

jurist · diction

A MAGAZINE OF THE SYDNEY LAW SCHOOL FOR ALUMNI AND THE LEGAL COMMUNITY
SPRING 2013



PEOPLE, POLICIES AND PLEBISCITES: REFORMING THE CONSTITUTION



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Bill O'Conner casts his
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The Drafting Committee of the Commonwealth Constitution appointed at the Adelaide Convention in 1897.
National Library of Australia, nla.ms-ms51-12-1277-51.

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A Message from the Dean

Professor Joellen Riley

I am writing this preface to a fresh edition of *JuristDiction* on 7 September 2013, having just cast my vote in the election for seats in both houses of our federal Parliament. Reading through these articles on the general theme of constitutional reform, it strikes me how very much we take for granted when we are queuing up at a local school, clasping a fistful of 'how to vote' papers for diverse political aspirants, in our triennial routine of compulsory voting for the parliamentarians who will govern us over the ensuing three years.

I wonder how many voters this morning reflected (as I have now been prompted to do) on the history and architecture of our system of government, the respective powers of its constituent parts, and our own role as the enfranchised 'people' in whose interests our nation is to be governed? I am reminded of the essential role that universities, and particularly law schools, play in examining and explaining issues of fundamental importance to our democratic society — a role that I desperately hope our incoming federal government will remember and respect.

Sydney Law School can boast an especially strong presence in constitutional law, not only in domestic law, but in comparative constitutional law. This issue carries an article about the workshop on constitutional reform in Burma/Myanmar, led by our Challis Professor in Jurisprudence, Wojciech Sadurski. This workshop marks the beginning of continued engagement between Sydney Law School and the Burmese people as they grow their own constitutional democracy.

Each of Sydney Law School's three professors in constitutional law has also contributed to this issue. Professor Helen Irving (whose distinguished career as a political historian is also profiled opposite) reflects on the re-emergence of debate about the need for Australia to become a republic. Professor Anne Twomey unpacks the arguments for and against constitutional change to enable Commonwealth funding of local government. Professor Peter Gerangelos explains the need for constitutional reform to clarify the ambit of the executive power of the Commonwealth. Two members of our teaching staff who are completing PhDs in constitutional law have also contributed articles related to their doctoral studies: Elisa Arcioni on the concept of 'the people' in our constitution, and Luke Beck, on constitutional guarantees of religious freedom.

The back pages carry the usual news items, including the wonderful news that one of our current students, Neha Kasbekar, won the Governor-General's Undergraduate Essay Competition organised by the Constitution Education Fund Australia for her paper on the recognition of Australia's first peoples in the *Constitution*.

Finally — do keep free the evening of Thursday, 13 February 2014, when we will again be commemorating the life and achievements of a great Australian constitutional lawyer and academic, with the annual lecture in honour of the late Professor George Winterton.

Professor Helen Irving

Chris Rodley

Constitutional law was not Helen Irving's first vocation. As an arts student at the University of Melbourne in the 1970s, her passion was political science, a subject she went on to teach for more than a decade. In the early 1980s, she completed a Masters degree in anthropology at Cambridge. Next, she became a historian, earning her PhD in history from the University of Sydney in 1987 with a thesis on British politics.

It was in 1991 that Professor Irving first developed a fascination for Australia's *Constitution*. Her interest was sparked while attending a convention in Manchester held by a group of activists known as Charter 88, who were lobbying for the creation of a written constitution for the UK.

'I watched them with fascination and bemusement,' the scholar recalls. She was struck by the idealism of many of those at the meeting, who felt a written constitution was the key to solving their country's problems. The feeling in the room reminded her of the spirit of the Utopian political movement of late Victorian Britain. 'I started to think, was there a similar idealism attached to the forming of the *Australian Constitution*, which was written at the same time?'

That question was the beginning of a large-scale research project to uncover the popular aspirations that underpinned the making of the *Australian Constitution*. Previously, historians had regarded the *Constitution* as an uninspired 'business deal between elites', says Professor Irving. In her book, *To Constitute a Nation*, she revealed the rich mix of popular activism, vigorous public debate and cultural forces that shaped the document.

The impact of women on the formation of the *Constitution* particularly interested Professor Irving, and in her book, *A Woman's Constitution*, she detailed the important role played by women's suffrage organisations and Christian temperance unions in the Federation campaign of the 1890s. She uncovered significant women whose voices had been sidelined in the telling of Australian history, such as leading NSW suffragist Elizabeth Ward. ('Unless



Australia is federated in the interests of women as well as men,' Ward once said, 'our national life will be one-sided, inharmonious and dwarfed.') Professor Irving later received a Centenary Medal for her own research and her collaboration with other historians in the lead-up to the centenary of Federation.

As time went by, she became increasingly interested not only in the history of our *Constitution* but also the law itself. So, in 1997, she decided to enrol in a graduate LLB at the University of Sydney. 'It was a feast for the intellectually curious,' she says of the experience. 'I regarded it as a bit of an anthropological experience as well because of the need to learn a new language and new set of cultural practices and rules.' Gratifyingly, she came first in her constitutional law class.

Until the mid-20th century, women who married foreign men were stripped of their citizenship across the world.

In 2001 Professor Irving was appointed to the Faculty of Law, where she combines legal research with insights gleaned from the three other academic disciplines she has specialised in over the course of her career. Currently, she is writing a history (supported by an ARC Discovery Grant) of the way citizenship has been defined by constitutions, with a particular focus on how women have lost and acquired the right to be a citizen. Until the mid-20th century, women who married foreign men were stripped of their citizenship across the world, a subject that has attracted little scholarly interest to date. 'It's a new lens for thinking about what a citizen is and what the relationship between the citizen and the state is,' she says.

Professor Irving also examines current issues in constitutional reform in her role as a Deputy Director of the Law School's Constitutional Reform Unit. Her study of the history of Australian referendums has taught her that any reform proposal which ignites organised opposition is probably doomed to fail. For that reason, she rates the proposal to recognise local government in the *Constitution* — now postponed indefinitely because of the federal election — as having an 'almost zero' chance of success. A referendum to acknowledge Indigenous people in the *Constitution* has a better prospect of success, she says, but only if the proposed changes are kept to an absolute minimum: 'I think what was put forward by the Expert Panel on the proposal for Indigenous recognition was too complicated and involved too many different principles over which there is certain to be reasonable disagreement.' Professor Irving, who was a prominent member of the Australian Republican Movement in the 1990s, suggests that advocates for a republic must adopt a similarly minimalist approach (see story, page 16).

It seems that the ideals of those who made our *Constitution* are set to remain with us, more or less unchanged, for the foreseeable future. 'We have to recognise that it's becoming harder to amend the *Constitution*,' says Professor Irving, 'and governments are wary of holding a referendum where there is a risk of failure.' **ja**



What's God Got to Do with It?

Freedom of Religion and the Constitution

Luke Beck

The story of how the *Australian Constitution* came to include a section providing a limited guarantee of religious freedom is far from dull. It involves the waging of political campaigns by religious groups and a dose of confusion and misunderstanding on the part of some rather eminent legal figures.



Commonwealth Of Australian Constitution Acts And Speeches. The Age Business Picture by Louise Kennerley.



Poster for Century of Progress World's Fair. 1933. Weimer Pursell, silkscreen print by Neely Printing Co., Chicago.

Section 116 of the *Constitution* provides: 'The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.'

The standard account of how s 116 came to be included in the *Constitution* focuses on the words 'humbly relying on the blessing of Almighty God' in the constitutional preamble. This account, presented by various scholars and the High Court, goes something like this: it was thought that inserting religious words in the preamble might imply that the Commonwealth had some sort of legislative power with respect to religion, even though religion was not on the list of powers to be granted to the Commonwealth. A provision such as s 116 was therefore necessary to prevent any such implication being drawn or to counteract any such implication.

The full story, however, is much more complex and interesting.

In the late 1890s, when the *Constitution* was being drafted, the NSW Council of Churches wanted God 'recognised' in the *Constitution* as 'the Supreme Ruler of the world, and the ultimate source of all law and authority in nations'. The Council organised a petition campaign for this purpose. All up, petitions containing 36,000 signatures were sent to the Convention that had convened to draft the

Constitution. Various motives have been attributed to this campaign, including a desire to create a Christian identity for Australia, the pursuit of some sort of semi-official status for religious leaders or leverage for pet projects.

Higgins was convinced that there was a 'danger' in the preamble and that ulterior motives were at play.

Whatever the motives, the proposal to 'recognise' God in the preamble caused concern in some sections of the community and a counter-campaign was undertaken. That campaign was led by the Seventh-Day Adventists, who worshipped on Saturdays and believed in freedom to work on Sundays, and had the support of various secularists.

The Adventists were worried that the result of recognising God in the preamble would be to empower the Commonwealth to introduce Sunday observance laws, to their obvious disadvantage. They, too, organised to petition the Convention and managed to obtain almost 8,000 signatures.

The churches' campaign ultimately prevailed. After twice deciding not to

include any religious language in the preamble, the Constitutional Convention decided to insert the words 'humbly relying on the blessing of Almighty God' in the preamble. In the main, the Convention was acting to appease the petitioners and hoping that the words might help garner popular support for the *Constitution* when it was put to referendum.

Some delegates to the Convention were alarmed. Chief among them was Henry Bournes Higgins, who would later become Attorney-General and a High Court judge. Higgins was convinced that there was a 'danger' in the preamble and that ulterior motives were at play. He told the Convention that constitutional recognition of God 'was not proposed merely out of reverence; it was proposed for distinct political purposes under the influence of debates which have taken place in the United States of America'.

Higgins told the Convention about a case called *Church of the Holy Trinity*, decided by the United States Supreme Court in 1891. There, it was held that a New York statute prohibiting the importation of all foreign workers did not apply to foreign ministers of religion because the legislature could not be taken to have intended this. The Supreme Court said that the legislature could not have had such an intention because the United States was a Christian country.

Higgins then told the Convention that, in reliance on *Church of the Holy Trinity*, the United States Congress enacted a law prohibiting the World's Columbian



Exposition (also known as the Chicago World's Fair) from opening on Sundays. Higgins said that the religious words of the Australian preamble could serve a similar function to *Church of the Holy Trinity* and give rise to 'an inferential power' that would allow the federal Parliament to pass Sunday observance laws.

