3

The Constitution

Harry Hobbs

Australia's system of government embodies a mixture of elements borrowed from the constitutional traditions of the UK and the USA. From the UK, the original architects of the Constitution adopted a Westminster system of representative and responsible government, set within the framework of a constitutional monarchy. From the USA, the drafters drew on strong concepts of the separation of powers, federalism and judicial review, though notably without an equivalent bill of rights.

What does democracy require of a constitution?

- A constitution should describe and establish the institutions of government and distribute and regulate power among and between them. Typically, powers are dispersed across multiple actors and institutions. While several models exist, the power to adjudicate should be insulated from the power to make and execute the laws to protect and promote individual liberty.
- A constitution should authorise and regulate the exercise of public power. Although this means institutions and branches of government should be limited by law, a constitution should also establish an effective and efficient system of government that can meet the needs of its citizens and respond to public demands.
- A constitution should empower all citizens with the capacity to participate in the processes of government on an equal basis. Distinct institutions and processes may need to be developed to promote the capacity of marginalised groups to participate in public decision-making.
- A constitution should recognise and respect the rights of marginalised groups that may otherwise find it difficult to have their interests protected in electoral competition.
- A constitution can identify the commitments, aspirations and values of the political community. The values identified should reflect a broad consensus of the community rather than be imposed by one group over another.

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- A constitution should be capable of change. Although amendment of the constitution should be more difficult than amending ordinary legislation, the document should not be excessively difficult to modify in light of the changing needs and values of the citizenry.

The next section briefly covers some recent developments. The chapter then summarises the key strengths, weaknesses, opportunities and threats (SWOT) surrounding Australia's constitutional setup. After this analysis, three sections consider selected issues in more detail.

Recent developments

Australia's Constitution document was drafted at a series of constitutional conventions in the 1890s, using a process of drafting and ratification that was remarkably democratic for its time (Hirst, 2000; Irving, 1999). The resulting outcome has proven a durable document. Any proposed amendment to the Constitution must be approved by both houses of Parliament (or by one house of Parliament twice after a period of three months) and then submitted to the people of Australia in a referendum. It will only succeed if it obtains a majority of votes across Australia as a whole, plus a majority of votes in a majority of the states. The process is challenging. Some studies suggest Australia's Constitution is one of the most difficult to amend in the world (**Hobbs and Trotter, 2017**, **p.59**). Although 45 attempts at amendment have been made since 1901, the Constitution has been altered only eight times, and no amendments have been made since 1977.

The Australian Constitution established a federal system of government. In drawing on the USA model, the drafters sought to adopt a decentralised federation, whereby the states would retain significant responsibilities. In the years following federation, however, political authority in Australia has become increasingly centralised (**Fenna, 2019**). Two factors are often attributed to this trend: the open-textured nature of Commonwealth legislative power and the Commonwealth's fiscal dominance.

The growing strength of the federal government led to frequent claims that the states are obsolete and should be abolished (see, for example, Bob Hawke, quoted in **Remeikis, 2016**). The COVID-19 pandemic challenged this narrative, revealing the continuing vitality and political authority of the states (**Browne, 2021**). The pandemic did not change the text of the Constitution, but it strengthened the role of the states and led to a revamp of intergovernmental architecture (see Chapter 16). In part, the states' recent prominence owes much to the Commonwealth's initial reluctance to lead. The forceful intervention of state premiers was crucial to the Scott Morrison government introducing the JobKeeper and JobSeeker economic stimulus payments, while the initially disastrous COVID-19 vaccine rollout forced the states to maintain and extend extraordinary public health regulations. Nevertheless, the primary reason for the importance of the states in Australia's response to the pandemic is the allocation of legislative authority under the Constitution. Exercising their primary responsibility for health, education and law and order, the states managed the compulsory hotel quarantine process, imposed hard border closures and lockdowns to prevent the spread of the virus and administered the delivery of vaccines to residents.

These and other public health measures caused considerable tension. In 2020, businessman and former politician Clive Palmer challenged the Western Australia border ban under its COVID-19 policies, alleging that the law facilitating the closure violated the Constitution.

