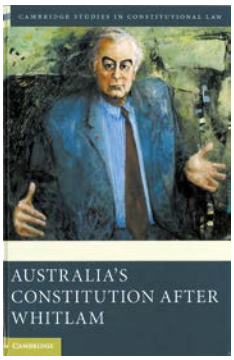
BOOK



Australia's Constitution after Whitlam

By Brendan Lim, Cambridge University Press, 2017

How does the Constitution change? It depends what is meant by 'Constitution' and 'change'. Beyond the formal text of the Constitution itself, Australian politics and public life have witnessed lasting debate and conflict as to 'informal constitutional principles' – including as to which institutions and actors have the ability to create, change or 'legitimate' informal constitutional principles. The definition and scope of these principles are potentially uncertain and are open to substantial dispute; they may be broadly defined as 'constitutional' principles beyond those set out in the *Constitution* itself, albeit while inviting greater debate as to what principles are 'constitutional' in nature.

Brendan Lim's fascinating new book reinterprets the short life and long shadow of the Whitlam government as a series of conflicts over informal constitutional principles, including whether and how popular elections can confer upon elected governments the power to declare and shape these principles. Even absent a formal constitutional referendum, Whitlam 'sought to weaken prevailing understandings of the federal balance and to expand the powers and responsibilities of the federal government' (p 1) – a profound shift in informal constitutional norms. The resistance to Whitlam challenged the notion that a popular mandate in the House of Representatives, even the election of a 'transformative national government', legitimates informal constitutional change in its own right (pp 1-2).

After introducing the book's key themes in ch 1, ch 2 of Lim's book addresses the vexed and potentially unclear distinction between ordinary and 'constitutional' legal principles. Lim identifies, amid ongoing debate, the significance (in identifying 'constitutional' principles) of 'reception' by a given constitutional community of a principle as constitutional in nature (p 24). Lim proceeds to explain the distinction between 'monist' democracy (with no inherent distinction between normal and constitutional law-making) and dualist democracy (by which the expression of the popular will is not solely the reserve of the elected government, but is 'mediate[d] through 'more complex institutional forms' (p 30)).

In ch 3, Lim explains the 1975 constitutional crisis as a conflict between two theories of legitimacy. Under Whitlam's 'monist' theories of legitimacy, his government, as recipients of a popular mandate, were 'entitled to plenary lawmaking authority' (p 72). Under the Senate's 'dualist' theories of legitimacy, Whitlam's election was not of itself sufficient to engage in 'higher' lawmaking or to effect informal constitutional change (pp 79-80). Lim acknowledges that elements of his thesis are at odds with the self-presentation of the parties concerned – with Whitlam's lasting concern for formal constitutional change (and hence apparent conceptual distinction between different forms of constitution-making authority) and with how the Opposition themselves explained their role during 1975. But Lim's theories are nonetheless lucid, clearly-explained and compelling.

Lim examines the long shadow of this 'clash of constitutional grammars' upon subsequent events and controversies. In ch 4 he explores the constitutional views and stormy tenure of Justice Lionel Murphy, including the significance of the appointment as an expression of Whitlam's transformative constitutional agenda. In ch 5 he examines evolving ideas of the High Court's institutional role and the role played by the notion of popular sovereignty in that Mason court's self-conception – with the court adhering to the classically dualist notion that the court, a body other than an elected government, was in some sense capable of speaking 'for' the people. This idea clashed with the advent of a new monism under John Howard, and a renewed emphasis in both political and legal spheres upon the primacy of elected governments (with the court's role shifting from the expression of the popular will in its own right to a form of 'representation-reinforcement', seeking at least ostensibly to give effect to the popular will as expressed through legislative intent). Ch 6 examines the 1999 republican referendum, including the impact of the 1975 crisis (and competing monist and dualist conceptions of elected parliamentary governments) on the proposed design of republican institutions.

Lim's book is an inspired synthesis of constitutional analysis and political theory to reinterpret some of the key conflicts of recent decades in Australian public life, employing theories of governance and political power to explain some of those conflicts. This book deserves to have a lasting impact on how those conflicts are understood.

Reviewed by Douglas McDonald Norman

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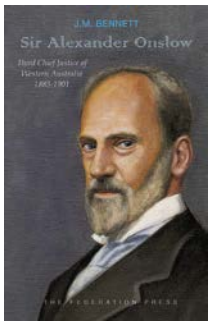

Sir Alexander Onslow

J M Bennett, The Federation Press, 2018

This biography of the third chief justice of Western Australia is Dr Bennett's latest addition to his Lives of the Australian Chief Justices. It has the benefit of a foreword by WA Chief Justice Martin, well-positioned to put Onslow's own story in a wider theme. For current purposes – a review in the journal of the NSW Bar Association – the last paragraph of the foreword bears reprinting in full:

> Dr Bennett tells me that he expects this book, the 16th, to be the last in the series. I am sure that I join his many readers in expressing the hope that his prediction of the future is less accurate that his recount of the past. But if this is the last of the series, it is fitting bookend to an exceptional body of work which spans all the then colonies of Australia, providing an extraordinary insight into colonial life through the lens of the law. Lawyers, historians and anybody with an interest in the development of Australia will join me in congratulating him upon the completion and publication of another excellent piece of literature.

In 1969, almost a half century ago, a young John Bennett edited *A History of the NSW Bar*. He is an honorary life member of the association. His contribution to legal history has been extraordinary. His particular fondness for writing the history of people who administered justice but still had time to remind themselves that they were representative of the law and not ruler of it, remains a lesson for every citizen who believes in an independent judiciary.

This reviewer interpolates that all is not quite lost. When Sir Henry Parkes's 17th child was born, a friend congratulated the 77-year-old on his last. Not my last, the politician replied, my latest. This reviewer understands that the current work is the last solo venture but that there is a final work with co-author Dr Ronald Coleman Solomon. The third Tasmanian chief justice Sir