This looks rather like the 'standard account' of how s 116 got into the *Constitution*. But looking a little deeper reveals a much more complex situation.

Higgins' story was not quite true. *Church of the Holy Trinity* did not say that the Christian character of America gave the Congress any religious power. And Congress did not exactly pass a Sunday observance law in respect of the Exposition. Rather, Congress passed a statute to fund the Exposition with a condition attached to the funding that the Exposition not open on Sundays. As it happens, the organisers of the Exposition took the federal money and ignored the Sunday closing condition.

Higgins told the Constitutional Convention of his bafflement at how the Americans could view the Sunday closing statute as valid. Higgins knew that Congress could only legislate in accordance with the powers granted to it by the *United States Constitution*, and none of those powers mentioned religion. This was also to be the case in the federal Parliament. But Congress had enacted a Sunday closing law and that law was apparently perfectly valid, even though Congress had no religious power. Higgins simply could not identify a head of power that could support it: it was, in Higgins' mind, an entirely religious law. If that was possible in America, it might also be possible in Australia.

The American Sunday closing statute was actually passed under Congress' trade and commerce power, rather than under some implied power based on the claim that America was a Christian nation. In their well-known *Commentaries on the*

Constitution of the Commonwealth of Australia, John Quick and Robert Garran point this out. Quick and Garran add that Higgins therefore had no reason to fear that the federal Parliament would be able to pass similar laws. This is a curious conclusion given that the federal Parliament was also given a trade and commerce power.

The legal reality underlying Higgins' concern — although he could not articulate it properly — was that although none of Congress' powers looked like a religious power, they were wide enough to authorise religious measures such as the Sunday closing condition. Although the Sunday closing statute looked to Higgins like a religious law, it was nonetheless still a law about trade and commerce as the Chicago World's Columbian Exposition was a trade fair.

So the story of s 116 isn't all about God in the preamble. Higgins stumbled upon the legal reality that the Commonwealth's express legislative powers would be wide enough to authorise legislation dealing with religion unless a provision prohibiting religious laws was inserted in the *Constitution*. *jd*



Luke Beck (LLM 2012) is a postgraduate fellow at Sydney Law School. This article draws upon Luke Beck, 'Higgins' Argument for Section 116 of the Constitution' (2013) 41(3) *Federal Law Review* (forthcoming).



Constitutions Matter

Sydney Law School's Constitutional Reform Workshop in Myanmar

Mekela Panditharatne

In November 2011, Wojciech Sadurski met with Aung San Suu Kyi, leader of the National League of Democracy and Nobel Peace Prize laureate, at her home in Yangon, to discuss the then political situation in Myanmar.

He found a determined and pragmatic leader, willing to learn from outside experience, and sensitive to the delicate balance between constitutional preservation and innovation, doctrine and design.

'We have the great advantage that we are starting from almost nothing,' Suu Kyi said, 'and if you are starting from almost nothing you can learn from the mistakes of others. We can learn from your mistakes, as well as from your successes.'

Eighteen months later, in May 2013, a three-day workshop on constitutional reform under the auspices of the Sydney Law School was held in Yangon, Myanmar.

The project involved a team of eminent constitutional experts led by Sadurski, Sydney Law School's Challis Professor of Jurisprudence. It focused on the experience of constitutional reform in transitional democracies, drawing on expertise from various academic institutions including Sydney Law School, the UNSW School of Law, the National University of Singapore School of Law, the ANU College of Asia and the Pacific, and the University of Victoria School of Law (Canada).

A diverse cross-section of Myanmar society attended the workshop, including Aung San Suu Kyi and other senior members of the National League for Democracy and key figures

within the ruling Union Solidarity and Development Party, the Shan Nationalities Democratic Party, and the Unity and Democracy Party of the Kachin State. Current and former members of the military engaged in discussions with representatives from most of Myanmar's ethnic groups and international constitutional experts.

A number of civil-society activists were present, working for organisations ranging from Myanmar Egress, to the Institute for Human Rights and Business, to Action Aid Myanmar. The burgeoning academic sphere within Myanmar was also represented, with Daw Khin Mar Yee, head of the University of Yangon School of Law, leading a delegation of academics from both the University of Yangon and Mandalay University. In all, around 80 people with a stake in Myanmar's constitutional progress were in attendance on each day.

Following the workshop, Aung San Suu Kyi called for major amendments to be made to Myanmar's 2008 Constitution, stating 'the whole process is the most difficult in the world'. There was a consensus that the current Constitution has inconsistencies that hinder Myanmar in its path towards becoming a prosperous and stable member of the global community.

Myanmar today is a country in flux. After 50 years of military rule, it is emerging from decades of oppression. The repressive state apparatus is gradually being lifted, and the fledgling shoots of a vibrant civil society are growing in newly fertile soil. The end of censorship, freeing of the internet, and the licensing of more than 12 daily newspapers as of

March 2013, dignify the early legacy of Myanmar's first federal Parliament.

Ethnic conflict, however, threatens the long-term stability of the nation. Myanmar is composed of more than 100 territorially domiciled minority groups, and its recent history has been fraught with violent animosity. Recent reports of ethnic cleansing in the state of Arakan highlight the need for a federal approach that accounts for the country's numerous ethnic groups, largely divided along geographic lines.

The repressive state apparatus is gradually being lifted, and the fledgling shoots of a vibrant civil society are growing in newly fertile soil.

As the leaders of the Arab Spring struggle with stagnation and sectarian conflict, it is clear that political reality tempers true democratic change. Will Myanmar emerge from its political ferment to become a beacon of success for other transitional states? This depends to a large extent on certain institutional capacities needed for democratisation to take root and prosper in an ethnically and religiously diverse polity.

The starting point for Sydney Law School's workshop was that constitutions matter. Bad constitutional design can hinder, while rational constitutional

design can help the process of transition. Myanmar's current Constitution, adopted in 2008 after a lengthy convention, is generally regarded as needing amendment or outright change if it is to support a robust democracy where the three arms of government — the executive, legislature and judiciary — keep each other in check.

The military retains a strong foothold in the executive and legislative branches of government, occupying a quarter of the lower house by constitutional design. Few rights are constitutionally entrenched. The constitutional court is weak and badly designed. Myanmar remains beholden to authoritarian legality shrouded in complexity and contradiction — a kind of dysfunction by design. The embers of autocracy still glow.

The Sydney Law School workshop aimed to contribute to the conversation around constitutional reform, as part of an important building block towards a national strategy in Myanmar for improved constitutional governance and accountability.

By providing key stakeholders with a series of 'constitutional tools' required to design and sustain constitutional democracy, the workshop had a practical and positive impact on the local process of constitutional reform.

A wide array of people were brought together to discuss vital but divisive developmental issues in a spirit of kinship and commonality, as participants negotiated their way to consensus positions on several important issues. This was particularly striking in a country where hierarchical, top-down command systems have often prevailed.

Small roundtables discussed the issues of the day, with moderation by





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designated lecturers. The nature of the roundtable discussion was driven by the participants, who aired strong views about priorities for constitutional change and directed questions to moderators on issues of particular and pressing salience. Aung San Suu Kyi participated, actively exchanging ideas with, among others, a young woman from Rakhine State, and a Member of Parliament from the Unity and Democracy Party of Kachin State.

At the top of the agenda was the need to reduce the stringency around amending the Constitution. Currently, three quarters of Myanmar's Parliament must approve constitutional change.

'The 75 per cent required to change the Constitution is unusually and absurdly rigorous and unprecedented in the world's constitutions today. It was clearly introduced for specific political reasons,' said Sadurski at a press conference following the workshop. 'If there is an area of consensus emerging from this conference, it's that the amendment that is needed is to the rules of the amendment.'

Other priority issues emerging from the workshop discussions included:

- Legal conditions of the rule of law — in particular, relaxing executive control over the judiciary and providing conditions for judicial independence;
- More genuine federalism or stronger decentralisation, and more clearly defined autonomy rights for ethnic minorities with practical effect;
- Strengthening of the separation of powers, including reducing the current imbalance in favour of the executive, and reducing the links between the military and the executive;
- Creating strong and independent

regulatory institutions, such as anti-corruption bodies, and providing guarantees of independence for the electoral commission, with a view to ensuring free and fair elections.

There are already signs that the workshop has had an impact on the national debate within Myanmar. Opposition leader Aung San Suu Kyi indicated in a speech on 27 May that the rule of law and internal peace should be given priority in amending the military-drafted 2008 Constitution. 'All the ethnic people, including the Bamar race, want an authentic federal system and to receive mutual rights. The National League for Democracy has to try to fulfill the needs of the ethnic people and this is related to amending the Constitution,' she said.

Further, Myanmar's Union Assembly circumscribed a state of emergency order in Meikhtila within a 60-day limit in the fortnight following the Sydney Law School's workshop. Prescribing temporal limits for states of emergencies was endorsed as 'best practice' during proceedings.

The workshop has engendered positive cross-institutional and cross-cultural conversation between the Sydney Law School and all arms of government in Myanmar, and with a variety of local counterparts in Myanmar including the Faculty of Law of Yangon University and representatives of minority groups. It had an immediate and constructive impact on Myanmar's political agenda, not only at a legislative level, but also at a community, grassroots level.

The role of constitutions in providing an effective model of governance in multi-ethnic societies is vital. Constitutions are not panaceas for all problems, but for a country like Myanmar, good

constitutional design is one of many 'necessary but not sufficient' factors of successful democratic transition. The people of Myanmar must now delve more fully into the specific local concerns that shape the application of constitutional theory in this remarkable country. And if they wish, Sydney Law School experts will be there to help. *jd*



Wojciech Sadurski is Challis Professor in Jurisprudence in the University of Sydney and Professor in the Centre for Europe in the University of Warsaw. He was visiting professor (in 2010, 2011 and 2012) at the University of Trento, Italy and in Cardozo Law School in New York. Previously, he has held professorial positions at the European University Institute. He has also taught as visiting professor at universities in Europe, Asia and the United States. He has written extensively on philosophy of law, political philosophy and comparative constitutional law. In 2013/14, Professor Sadurski is Straus Fellow and Global Visiting Professor at New York University Law School.

Mekela Panditharatne has worked as research assistant to Professor Sadurski. She is currently at Yale Law School.