Section 92 of the Constitution provides that the movement of people among the states shall be 'absolutely free'. In *Palmer v Western Australia* 2021, the High Court dismissed Palmer's challenge, holding unanimously that the closure was valid because it was justified by the legitimate end of protecting the health of the community (2021 HCA [5]).

Recognising the need for a coordinated and flexible response to the COVID-19 pandemic, the prime minister (PM), state premiers and territory chief ministers created the National Cabinet in March 2020. In May that year, Morrison announced that the National Cabinet would replace the Council of Australian Governments (COAG). The National Cabinet met frequently and proved successful in providing a forum for governments to discuss and coordinate action across the federation. However, concerns around transparency have been raised (**Saunders, 2020**). Formally, it is a subcommittee of the federal Cabinet, and so the Commonwealth government asserted that Cabinet confidentiality applied to it. This makes little sense, as the National Cabinet is an intergovernmental forum composed of the leaders of nine separate governments accountable to nine separate parliaments. In August 2021, Senator Rex Patrick successfully challenged the assertion of Cabinet confidentiality (*Patrick v Secretary, Department of Prime Minister and Cabinet* 2021). The Commonwealth introduced legislation to overturn the ruling, but the bill lapsed at the dissolution of Parliament in April 2022. The new Labor federal government elected in 2022 continued the National Cabinet and maintained the fiction that its deliberations were protected by Cabinet confidentiality. By mid-2023, all but one state PM was Labor, but tensions around intergovernmental relations under the new body remain (see Chapter 16). The COVID-19 pandemic revealed the flexibility of Australia's governance arrangements.

Yet not everything is so malleable. The low success rate of efforts to change Australia's Constitution may have implications for the democratic authority of the Constitution document. One view is that the Constitution, like any law, derives authority from the ability of its subjects to reform it through legitimate means. To the extent that the Constitution may be perceived as unduly difficult to modify, that legitimacy is undermined (**Hobbs and Trotter, 2017**). In the past decades constitutional amendments – all of which have failed or not proceeded – have been proposed on the constitutional status of Aboriginal and Torres Strait Islander peoples, instituting human rights protections and replacing the monarch as head of state with a president (which would also mean 'repatriating' the Constitution by removing any reference to UK institutions). Most recently, the Labor government in March 2023 proposed a referendum on formally establishing a Voice for Aboriginal and Torres Strait Islander peoples that would be empowered to make representations to the Parliament and executive government, with a question phrased as follows: 'A Proposed Law: To alter the Constitution to recognise the First Peoples of Australia by establishing an Aboriginal and Torres Strait Islander Voice. Do you approve this proposed alteration?' Initial hopes for bipartisanship between the major parties on the proposal subsequently eroded, and the proposal was decisively rejected by voters in October 2023 (see Chapter 4). The pre-history of the Voice effort is also covered in this chapter.

