interpretation of the Constitution based on the aspirations of the Australian community, and the countervailing intentionalism (or originalism), which emphasises fidelity to the intention of the framers. The judgment of Brennan J in *Mabo v The State of Queensland [No 2]* (1992) 175 CLR 1 (which appeared after the writing of the book) suggests that progressivism may well have become the desired theory of the present High Court. According to Craven, the progressivists believe that the constitution amendment procedure in section 128 has failed. Intentionalism, the competing view which emphasises the constitutional compact, would wind back the expansive interpretation of Commonwealth powers which the High Court has espoused in the last 70 years. Craven proposes a bridge between the two methods which he describes as contextualism. In his opinion, the Court should continue to give authentic expression to the will of the Australian people as expressed in the text. However, where the text is ambiguous, an interpretation should be adopted which best mirrors the needs and values of the Australian people, but in doing so great weight should also be attached to the fundamental values of the founders. Thus contextualism represents both a moderate progressivism and a moderate intentionalism.

The difficulty with any theory which purports to be sociological in nature, that is, to represent the aspirations or needs of the people, is that it may well intrude upon electoral choice as well as the amendment process which requires ratification by the people. Two judges of the Court (Deane and Toohey JJ in *Nationwide News v Wills Pty Ltd* (1992) 108 ALR 681, 721–722) have recently stated that the principle of separation of powers is, together with federalism and representative government, one of the three major foundations of the Constitution. The Court therefore would seem to be required to abstain from exercising its function where it is invited to revise an established rule by reference to the aspirations of the Australian people. These aspirations surely are better able to be determined by the political process, namely, by triennial elections or, in terms of major revisions, by the ratification of a proposal

by the people according to the procedure laid down in section 128. The reviewer has previously proposed an elected constitutional convention as a method of involving the people in constitutional *initiation* of reforms ("An Elected Constitutional Convention?" (1992) 22 UWAL Rev 52). Any great leap forward should not therefore be the province of the Court but other branches of the Australian constitutional system including ultimately the decision of the electorate.

This issue is taken up by Burmester in his chapter on locus standi. It is Burmester's view that judicial review in the constitutional context should acknowledge the "primacy of the political process as a constitutional restraint". Thus the Court should not adopt a wide view of locus standi in so far as there are other methods for resolving constitutional disputes in the political (viz, legislative and executive) arena. Although three judges in *Davis v The Commonwealth* (Mason CJ, Deane and Gaudron JJ (1988) 166 CLR 79, 96) do not rule out taxpayers as having sufficient locus standi in certain circumstances, Burmester is strongly of the view that "judicial imperialism" should not be a motivating force impelling the High Court to try to resolve all social evils. Burmester notes a more restricted approach by the United States Supreme Court to taxpayers' locus standi in recent years after an earlier pro-taxpayer standing judgment. It is not easy to see, however, why the author would apply the same restraints to State litigants as are applied to private litigants. Together with the Commonwealth, the States are participants in the political process.

Lindell in his chapter on the "Justiciability of Political Questions: Recent Developments" pursues the theme in his analysis of questions relating to the type of case which the High Court should regard as being inappropriate for judicial settlement. Although the political question approach espoused by the United States Supreme Court has not as such been adopted in Australian decisions, the question cannot be avoided. Rather than leaving it to the High Court to determine when an issue should be regarded as political, Lindell considers that the circumstances in which the Court can evaluate such a matter as being within the non-justiciable category should be more clearly defined. Again, the separation of powers doctrine in the United States is the underlying principle guiding the Supreme Court in its determination of this type of question.

Returning to the other major theme of the constitutional triad (viz, federalism), Zines in chapter 2 embarks upon an extensive examination of the case law to clarify the nature of the process involved in ascertaining whether a Commonwealth law has a sufficient connection with a topic listed in the section 51 heads of power. While adopting a broad approach which would tend to uphold Commonwealth power, Zines nevertheless considers that a characterisation approach requires that laws be not merely judged in terms of their content and meaning but also within the total context of law and society. While admitting that it is easy for the Court to slip back into a reserve powers doctrine (Zines is particularly critical of the decision of the Court in *Gazzo v Comptroller of Stamps (Vic)* (1981) 149 CLR 227), it appears to the reviewer that if federalism is to be treated as a basic principle, a reference to some doctrine of federal balance may be necessary in ascertaining the outer limits of a particular Commonwealth power. This is dealt with by Lee in his chapter on the external affairs power. However, Lee considers that there are only internal limitations on that power and rejects a concept of federal balance.

Thomson takes up the question of legislative power to regulate the appointment

process for High Court judges under the incidental power. The better view is that, while the appointment process can be subjected to consultation, no veto can be imposed on the Governor-General in Council's choice under section 72.

Winterton's essay on the power of State Governors is a valuable contribution to the often neglected topic of State Constitutions. He examines in detail the Letters Patent issued in the 1980's to the State Governors, which accompanied the Australia Acts 1986. He sets at rest a number of inaccuracies as to the interpretation of section 7(5) of those Acts. As he rightly points out, this section cannot deprive a Governor of reserve powers, or the Queen of the few powers residing with Her. Because of the possibility of "hung" parliaments (with Independents holding the balance of power in a Lower House), Winterton undertakes what is probably the most detailed and sophisticated analysis of the Tasmanian constitutional situation of 1989. There is however room for disagreement with his thesis that the request for dissolution by the former Tasmanian Premier, Mr Gray, was not proper. The Australian Labor Party had stitched up an accord (but not a *coalition*) with the Green Independents *after* the election; there was a breach of an electoral pledge, and a Premier defeated pursuant to a vote of no confidence was entitled to establish a case to the Governor for the exercise of his discretion in favour of a new election. It had always been appropriate for a Governor in these circumstances to determine whether a stable alternative government could be formed.

To complete this review of the book it may be mentioned that there are two solid articles on individual rights: Coper on section 92 and Hanks on other guarantees of rights.

There is no doubt that this book of essays, by raising the significant issues of our constitutional system, has provided a foundation for informed analysis of its future direction.

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Review of G Hughes and A Sharpe, *Computer Contracts: Principles and Precedents*, 2nd edn, Sydney: Law Book Company, 1992. $275.00 plus cost of updates.

The first subject in the area of computer law to attract treatment in monographs was the law of contract. It has now accumulated guides for practitioners in most jurisdictions, often in loose-leaf form, and indeed increasingly backed up by computer-readable versions of the standard forms of such contracts. This is the second edition of the principal Australian text in that mode. Both of its authors have