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Three-year-old Shaunavarma Jayachandrah with his father, Manoj, is congratulated by Australian Prime Minister John Howard during a Australian citizenship ceremony in 2007. Picture by Chris Lane.

Who Are We?

'The People' and the Australian Constitution

Elisa Arcioni

Many people are familiar with the phrase 'We, the People' in the preamble to the US Constitution. Fewer know that the preamble to our own Constitution begins with a reference to 'the people', and that the Australian 'people' were more involved in the making of our Constitution than the American 'people' were involved in making theirs.

The renewed emphasis on Australian history in the national school curriculum may make a difference to what we know to be widespread ignorance as to how our *Constitution* came to be.

In this edition of *JuristDiction* we are focusing on the issue of constitutional reform. What changes might be needed with respect to the constitutional references to 'the people'? To begin with, there is no definition of the Australian 'people' in the *Constitution*. There are references to the people of the states and of the Commonwealth, electors and subjects of the Queen. But who are we? My work, relying on the words of the *Constitution*, the way the High Court has interpreted them and historical materials relating to the drafting of the *Constitution*, reveals we are not one 'people', but a complex mix of a number of groups. Some of us are more secure in our constitutional status; others have more limited access to constitutional protections or rights.

Consider, for example, the position of dual citizens. I have Italian citizenship, inherited from my parents and grandparents who were Italian citizens. I am also an Australian citizen by birth. My children are automatically dual citizens. Neither I nor they can be elected to federal Parliament because s 44(i) of the *Constitution* disqualifies us on the basis of citizenship of a 'foreign power'. As we have an allegiance to a 'foreign power', are we also considered to be 'aliens' who can be deported? On the basis of the law to date, we are not sure.

Consider electors in the Australian territories. Unlike electors in the states, they do not have a constitutionally protected federal right to vote. Section 122 of the *Constitution* says that the Parliament can grant representation to the territories 'on the terms which it thinks fit'. What the Parliament gives to electors in the territories, it can also take away. The difference in voting rights between electors in the states and those in the territories can also be seen in relation to referenda. Section 128 of the *Constitution* sets out the procedure to be followed in order to change the *Constitution* itself. That procedure includes a referendum where electors vote to accept or reject a proposed change. Electors in the territories could not vote at all in those referenda until 1977, when electors in the states approved a change to extend the referenda vote to people in the territories. But, it only applies to those territories that have already been granted federal representation by the Parliament.

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One obvious absence from our *Constitution*, leading to uncertainty as to who we are, and what flows from membership of the constitutional community, is any reference to Australian citizenship. The only reference to 'citizen' is in the context of *foreign* citizens being prevented from sitting as members of federal Parliament. At the moment we rely on federal legislation to provide the rules as to who is a citizen by birth and how one can become a citizen through naturalisation. The Parliament has changed the rules over time, and the High Court has struggled to work out the constitutional consequences of those changes. However, no proposal is currently in the political sphere suggesting a referendum on the matter.

An issue that has been the focus of discussion since Federation, and which is in the public arena once more, is that of recognising Aboriginal and Torres Strait Islander peoples in the *Constitution*. When the *Constitution* was drafted, s 127 excluded 'aboriginal natives' from being counted among the 'people' of the states and Commonwealth. While Aboriginal and Torres Strait Islanders were counted in the various state and Commonwealth censuses (albeit inconsistently and not comprehensively), they were then excluded from calculations required by a variety of sections of the *Constitution*. The Commonwealth could make special laws under s 51(26) with respect to people of a race, except 'the aboriginal race in any State' and according to s 25, a state Parliament could deny people a vote in their state on the basis of race. Some of those provisions were changed in 1967, leading to a constitutional silence with respect to Aboriginal and Torres Strait Islanders. Are they (now) part of the constitutional 'people'? Should they be recognised in the text and, if so, how? And with what consequences?



The statesman's mantle - John Howard attempts to write the preamble to the Constitution. 1999.
Geoff Pryor, National Library of Australia, vn4768824.



Aboriginal protesters at the 1999 Republican Convention.
Loui Seselja, National Library of Australia, an14067000-223.

Following the election of the minority Commonwealth Labor government in 2010, an agreement was reached between Labor and the Greens which included working towards the calling of a referendum to recognise Aboriginal and Torres Strait Islander peoples in the *Constitution* explicitly. The government convened an Expert Panel to consider the issue and the Panel reported to Parliament after extensive consultation. The Panel made a series of proposals, including: removal of all references to 'race' from the *Constitution*, inserting a new section recognising Aboriginal and Torres Strait Islander peoples and giving the Parliament the power to make laws 'with respect to' those peoples, a prohibition of racial discrimination, and a recognition of Aboriginal and Torres Strait Islander languages while at the same time recognising English as the 'national language'.

Rather than call a referendum on the matter, the federal government introduced legislation to recognise Aboriginal and Torres Strait Islander peoples. That legislation set up a review process to encourage more debate and development of constitutional reform proposals that would be likely to receive sufficient support in order to be successful in a referendum. Some of the Australian states have also introduced some measure of recognition within state legislation, but usually in a form that has only symbolic rather than legal effect. The federal government is now investing money into building the momentum for constitutional reform in this area, with the work being led by Reconciliation Australia.

There is no indication, however, that the forthcoming (at time of writing) election will have constitutional recognition as a high priority. To date, the political arena has been overwhelmed with leadership disputes, debate on asylum seeker policy and on climate change, and other concerns. However, the issue of constitutional reform to bring our foundational document in line with the reality of our identity will not go away. We do need to consider how the *Constitution* reflects the historical fact that Aboriginal and Torres Strait Islander peoples were here, with their own systems of law, long before white people. We need to consider whether the *Constitution* can help us address the injustice of non-recognition and the ongoing consequences of that history.

This is only one of a number of areas regarding the Australian constitutional 'people' that is worthy of attention. Should there be constitutional differences between people in the states as compared to people in the territories? What constitutional impact, if any, should flow from dual citizenship? Inclusion of a constitutional definition of Australian citizenship may not be the answer. However, we do need to understand the contours of what the *Constitution* says about our identity and consider whether changes need to be made so that our foundational document reflects who we, 'the people', really are. *jd*

This is only one of a number of areas regarding the Australian constitutional 'people' that is worthy of attention. Should there be constitutional differences between people in the states as compared to people in the territories?



New Australian Citizens swear the oath in front of Queanbeyan mayor Tim Overall centre. Picture by Jeffrey Chan.



Elisa Arcioni is a senior lecturer who joined the Sydney Law School in 2012. Prior to that she was a lecturer in law at the University of Wollongong and associate to the Honourable Justice Michael Kirby, High Court of Australia.

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A Constitutional Recipe for an Australian Republic

Helen Irving

One fine day, an Australian republic may be back on the national agenda. If a republic is ever to be achieved, a referendum to amend the *Constitution* will be needed. Success will be difficult.

Most referendums in Australia's constitutional history have failed. We don't really know why, but we have some reasonable intuitions. Proposals that are radical — or able to be depicted as such — have a lower chance of success than proposals that reflect the status quo or the comfortable aspirations of the majority. Referendums that incorporate multiple changes in a single question are less likely to succeed than those with few. Proposals that attract any level of organised opposition are as good as certain to fail. The 1999 republic referendum suffered from all these drawbacks. Its resounding defeat suggests that another attempt should only be made when there is unmistakable evidence of support.

Some republicans see a referendum as the opportunity for major constitutional change. In 1999, the 'maximalists' included advocates of the direct election of the head of state, and those who wanted a bill of rights in the *Constitution*. To be blunt, neither has much chance of success.

Although, in 1999, direct election was popular with many Australians, many others, including political leaders, were implacably opposed. A powerful 'No' alliance would be certain to form were direct election included in a referendum question. However popular the idea might appear, the record would indicate almost certain defeat. (Seemingly popular proposals have failed in the past.)

The more recent experience of the National Human Rights Consultation's proposal that Australia should adopt a non-constitutional *Human Rights Act* is indicative of the likely outcome if a bill of rights were included. In 2010,

a concerted oppositional campaign by, among others, religious and political leaders, led to the proposal's abandonment by government. A constitutional proposal would unquestionably attract even fiercer opposition.

Everything we know about referendum history and Australian attitudes suggests that minimal changes should be sought. Those who want a republic have to be realistic. For success to be conceivable, the proposal should leave as much of the *Constitution* untouched as possible. This is less defeatist than it sounds; current constitutional practices are, in fact, already well on the way towards a republic.

The 1999 referendum proposed replacing the *Constitution's* references to the Governor-General with references to a 'President', to be appointed by a two-thirds majority of the Commonwealth Parliament, with the nominee chosen by the Prime Minister in agreement with the leader of the Opposition. As a concession to the widespread wish for popular choice, the Prime Minister's list of candidates was to be provided by a broadly representative nomination committee, appointed by the Parliament.

This proposal didn't satisfy either side.

The plan was to be minimalist, but the proposed changes were complicated and unnecessarily large in number. First, the title 'President' was a mistake. 'President', for some, invoked an American-style executive, unnecessarily suggesting radical change. Further, the substitution of 'President' for 'Governor-General' would have required



Picture By Craig Sillitoe.

56 separate alterations to the *Constitution's* text. Additionally, since 'President' already appears in the *Constitution*, a further 12 changes would be needed to clarify that, in context, this means 'President of the Senate'.

The term 'Governor-General' should be retained. It is familiar to Australian ears. It makes structural sense (the states have Governors). It isn't etymologically monarchical and nor is it constitutionally problematic. Like the name 'Commonwealth', its retention would not compromise the republican principle.

Some modifications will still be unavoidable. The *Constitution's* references to the Governor-General as 'the representative of Her Majesty' will have to be deleted. But this is hardly drastic, since the Governor-General hasn't acted as the Queen's representative for decades. The deletion of the words saying the Governor-General is 'appointed by the Queen' will be necessary, but will only have a minor impact. The Queen (who, nowadays, acts on the Australian Prime Minister's advice regarding appointments) will simply no longer issue the Governor-General's commission. In some places, references to the Governor-General will have to be added: for example, to replace 'the Queen' in the list of those 'vested with' the legislative and executive power of the Commonwealth. But the *Constitution's* references to the 'Governor-General-in-Council', meaning that he or she acts only on Australian government advice in particular matters, should not be altered.