Strengths, weaknesses, opportunities and threats (SWOT) analysis

Current strengths	Current weaknesses
The Australian Constitution has set the foundations for a stable and secure liberal democracy that has endured for over 120 years. This is a significant achievement, given that comparative studies show that, on average, constitutions last for around 17 years (Elkins, Ginsburg and Melton, 2009).	The absence of comprehensive human rights protections leaves many marginalised Australians vulnerable to legislative or executive action. Australia is the only democratic country in the world that does not have a constitutional or statutory bill of rights. In fact, the Australian Constitution still expressly empowers Parliament to pass laws that discriminate on the basis of race.
Australia's federal system of government enhances democratic participation by allowing citizens to engage with government more regionally and directly, as well as nationally. This arrangement is particularly valued in a country that (almost uniquely in the world) stretches across a whole continent.	The Australian Constitution no longer formally discriminates against Aboriginal and Torres Strait Islander peoples, but neither does it empower them with the capacity to have their unique interests and distinct voices heard in the processes of government. This democratic deficit challenges the capacity of First Nations peoples to participate. An initiative to create a Voice formally linked to Parliament for First Nations Australians was rejected in a national referendum in 2023.
Australia's relative success in dealing with the initial wave of the COVID-19 pandemic demonstrates that the country's flexible intergovernmental arrangements facilitate cooperation and coordination and are generally fit for purpose.	Australia's poor record of constitutional amendment has inhibited attempts to reform the instrument to bring it in line with the contemporary needs and values of its citizens. No formal change has been made since 1977, despite significant political, cultural and social changes within the Australian community.
Past efforts have been made to simplify some of the complex lines of accountability for public policy by transferring functions between the states and the federal government (with finance attached). Although proposals for large movements have failed to work, some small-scale adjustments have been made.	While federalism offers considerable advantages for Australia, the precise relationship between the federal government and the states causes complications. In particular, vertical fiscal imbalance clouds lines of accountability and responsibility (see Chapter 16).
Australian democracy is relatively stable. The balance provided by the existing constitutional set-up is credited by many observers with explaining the generally small scale of populist movements in Australia, and the absence of other changes that have potentially adverse implications for liberal democracy.	Australians appear to have little knowledge of their own Constitution. While survey data is dated, reports from the 1990s suggest that many Australians are unaware of the basic structure and institutions established under the Constitution.

Future opportunities	Future threats
By their nature, constitutions are designed to change slowly, especially written ones. Australia's arrangements combine both the secure foundations of a written constitution and a measure of the flexibility inherent in Westminster system arrangements.	As mentioned, the Australian Constitution has only been amended eight times since 1901 and has not been changed since 1977. There have been significant changes to Australian society since this date, but the Constitution itself has failed to keep up to date. This will continue to cause problems into the future.
The COVID-19 pandemic demonstrated the efficacy and accountability of federalism and Australia's intergovernmental architecture (see Chapter 16). This helped create a public mood more supportive of seeking consensus solutions, which lasted to the 2022 federal election and beyond.	Once the 'group jeopardy' posed by the initial stages of COVID-19 had passed, the National Cabinet's longer-term pattern of operations remained unclear. The Albanese government elected in 2022 has continued the system, albeit in a somewhat more consensual style, while some aspects remain in flux.
The rejection of the referendum proposal on constitutional recognition of First Nations peoples (and/or a republic) has provided an opportunity for a broader stocktake of the health of Australia's Constitution (see Chapter 4). This could be assessed via a new standing body that reports every 10 years on reform options.	The poor record of constitutional amendment is self-fulfilling. Parliamentarians have been unwilling to consider holding either a First Nations peoples or a republic referendum unless assured of the proposal's success in advance. This makes future reform harder to achieve. The Albanese government's 2023 proposal took a risk in an attempt to break this mould. However, it failed, despite being a very modest measure.

There are three dimensions of the Constitution that have occasioned a great deal of debate and where the issues involved are worth considering in detail. These are human rights and the role of the High Court, the position of First Nations peoples and issues around the country's continued links to the UK monarchy or possible transition to a republic.

Human rights protections and the High Court

Human rights protection is limited under the Australian Constitution. While the drafters borrowed heavily from the USA, they chose not to include comprehensive protections. Rather than a judicially enforced bill of rights, the drafters considered that 'the common law and political processes' (Williams and Hume, 2013, p.67) would prove the best guardian of individual liberty. As a result, the Constitution expressly protects only five individual rights:

- Section 41 guarantees the right to vote in federal elections to all persons who are enfranchised at the state level.
- Section 51(xxxi) provides that the Commonwealth government may acquire property on just terms only.
- Section 80 guarantees a right to trial by jury on all indictable offences.
- Section 116 provides for freedom of religion.
- Section 117 prohibits discrimination on the basis of state residency.

The list is small, but judicial interpretation has further narrowed the protection provided. For example, in *R v Pearson; Ex parte Sipka* the High Court held in 1983 that section 41 protected the voting rights of persons enfranchised prior to the adoption of the *Franchise Act 1902* and no longer has any effect. Similarly, although section 80 guarantees the right to jury trial for indictable offences, the High Court has maintained that Parliament can determine whether an offence is indictable or not, essentially allowing Parliament to bypass the protection (*Kingswell v The Queen* 1985). Finally, the High Court's formalistic reading of section 116 has meant that no law has ever been found to breach the protection of religious freedom (Beck, 2018).