In several sections, the *Constitution* refers simply to the 'Governor-General'; for example, with respect to issuing the writs for an election. Such references should also stand. Technically, they allow the Governor-General to act on his or her own initiative. While some people may want these powers exercised only on government advice, this would demand a much larger debate about the head of state's role than is necessary. The reality is that the Governor-General has almost never acted otherwise than on advice — the events of 1975 must be treated as an exception — and this would not change because Australia became a republic.

Some have suggested that, freed from an implicit mental obligation to ask 'what would the Queen think?', the Governor-General would feel personally empowered, potentially in conflict with the government. This is speculation only, but needs consideration. History provides us with one counter-example. When the first Australian-born Governor-General, Isaac Isaacs, was nominated by Prime Minister Scullin in 1930, the British government and the King were opposed. Critics suggested that an Australian would lack impartiality and that Isaacs might be compromised by friendships and former party associations. Nothing of the sort eventuated. Isaacs performed his duties with probity and dignity.

What else needs to be changed? Twenty years ago, Professor George Winterton worked through the whole *Constitution*, drafting alterations and additions, to demonstrate how an Australian republic could be achieved. In addition to proposing the choice of the head of state (whom he gave the title 'President') by an absolute majority of two-thirds of both Houses of Parliament, Winterton added many other procedural sections concerning the head's appointment and the circumstances surrounding possible removal. The *Constitution* currently says little about the Governor-General's tenure, and while these additions are not strictly necessary, they are sensible and mostly uncontroversial (they could, however, more easily be incorporated into the *Governor-General Act*, avoiding extra constitutional change).

Winterton also proposed removing the 'dead letters': obsolete provisions, such as those that once gave Britain the power to disallow Australian legislation. This, too, is sensible and unlikely to arouse controversy, although it is not constitutionally necessary. The 'spent' provisions — those that were transitional or temporary in 1901 — are different. They reflect the particular arrangements around the *Constitution's* adoption and early operation. The

Constitution is a historical document, as well as a legal one. These provisions are part of its story. None of them compromises the republican goal. Since we want as little change as possible, it will be wiser to retain them. Further, the historical context has assisted the High Court in the interpretation of other constitutional provisions, and this suggests caution in erasing constitutional history.

Winterton was mostly a 'minimalist', but he went further than the minimum and also proposed new provisions to 'fortify' the rule of law and representative government, including empowering the Parliament to control the executive and to define the head of state's 'reserve powers'. These changes, I suggest, go beyond the simple republican goal and are too complex or potentially controversial for success at a referendum. They reflect important values, but ways of satisfying them without constitutional change should be explored.

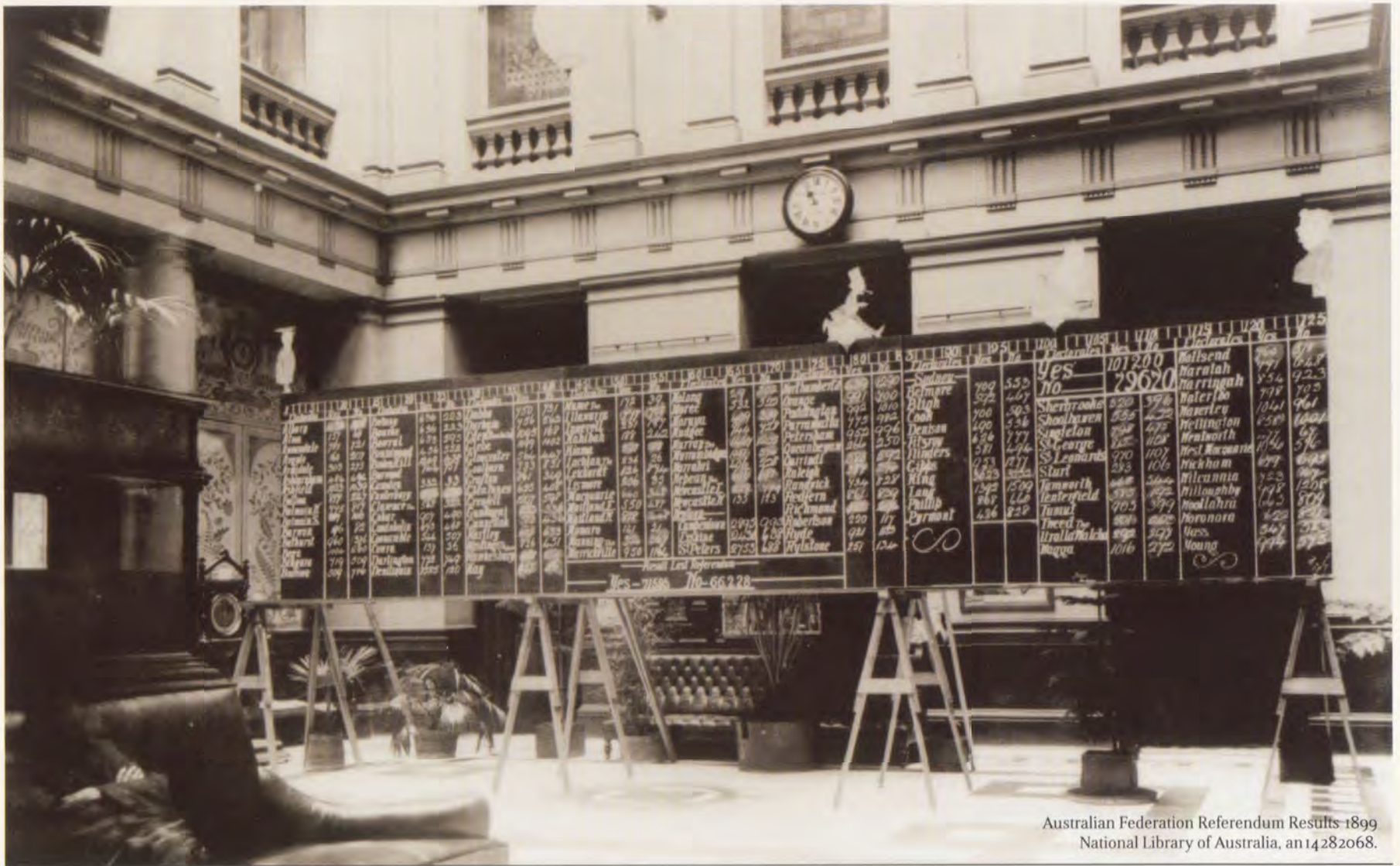
My 'ultra-minimalist' goal is a model that, as far as possible, will generate consensus. Some alterations will require particular reflection. Section 117 of the *Constitution* prohibits the states from discriminating against a 'subject of the Queen' on the ground of residence in another state. Winterton and the 1999 republic proposal would have substituted the words 'Australian citizen'. But when it was written, this section protected many non-Australians who were also 'subjects of the Queen': New Zealanders, Canadians, Britons, Irish, South Africans, Indians, and more. Do we want this protection to extend to Australian citizens alone?

Does a republic need a new preamble? Technically no, although it would seem stingy to suggest going without one. Some sort of 'declaration' seems appropriate for significant change. The existing preamble (which is the preamble to the *Constitution Act*, of which the *Constitution* is a part) sets out the historical agreement of the people of the former colonies to unite in an 'indissoluble federal Commonwealth'. It also states that the Commonwealth is 'under the Crown of Great Britain and Ireland'. This is already inaccurate, but changing words in the non-constitutional part of the Act may be complicated. My preference is to leave the preamble intact, and insert a heading, 'Historical Clauses', at the start of the Act, then add a new preamble at the top of the *Constitution* proper. (We can assume that a referendum on Indigenous recognition will already have been held.) The new preamble should also be minimalist. Above all, it should avoid trying to capture Australian 'values'; these will inevitably be controversial and unnecessarily divisive. Winterton's words for a new preamble — 'We, the people of Australia, have decided to constitute the Commonwealth of Australia as an independent federal republic' — will be all that is needed.

My argument is for minimal change, not merely to improve the chances at a referendum, but also because incremental or moderate change is generally the best way to proceed. It allows people to adjust their expectations; it is respectful of those who do not want change at all; it gives everyone time to adapt. This is not the same as proposing only 'Burkean' organic change. Waiting for constitutional change to happen of its own accord, or 'when the time is right', means that nothing — at least nothing planned — will happen. *jd*



Professor Helen Irving (PhD 1987, LLB 2001) teaches and researches in Australian and comparative constitutional history and law. She also keeps a blog on women and constitutional issues: blogs.usyd.edu.au/womansconstitution. This article is an edited version of 'Amending the Constitution: Achieving the Democratic Republic', in Benjamin Jones and Mark McKenna (eds) *Project Republic* (Black Inc, 2013).



Australian Federation Referendum Results 1899
National Library of Australia, an 14282068.

Local Government Referendum Yes, No and When?

Anne Twomey

Australia has a pretty dismal record of constitutional reform, and no wonder, given how badly governments manage it.

The proposed referendum on direct funding of local government is a case in point. The Commonwealth committed to holding it at an election on 14 September 2013, passing the necessary legislation at the last possible minute to meet the constitutional requirement of a minimum period of two months before voting on the referendum can commence. But then there was a change of Prime Minister, the election date went out the window, uncertainty reigned on whether it would be held or not, and finally an election was announced for 7 September — a week too early for the referendum to be held. If elected, the Rudd government said it would reconsider holding the referendum later, while an Abbott government is uncommitted. Meanwhile, millions of dollars have been spent on a campaign for a referendum that may not happen at all.

In the midst of this chaos, the Constitutional Reform Unit (CRU) at Sydney Law School attempted to bring some order and enlightenment. The CRU was established to support the

constitutional reform process. Its role is to provide objective information to voters and opinion-makers, so that people can make a genuinely informed choice about constitutional reform. This is particularly important when much of the parliamentary debate and the official 'Yes/No' case are prepared by people advocating a particular result, who seek to persuade rather than to inform. In the past, Yes/No cases have often been inaccurate, misleading, emotive and prejudicial — but rarely informative or fair.

The CRU therefore prepared its own alternative Yes/No case, along with some FAQs to provide the necessary background information. It also published a detailed academic paper and bibliography for those who wanted to explore the issues in more detail. While the referendum was not held in September, the proposal is still alive and the work done will be available if and when it comes back on the public agenda. Following is a shortened version of the alternative Yes/No case. The full information is at: sydney.edu.au/law/cru/lgr.shtml

Yes Case

Pryor, Geoff, *Crossroads*, 1992.
1 drawing : pen and ink on board.
National Library of Australia, vn3062520

1. The power of the Commonwealth Parliament to fund local government directly is in doubt.

Local government has, since the 1920s, received Commonwealth funding by way of grants to the states on condition that the money is passed on to local government. In recent years the Commonwealth has given some of that money directly to local governments, bypassing the states. The constitutional validity of this direct form of funding was put in doubt in 2009 by the High Court's *Pape* decision ((2009) 238 CLR 1).

2. It is likely that some schemes providing direct funding of local government would be declared invalid if they were to be challenged in the High Court.

The proposed change would explicitly provide the Commonwealth with the power to fund local government directly, removing any doubt created by the High Court's decision.

3. Constitutional recognition would acknowledge the role played by local government in Australian society.

Local government has a significant role in the provision of services. Local government bodies also work collaboratively with state and Commonwealth governments in the development and implementation of policy objectives. This contribution will be recognised by including an express reference to 'local government' in Australia's most important legal document. Constitutional recognition of local government may help engender respect in the community for local government as an essential feature of the Australian system of government.

4. Direct funding of local government would avoid time-consuming negotiations with the states.

Using the existing system of funding local government bodies through conditional grants to the states may result in delays which could be problematic when urgent funding or immediate economic stimulus is needed.

Direct Commonwealth funding would allow the Commonwealth to bypass the states, permitting funding to flow to local government more quickly. It would avoid haggling about terms and conditions and allow governments to get on with the provision of services and facilities to the public.

5. The power to fund local government directly may result in more funding.

The Commonwealth may be more likely to fund existing programs or new programs

at the local level if there is political advantage in doing so. Although indirect funding of local government is possible by way of conditional grants to states, the Commonwealth may prefer to implement its own policies at the local level so that it can gain the electoral credit for building roads, sporting grounds and community facilities. This may give it the incentive to increase its funding.

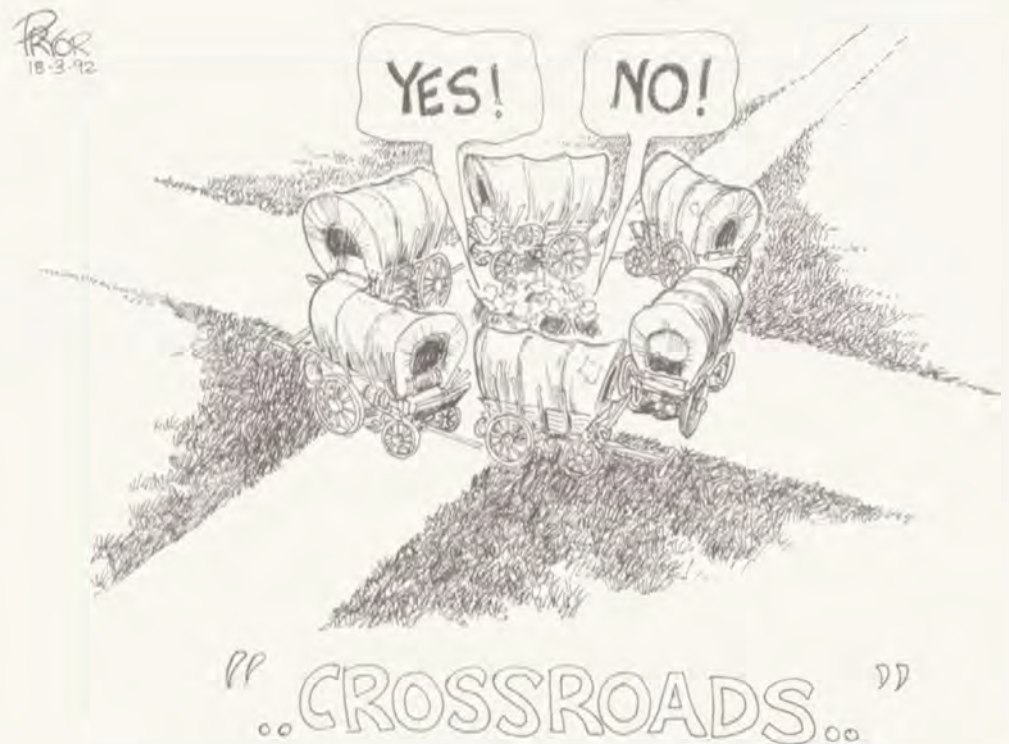
Funding through the states is also dependent on state wishes, which may be different from Commonwealth policies.

6. The Commonwealth would be better equipped to pursue national policy objectives.

Collaboration between local government and the Commonwealth may result in more targeted investment in the provision of local services and the pursuit of national policy objectives. It would avoid the Commonwealth having to negotiate with the states about shared policy aims and instead permit the Commonwealth to pursue national policy objectives by funding local government bodies to implement them on the ground.

7. Constitutional recognition would help the voice of local government be heard.

Local government is the level of government that is closest to the people. Its voice is often lost in the development of policy at the Commonwealth and state levels and in discussions on how it should be implemented. Constitutional recognition of local government may encourage other levels of government to listen to local government bodies about their needs and community wishes.



No Case

1. The Commonwealth Parliament already has the power to fund local government.

The *Constitution* already provides the Commonwealth with the power to make grants to the states on the condition that all the money is passed on to local government. Even if direct funding of local government is unconstitutional, there is no risk to local government, because the same money can be paid to local government by way of conditional grants to the states. There is simply no need for change.

2. The Commonwealth would have more influence over local government policy.

Any direct funding to local government would be on such 'terms and conditions as the Commonwealth Parliament thinks fit'. Those terms and conditions can extend to anything that a local council does, regardless of whether the Commonwealth's money funds it. This may limit the ability for local government bodies to pursue their own objectives in their own communities. It could turn them into agents of the Commonwealth, causing them to lose their identity and their capacity to implement the wishes of their local communities.

Any direct funding to local government would be on such 'terms and conditions as the Commonwealth Parliament thinks fit'.

3. The establishment of a central authority to oversee funding arrangements may be more costly and inefficient than the current system.

Local government has different responsibilities and roles in each of the states. If local government were to be funded directly from Canberra, a new federal bureaucracy would be needed to collect and assess information from each local government body. It would need to develop a single funding formula to fit different local government bodies

across the country. This would be difficult, administratively burdensome and expensive. It would also increase the administrative burden on local government bodies as they would have to provide different information, based upon different funding formulas, to two different levels of government.

4. Direct funding would not necessarily result in increased funding.

The Commonwealth can already give as much money as it wants to local government. Changing the *Constitution* will not put any more money into Commonwealth coffers to allow it to spend more from its budget on local government. Funding may even be reduced if the Commonwealth deducts from grants its increased administrative costs, as it does with the GST.

5. It would centralise power in the Commonwealth.

This expansion of Commonwealth power would contribute to the centralisation of power in Australia. It would permit the Commonwealth to bypass the states and fund projects at the local level on any policy area, even when it is not otherwise within Commonwealth power. The High Court in two recent cases held that the Commonwealth cannot spend money on programs that are not otherwise within its powers. This proposed amendment would provide an escape clause so that the Commonwealth could interfere in policy areas outside its powers by using conditional grants to local government, centralising even more power in Canberra.

6. Accountability would be reduced and the 'blame-game' extended.

A local government body would be accountable to both Commonwealth and state governments, as well as its electorate. The Commonwealth could impose conditions on its grants which may be inconsistent with state policies or incompatible with existing structures and procedures. It may also tie up local government budgets, placing conditions on grants that local government must 'match' funding or maintain funding levels in relation to particular programs. This is likely to lead to a lack of responsibility,

as some areas of local government will be over-funded, some under-funded and many important matters will simply get lost in between. The Commonwealth, state and local governments will all blame each other for these failings and no one will be accountable. It is hard enough for local government to be accountable to two masters (the state and the local community). Being accountable to three masters would be impossible. *jd*

Local government has different responsibilities and roles in each of the states. If local government were to be funded directly from Canberra, a new federal bureaucracy would be needed to collect and assess information from each local government body.



Professor Anne Twomey has worked as a solicitor, and for the High Court of Australia as a Senior Research Officer, the Commonwealth Parliamentary Research Service as a researcher in the Law and Government Group, the Commonwealth Senate as Secretary to the Senate Legal and Constitutional Committee, and The Cabinet Office of NSW as Policy Manager of the Legal Branch.

Constitutional Reform and Executive Power

Peter Gerangelos

Two recent decisions of the High Court — *Pape* (2009) 238 CLR 1 and *Williams* (2012) 288 ALR 410 — have highlighted a potential need for constitutional reform to an important aspect of the *Constitution* which has long suffered from a deficit of clarity — one which can no longer be ignored — the ambit of the executive power of the Commonwealth and its relationship to Commonwealth legislative power.

Executive power, by s 61 of the *Constitution*, 'is vested in the Queen and is exercisable by the Governor-General [on advice from Commonwealth Ministers] as the Queen's representative' and 'extends' to 'the execution and maintenance of this Constitution, and of the laws of the Commonwealth'. These meagre words, albeit loquacious when compared to analogous jurisdictions, do not easily permit a precise definition of the power of the Commonwealth executive: 'the government'. While the validity of government action is usually determined by reference to relevant statutory provisions that may authorise it — the powers of the Minister under the *Migration Act*, of the Commissioner under relevant tax statutes, and so on — this can become problematic in the absence of a governing statute.

The emblematic scenario remains 'the *Tampa* incident', in which Commonwealth forces were authorised to use coercion to board a foreign ship and detain 'friendly aliens' aboard who had been rescued from their own sinking boat. Without discounting the underlying human tragedies which often arise in such cases — indeed because of them — there is a pressing need for clearly defined limits to determine what the Commonwealth can do in situations of national emergency, natural disaster, terrorism, border-protection and so on. Quick and decisive action may be required, potentially involving the use of force, the destruction of property, the temporary suspension or abrogation of civil liberties.

From the perspective of constitutional architecture and symmetry, not to mention the maintenance of the rule of law, the resolution of this issue must be consistent with both the separation of powers (the relationship in particular between the executive and legislature), on the one hand, and federal balance (the respective powers of Commonwealth and State Executives) on the other. In relation to the former, the issue is whether there is a pocket of executive power that may be immune from parliamentary regulation or control. In relation to the latter, uncertainty with respect to the ambit of Commonwealth executive power will usually favour the expansion of Commonwealth power over that of the States.

The pre-*Pape* position, while not perfect, did quite well in maintaining this symmetry: the ambit of s 61 was defined ultimately by the prerogatives and capacities of the Crown recognised by the common law, exercisable within the field determined by reference to Commonwealth legislative competence. Thus, the Republic Advisory Committee was able to state confidently (*The Options* —

The Report, at 146) that in 'the light of the *Constitution's* background in British constitutional history and the common law, s 61 has been treated as a shorthand prescription for incorporating the prerogative in the Crown in right of the Commonwealth; so that the full range of executive prerogatives relevant to Commonwealth legislative power is vested in the executive government of the Commonwealth, and the executive power of the Commonwealth, like the (common law) prerogatives, is subject to control by legislation'. Even though these may have at times been difficult to discern, many (external affairs, defence, granting of honours, entering into contracts, and so on) were quite settled. The common law provided legally discernible criteria by which to determine the issue and, consistently with responsible government, did not disturb the supremacy of Parliament over the executive power. Commonwealth executive power was limited to Commonwealth spheres of operation determined by the extent of its legislative competence as set out in the enumerated heads of its legislative power in the *Constitution*, thus setting up some protection for the sphere of State executives.

Nevertheless, the degree of uncertainty was such as to render the issue worthy of close examination by the Constitutional Commission in 1987, and more recently, by the Republic Advisory Committee in the 1990s, and by the Legal and Constitutional References Committee in 2004. To remove any uncertainty, the Republic Advisory Committee suggested that constitutional provisions be drafted, expressly subjecting Commonwealth executive power to legislative control in order to secure parliamentary supremacy over the executive, to shut the door firmly on any suggestion (leaving aside for the moment the special case of the reserve powers) that the executive could make good some power of its own, immune from legislative control.

The need for constitutional reform to remove uncertainty has arguably become more acute following *Pape* (confirmed in *Williams*) where it was held that the common law no longer provides the outer limit to s 61 executive power. Instead, the 'maintenance' limb in s 61 is to be regarded as adding inherent content to executive power which is derived from the character and status of the Commonwealth as a national polity, the contours of which can be deduced from the existence and character of the Commonwealth as an independent federal national government. As the High Court has eschewed any precise definition, beyond determining the issue on a case-by-case basis, this concept remains very elusive indeed. Without reference to the common law, it is difficult to identify legally discernible



Left: Gough Whitlam and Bob Hawke watching Sir John Kerr putting his reserve powers shotgun away in the Australian Constitution safe. McCrae, Stewart, 1919- "Does this mean we'll have to blow the safe before we can disarm him?" National Library of Australia, vn3105152.

Without reference to the common law, it is difficult to identify legally discernible criteria by which to determine the outer bounds of executive power.

criteria by which to determine the outer bounds of executive power. The question must be asked: How can the court avoid making determinations based purely on policy and subjective considerations, especially in the face of an executive invoking a national emergency or exceptional circumstances — and avoid being dragged too deeply into political controversy? Now held to be derived *directly* from s 61, as opposed to indirect derivation from the common law incorporated therein, there is greater potential for the executive to make good any potential claim of immunity from legislative control, at least in certain circumstances. This is not a desirable outcome. Although less likely in a mature representative democracy, executive power remains the power most susceptible to abuse. The consequences are potentially corrosive to civil liberties and the values which inhere in a system of representative and responsible government. Although the political situation in Australia is relatively stable and benign, the experience of history, and a pragmatism born of present realities, counsel against complacency.

There is the added problem that by making reference first to s 61 to determine the ambit of the power, and then to the implied incidental legislative power in s 51(xxxix), the *legislative* competence of the Commonwealth is also expanded to support this expanded executive power; whereas under the previous position, the executive power always followed, and was thus limited by, the legislative.

In my view, the requirements of responsible government, implied in the *Constitution*, are most likely sufficient to maintain the supremacy of Parliament over the executive, even as against the importunate whispers of the separation of powers. But that is one view and there have been contrary voices that have suggested that because executive power is expressly vested by s 61, a constitutional provision, aspects of it at least remain separated, immune, from legislation. The former view thus needs to be bolstered by constitutional reform. However, the various reform proposals have not been consistent, either in terms of the precise nature of the reform or as to how much should be defined and how much left flexible to accommodate an evolving political process. Be that as it may, I suggest the following constitutional amendments have much to commend them:

1. A provision that the executive power of the Commonwealth shall be subject to the legislative power of the Commonwealth.
2. A provision that s 61 executive power exercisable by the Governor-General must be exercised on ministerial advice.

3. An addition to s 51 to authorise the Parliament to make laws with respect to the exercise of any executive power vested by the *Constitution* in the Governor-General (and where the reserve powers are concerned, to require at least a two-thirds majority in each House).
4. Until such laws are enacted, a provision requiring that executive power be exercised pursuant to existing constitutional conventions.

It is not clear when a propitious moment may arise to reconsider these matters seriously, but it may be wise not to wait. In the meantime, when pondering the ambit of s 61 executive power by reference to elusive 'nationhood'-type considerations, concerned about prevention of undue aggrandisement and uncertainty about how to proceed toward some reasoned limit, one could do a lot worse than consider, as a starting point, the advice of a past Professor of Medieval and Renaissance Literature at Cambridge, who said rhetorically: 'The State exists simply to promote and to protect the ordinary happiness of human beings in this life. A husband and wife chatting over a fire, a couple of friends having a game of darts in a pub, a man reading a book in his own room or digging in his garden — that is what the State is there for. And unless they are helping to increase and prolong and protect such moments all the laws, parliaments, armies, courts, police, economics etc. are simply a waste of time.' Perhaps this was a mere throwaway comment, but the sentiments it represents may be worthy of consideration. *jd*



Prior to joining Sydney Law School, Peter Gerangelos (BA 1982, LLB 1988) had extensive experience in practice as legal counsel to the Commonwealth, holding the position of Principal Solicitor in the Office of the Australian Government Solicitor. He was also the Commonwealth Attorney-General's Scholar (1996). He is a member of the

Australian Association of Constitutional Law and the Convenor of the George Winterton Memorial Lecture Series. He is the leading author and general editor of the leading casebook, *Winterton's Australian Federal Constitutional Law*.



Clinical Legal Education

Educating Lawyers and Empowering Communities

Russell Schmidt

In 2012 I had the opportunity to participate in the Sydney Law School's Social Justice Clinical Course, which saw me placed at the Public Interest Advocacy Centre Ltd (PIAC) for a supervised internship. During my studies I also had the privilege of undertaking internships with the Federal Court of Australia and the Environmental Defender's Office. I consider these experiences, and what I learnt outside of the classroom, to have given me the ideal preparation for the transition from student to professional.

While in my final semester, the opportunity arose to complete an internship with an organisation in Thailand focusing on clinical legal education. So, I submitted my final exam at Law School on a balmy Saturday morning, and within 24 hours I was on a plane, heading towards the stifling humidity of Chiang Mai in northern Thailand, to begin volunteering with Bridges Across Borders Southeast Asia Community Legal Education Initiative (BABSEA CLE).

Throughout Southeast Asia, respect for the rule of law and the merits of access to justice programs are relatively new concepts. I developed an interest in this area while at the Federal Court, where I conducted research that ultimately contributed to a benchbook for the Supreme Peoples' Court of Vietnam under an AusAID funded project. Now, even though I am based in Thailand, I have worked with students from the University of Economics and Law in Ho Chi

Minh City to develop a curriculum for use in their university legal clinic in Vietnam, which has allowed me to pursue my interest in strengthening the rule of law.

I have had the benefit of seeing development work from many angles. I have helped our Thai team with outreach work at a refuge for pregnant women who have been abused, incarcerated or ostracised, where we informed them about the legal process of acquiring and demonstrating Thai nationality — a huge problem for refugees, hill-tribes and women from rural areas. I have also worked in our office with the US Embassy in a successful effort to fund this outreach program into the future. In addition to curriculum development, I have assisted with training sessions on legal ethics for both academic staff and students at both Chiang Mai University and at the National University of Laos in Vientiane.

During my time in Thailand I have become enamoured with the complex and fascinating place that is Myanmar. My knowledge of Myanmar prior to arriving in Chiang Mai, which is home to a large number of refugees and migrants, was limited largely to Daw Aung San Suu Kyi and the state of Myanmar's democracy. In Australia, little attention is paid to the occupation of Shan and Kachin by an estimated 100,000 Burmese troops, nor to the alleged role that some of the monks, collectively a social pillar in Myanmar, have played in the appalling and overtly racist violence



that is being committed against the minority Islamic Rohingya people. While BABSEA CLE's work, in Myanmar and other countries, intentionally avoids many of these sensitive political issues, I have a strong belief that it is through strengthened education and training of the students who will become leaders that positive solutions can be found to these problems.

The majority of universities in Myanmar have shown an eagerness to implement CLE methodologies in their curricula, putting BABSEA CLE in an almost unique position with respect to its ability to engage in justice education capacity building. During my time here I have helped adapt education materials for use in-country and worked on numerous proposals with the United Nations Development Programme to see this dream become a reality.

It is law students who will, in large part, go on and become not just the judges, but the politicians, administrators and advocates of the future. As Myanmar looks forward to the elections of 2015 and the period beyond, even under the currently troubling constitutional situation, it makes the importance of the education of these future leaders about the rule of law, ethical practice and social justice all the more important.

The thought that I have been at the cutting edge of a project that will deliver a tangible benefit to some desperately poor, marginalised and repressed people is not only heart-warming but makes me incredibly grateful for the education that I have the benefit of and my decision to go to Sydney Law School. I could not be happier with where my studies have taken me, the people they have led me to meet, and the experiences I have had here. *jd*

Russell Schmidt (BA 2011) has completed his studies at Sydney Law School and will graduate with an LLB in November 2013.





60 YEAR REUNION — CLASS OF 1953

Sydney Law School recently hosted its first 60-year reunion, for the graduating class of 1953. Fifteen graduates attended a lunch at Sydney Law School.

The event was organised by the Hon Eric Baker, Mr Neville Head and Mr Geoffrey Biggers in conjunction with Sydney Law School.

Mr Neville Head acted as Master of Ceremonies for the occasion and Mr Michael Foster, QC contributed by making a humorous speech in which he recorded anecdotes of events that occurred during the undergraduate years of those present.

Alumni Officer, Greg Sherington, took the group on a tour of the new facilities at Camperdown, before the Dean, Professor Joellen Riley, addressed the gathering on teaching law in the 21st century.

Those that attended were the Hon Eric Baker (LLB 1953), Mr Bruce Brown (BA 1950, LLB 1953), Mr Ken Cato (LLB 1953), Mr Samuel Cook (LLB 1953), the Hon Harvey Cooper, AM (LLB 1953), Mr Ian Curlewis (LLB 1953), the Hon Michael Foster QC (BA 1949, LLB 1953, LLM 1975), Mr Neville Head (BA 1950, LLB 1953), Mr Geoffrey Kolts QBC QC (BA 1950, LLB 1953), Mr Constantine Limbers (BA 1950, LLB 1953), Mr Thomas Magney (LLB 1953, LLM 1974), the Hon Clement Mitchelmore (BA 1950, LLB 1953), Mr David Panckhurst (LLB 1953), Mr John Parnell OAM (LLB 1953, LLM 1969), the Hon James Staples (BA 1950, LLB 1953).



Alumni and Student News



DR MARK LEEMING SC APPOINTED TO SUPREME COURT OF NSW

Sydney Law School congratulates Dr Mark Leeming SC (BA 1991, LLB 1993, PhD 1997) on his appointment as a Judge of the Supreme Court of NSW and a Judge of Appeal.

Dr Leeming has taught equity part-time at the Sydney Law School since 1995 and has been its Challis Lecturer in Equity for the past nine years.

SYDNEY LAW SCHOOL ALUMNI QUEEN'S BIRTHDAY HONOURS

Alumni and friends of Sydney Law School were recognised in this year's Queen's Birthday Honours.

Mr Christopher Herbert Brown OAM (LLB 1972, LLM 1978): for service to the community, particularly to people with a disability.

Dr Elwyn Edgar Ernest Elms OAM (LLB 1967, DipCrim 1990): for service to the law in New South Wales, and to the community.

Mr James Herbert Marsden OAM (LLB 1973): for service to the community of Campbelltown.

Mr Gambhir Watts OAM (MALP 1999): for service to multicultural relations in New South Wales.

The Hon Paul Robert Andrew Munro AM (LLB 1961): for significant service to workplace relations, the trade union movement, and to industrial law.

Mr Kenneth Reginald Reed AM (BA 1957, LLB 1960): for significant service to the performing and visual arts as a supporter and philanthropist.

Mr Nigel Richard Ray PSM (BEC 1982, LLB 1984, MEc 1987): for outstanding public service through contributing to economic policy and the Australian Government's fiscal strategy in response to the Global Financial Crisis.

Mr James Lindsay Glissan ESM QC (BA LLB 1971, LLM 1976).

ALUMNUS WINS VIET NAM NATIONAL ENVIRONMENT AWARD

Sydney Law School congratulates Nguyen Van Duyen (MEL 2001) on winning the Viet Nam National Environment Award.

The Viet Nam National Environment Award is the only official award conferred by the Minister for Natural Resources and Environment of Viet Nam for organisations, communities or individuals who have made outstanding contributions to the cause of environment protection in Viet Nam.

Every second year the award is announced and awarded on the occasion of World Environment Day (5 June).

The Deputy Prime Minister and Minister for Natural Resources and Environment, Nguyen Thien Nhan, attended and presented the awards.

Nguyen has donated all the money from the award to contribute to installing a clean water system for a school for ethnic minority students in the mountainous district of Bac Ha, Lao Cai province.

In 2011, Nguyen was awarded the Australian Alumni Award for sustainable community development for his work in sustainable land management to combat desertification due to climate change in Viet Nam.

NEHA KASBEKAR WINS GOVERNOR-GENERAL'S UNDERGRADUATE ESSAY COMPETITION

Congratulations to the winner of the Governor-General's Undergraduate Essay Competition, Neha Kasbekar. Now in its 10th year, the competition, organised by the Constitution Education Fund Australia, is one of Australia's most prestigious, providing students with the opportunity to be recognised for their academic skill, talent and research.



Finalists this year were interviewed by an eminent panel chaired by the Hon Justice Kenneth Hayne AC of the High Court of Australia.

The panel included the Hon Justice Pamela Tate of the Court of Appeal, Supreme Court of Victoria, Professor Peter Gerangelos (The University of Sydney), Mr George Harris (Partner, Baker & McKenzie), Dr Peter Johnston (Senior Barrister and Lecturer in Constitutional Law) and Professor HP Lee (Sir John Latham Chair of Law at Monash University).

Neha's essay discussed the 'yes' and 'no' cases in the current push for recognition of the Aboriginal and Torres Strait Islanders in the *Australian Constitution*. The judges were highly impressed with Neha's extensive research and her written and verbal critical analysis of the topic, awarding her the Professor George Winterton Prize.



VALE PENNY PETHER

Staff and alumni of Sydney Law School were saddened to learn of the death of esteemed alumna and longstanding colleague, Professor Penelope 'Penny' Pether, aged 55.

Professor Pether completed her studies at the University of Sydney (BA 1980,

LLB 1982) and practised as a solicitor at Freehill, Hollingdale & Page (now Herbert Smith Freehills). She later worked at the Ombudsman's Office, investigating alleged police misconduct. Keenly interested in English Literature, she completed her Master of Letters at the University of New England and became an assistant lecturer at the University of Sydney, where she completed her PhD, focussing on the authors E M Forster and Virginia Woolf.

Professor Pether's colleagues at Sydney Law School knew her as an incisive scholar, and welcomed her generosity and humour. She had a profound passion for education.

After meeting Professor David Caudill (who was to be her husband) at a conference in California in 1996, Professor Pether moved to the United States to pursue her career in academic education. She taught at the University of California-Irvine, Southern Illinois University, American University and Yeshiva University's Cardozo Law School. With her husband, Professor Pether joined the faculty at Villanova University School of Law in 2005.

Professor Pether wrote on comparative constitutional law and government power and was known as one of the leading lights of the discipline often loosely described as 'law and literature'.

Sydney Law School offers its most sincere condolences to Professor Pether's family.

Written by Tony Damian and Andrew Rich, *Schemes, Takeovers and Himalayan Peaks* is the leading Australian book on the use of schemes of arrangement to effect changes of control of listed and widely held Australian companies.

The third edition provides a comprehensive review of the law and practice of schemes of arrangement as well as a detailed examination of the policy and regulatory issues relevant to this dynamic area.

Schemes, Takeovers and Himalayan Peaks is an essential companion for corporate lawyers, barristers, investment bankers, company executives and others involved in change of control transactions. It is also useful for students and those interested in the policies that underpin the regulatory framework surrounding change of control transactions in Australia.

Copies can be ordered at: sydney.edu.au/law/news/schemesofarrangement/

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3RD EDITION



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2013 Sydney Law School Prize Giving Ceremony

On 23 May 2013, the Sydney Law School held its annual Prize Giving Ceremony to celebrate the achievements of outstanding students.

More than 250 people attended, including prize winners and their families and Faculty staff. They gathered in the Law School Auditorium, where Professor Peter Gerangelos was charged with announcing the recipients.

The Dean, Professor Joellen Riley, praised our students and expressed the Law School's gratitude for the invaluable support of the community and the profession, warmly thanking all prize and scholarship donors for their generosity.

The University Medallist for Law, Daniel Ward (BA 2009, LLB 2013) gave a student address at the ceremony. Prize winners then joined graduands and their families for the Sydney Law School Alumni Graduation Party, a special celebration in advance of their graduation on 24 May. *jd*



Professor Joellen Riley addresses the Alumni Graduation Party



Daniel Ward speaks at the Prize Giving Ceremony

Sydney Law School congratulates all prize winners:

Ella Alexander

Allan Bishop Scholarship

Luke Atkins

LexisNexis Book Prize No 4 for Proficiency in Juris Doctor Year I

Fayzan Bakhliar

The C A Hardwick Prize in Constitutional Law

Pitt Cobbett Prize for Constitutional Law

David Blight

Wigram Allen Scholarship for the Juris Doctor - Entry

Lance Bode

AMPLA Prize in Energy and Climate Law

Katherine Bones

Monahan Prize for Evidence

Christian Bourke

Bruce Panton MacFarlan Prize

Jesse BuckinghamLaw Society of New South Wales Prize for The Legal Profession
Margaret Dalrymple Hay Prize for The Legal Profession**Christopher Campbell**

Sir Maurice Byers Prize

Lisa Cantlon

Ashurst Prize in Australian Income Tax

Andrew Charleston

J H McClemons Memorial Prize in Criminology No 2

Ian Cheung

Deloitte Indirect Tax Prize

William Clarke

Wigram Allen Scholarship for the Juris Doctor - Entry

Louise ColemanAcademic Merit Prize
Zoe Hall Scholarship**Stephanie Constand**

John Warwick McCluskey Memorial Prize

Neil Cuthbert

Sybil Morrison Prize for Jurisprudence

Lewis D'Avigdor

Julius Stone Prize in Sociological Jurisprudence

Stuart Dullard

Nancy Gordon Smith Memorial Prize

Michael Falk

Thomas P Flattery Prize for Roman Law

Daniel FarinhaAaron Levine Prize for Criminal Law
E M Mitchell Prize for Contracts
Herbert Smith Freehills Prize in Contracts
LexisNexis Book Prize No 2 for Proficiency in Combined Law II**Kate Farrell**

Zoe Hall Scholarship

Daniel Flanagan

Sir John Peden Memorial Prize for Proficiency in Foundations of Law, Federal Constitutional Law, Public International Law, Real Property

LexisNexis Book Prize No 6 for Proficiency in Juris Doctor Year II

Daniel Fletcher

Academic Merit Prize

David Foong

Andrew M Clayton Memorial Prize - Clayton Utz

Clare Forrester

Allens Linklaters Prize in Competition Law

The Christopher C Hodgekiss Prize in Competition Law

Raymond Fowke

Henry Davis York Prize in Environmental Law

Gillian Gan

The Tomonari Akaha Memorial Prize

Sarah-Jane Greenaway

Judge Samuel Redshaw Prize for Administrative Law

Victoria GrimshawLaw Society of New South Wales Prize for The Legal Profession
Margaret Dalrymple Hay Prize for The Legal Profession**Alison Hammond**

E D Roper Memorial Prize No.2 for Equity and Corporations Law

Emily Hartman

Law Press Asia Prize for Chinese Legal Studies No 1

Andrew Hayes

NSW Women Justices' Association Prize

Kathleen HeathAcademic Merit Prize
E D Roper Memorial Prize No 1 for Equity and Corporations Law
George and Matilda Harris Scholarship No 1 for Law II
John Geddes Prize for Equity
LexisNexis Book Prize No 5 for Proficiency in Combined Law IV and Graduate Law II**Caroline Heber**

Sydney Law School Foundation International Scholarship - Masters

Simon Hill

Wigram Allen Scholarship for the Juris Doctor - Merit

Darren Husdell

G W Hyman Memorial Prize in Labour Law

Ishani Jayaweera

Mr Justice Stanley Vere Toose Memorial Prize for Family Law

Michael Jeffreys

University of Sydney Foundation Prize

Corey Karaka

Peter Paterson Prize

Ramya Krishnan

Academic Merit Prize

Ivana Kuti

Gustav and Emma Bondy Postgraduate Prize in Jurisprudence

Mandy KwanAshurst Prize in Australian Income Tax
King & Wood Mallesons Prize in Banking and Financial Instruments**Matt Lady**

Chartered Institute of Arbitrators Prize

Bronte Lambourne

Herbert Smith Freehills Prize in Torts and Contracts

Clare LangfordNew South Wales Justices' Association Prize in Administrative Law
Pitt Cobbett Prize in Administrative Law**Joanne Langford**

Carolyn Mall Memorial Prize in Indirect Taxes (Ernst & Young)

David LewisAcademic Merit Prize
Ashurst Prize in Advanced Taxation Law
Australian Taxation Office Prize in Taxation Law
Ian Joye Prize in Law
Sir Dudley Williams Prize
Nancy Gordon Smith Memorial Prize**Ying Hao Li**

Academic Merit Prize

Kate LindemanAcademic Merit Prize
Nancy Gordon Smith Memorial Prize**Stephen Lloyd**

Peter Cameron Scholarship

Daniel MacphersonAcademic Merit Prize
Harmers Workplace Lawyers Prize for Anti-Discrimination Law
Minter Ellison Prize for Intellectual Property
Nancy Gordon Smith Memorial Prize**Aman Mann**

Sydney Law School Foundation International Scholarship - Juris Doctor

Hannah MartinAcademic Merit Prize
Ashurst Prize in Environmental Law
Harmers Workplace Lawyers Prize for Labour Law
John George Dalley Prize No 1A
Playfair Prize in Migration Law
Rose Scott Prize for Proficiency at Graduation by a Woman Candidate
Sir Alexander Beattie Prize in Industrial Law
Sir Peter Heydon Prize for the best contribution in Constitutional, Administrative, or International Law
Nancy Gordon Smith Memorial Prize**Ryan Miu**George and Matilda Harris Scholarship No IIB for Combined Law III
LexisNexis Book Prize No 3 for Proficiency in Combined Law III**David Naylor**

Law Press Asia Prize for Chinese Legal Studies No 2

Amanda NguyenJ H McClemons Memorial Prize No 1 in Criminology
Tuh Fuh and Ruby Lee Memorial Prize in Criminology**Christopher Parkin**

The Justice Peter Hely Scholarship

Ekaterina Podzorova

Minter Ellison Scholarship

Rupert Robey

ACICA Keith Steele Memorial Prize

Jonathon SaveryEdward and Emily McWhinney Prize in International Law
Pitt Cobbett Prize for International Law**Karl Seitz**

Jeff Sharp Prize in Tax Research

Heidi Sham

Herbert Smith Freehills Prize in Torts and Contracts

Richard SwainAcademic Merit Prize
Edward John Culey Prize for Proficiency in Real Property & Equity**Nathan Tew**

Wigram Allen Scholarship for the Juris Doctor - International

Andrew ThomasAcademic Merit Prize
The Australian Securities and Investment Commission Prize in Corporations Law**Sai Vaheisvaran**

Margaret Ethel Peden Prize in Real Property

Thu Han Wai

Sydney Law School Foundation International Scholarship - Combined Law

Daniel WardAcademic Merit Prize
John George Dalley Prize 1B
Joye Prize in Law
Nancy Gordon Smith Memorial Prize
R G Henderson Memorial Prize
University Medal**Bryce Williams**

Anjel Akira Kawamura Prize in Japanese Law

Hope WilliamsCaroline Munro Gibbs Prize for Torts
LexisNexis Book Prize No 1 for Proficiency in Combined Law I**Thomas Williamson**

Herbert Smith Freehills Prize in Torts and Contracts

Geoffrey Winters

Victoria Gollan Scholarship

Henna Xing

Roy Frederick Turner AM Scholarship

Alice Zhou

Walter Ernest Savage Prize for Foundations of Law

Love, Contractually

Sydney Law Students' Annual Revue

Natasha Gillezeau



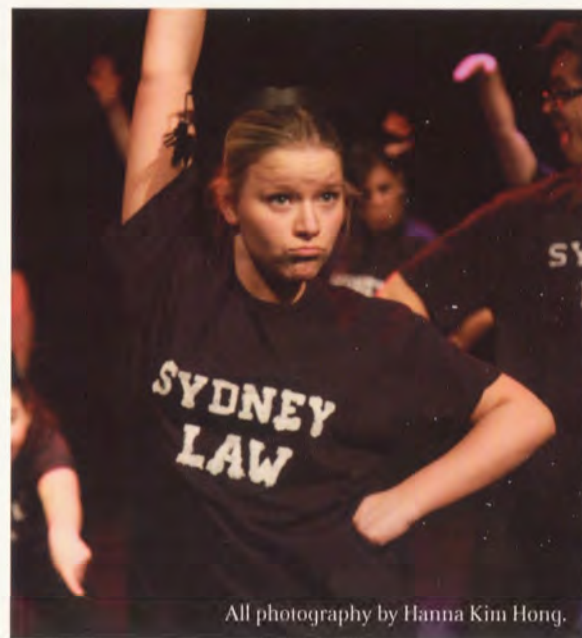
My rationale for studying law was simple. I needed to be in the Sydney University Law Revue. Trying to explain 'revue' to the non-initiated is difficult. Until you have seen it, you cannot truly understand it. This year's show, *Love, Contractually*, was directed by the incredible Sam Farrell and Anthea Burton, and produced by the ridiculously competent Tori Grimshaw and Emily Hartman. In line with tradition, the show was entirely devised by the students who make up the cast, crew and band.

We were spoilt by the calibre of the acting. We had not one, but three Julia Gillard impersonators. The quality of the scriptwriting led me to conclude that someone in our cast

actually *was* Stephen Fry. While 'We Need to Talk about Devon' did not make the final cut, 'Snakes on a Plaintiff' staked its claim as Highfalutin Pun of the Year.

I co-choreographed the show, which included the jovial number 'Pyong-Yang'. Sung to the tune of Ricky Martin's 'She Bangs', the lyrics unveiled the truth about the rogue state of North Korea: 'yeah it looks like a famine, but it's really a rave, still going strong after six decades'. Entertaining and informative.

Even though at times a little less than pitch-perfect, *Love, Contractually* was undoubtedly the best thing I have been a part of this year. My countdown to the next show is already underway. *jd*



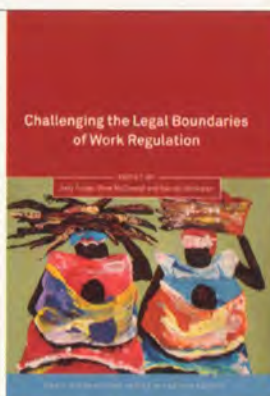
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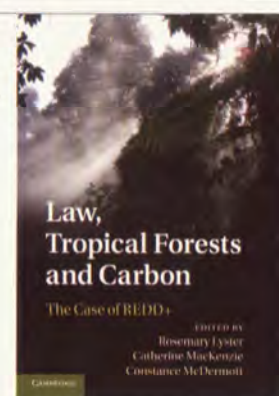
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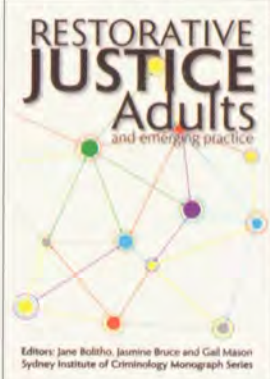
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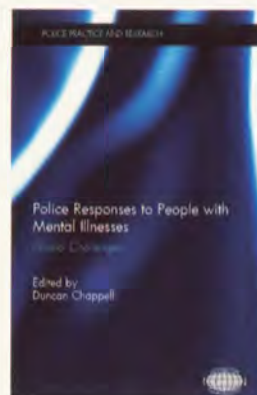
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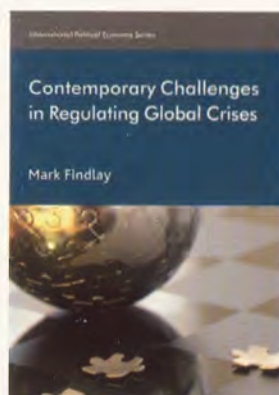
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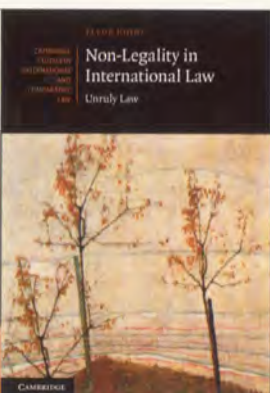
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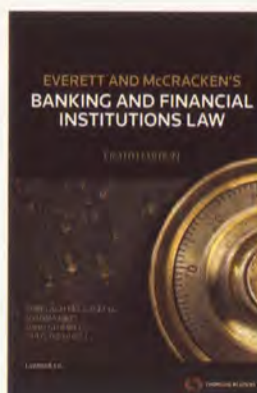


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This page features books edited or written by Sydney Law School academics.



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