Faith in Parliament was a key factor for the absence of a comprehensive bill of rights. Chief Justice Mason, for instance, has explained that this sentiment was 'one of the unexpressed assumptions on which the Constitution was drafted' (*Australian Capital Television v Commonwealth* 1992, p.136). This is true, but the absence of rights guarantees also reflects the racist attitudes of the day. As George Williams and David Hume have argued, the 'prevailing sentiment' that Chief Justice Mason identified 'was not [solely] due to a belief that rights across the whole community were generally well protected', but rather was 'driven by a desire to maintain race-based distinctions' (Williams and Hume, 2013, p.52). The drafters specifically empowered Parliament with plenary legislative authority to make laws that discriminate on the basis of 'race' and were careful to ensure that any legal constraints on this power were avoided.

Over the years, the absence of individual rights protections has prompted widespread calls for change. However, referendums to amend the Constitution to recognise certain human rights failed in both 1944 and 1988 and no legislated charter of rights has been enacted at the Commonwealth level. Nevertheless, three subnational jurisdictions – the Australian Capital Territory (ACT), Victoria and Queensland – have each enacted a statutory human rights act. Others may follow.

The Constitution contains few express protections, but the High Court has uncovered several rights implied by the text and structure of the instrument. For example, drawing on provisions that mandate that the legislative and executive branches of government are 'ultimately answerable to the Australian people' (*Nationwide News v Wills* 1992, p.47), the Court has held that the Constitution implicitly protects freedom of political communication as 'indispensable to that accountability' (*Australian Capital Television v Commonwealth* 1992, p.138). While the act of casting a ballot is the principal moment at which an elector holds their representative accountable, the Court has employed a broader notion of democratic accountability, declaring that the implied right operates across the electoral process and on all political matters (*Brown v Tasmania* 2017).

The High Court's capacity to ameliorate the absence of statutory or constitutional human rights protection through judicial creativity is significant but limited. In this case, the implied freedom of political communication is not strictly speaking a right, but rather an immunity from legislative and government action, meaning that legislation that infringes the implied freedom will be struck down. This can still promote democratic outcomes. In 2015, the Court upheld a law that imposed caps on political donations and banned property developers from making donations. Although holding that the law burdened the implied freedom, the High Court explained that the effect of the law was to promote rather than limit political communication. As Justice Gordon explained, the law ensures 'that *each* individual has an *equal* share, or at least a more equal share than they would otherwise have, in political power' (*McCloy v New South Wales* 2015, p.285).

The implied freedom enhances democratic values but the High Court's role in uncovering an implicit constitutional protection has attracted criticism. Judicial creativity is central to the common law, but constitutional reform should ideally be developed through the referendum procedure in section 128 rather than the judiciary. This ensures constitutional change has broad popular support across the community. It is also more comprehensive, as informal constitutional amendment is not available in all cases.

The position of First Nations peoples

The drafters noticeably did not draw on the law and governance traditions of the First Nations communities that had occupied and cared for the continent for some 60,000 years. While in several colonies Aboriginal and Torres Strait Islander peoples could vote for delegates to constitutional conventions, participation was not encouraged. In any event, no First Nations delegates attended the conventions, and their interests and aspirations were not considered in debate. The Constitution that was drafted simply ignored hundreds of existing Indigenous governing orders, blanketing multiple complex normative systems in a single legal framework that denied the reality and continuing vitality of those self-governing communities.

References to First Nations peoples in the final instrument were exclusionary. Three provisions stand out. Section 25 contemplated the disqualification of persons from voting on the basis of their race, section 51(xxvi) left responsibility for Indigenous affairs entirely in the hands of the states, while section 127 excluded 'Aboriginal natives' from the population count for the determination of electoral representation. Although it is not accurate to state that racial prejudice alone lay behind the drafting of each section, in combination these provisions contributed to symbolically, if not practically, exclude Aboriginal and Torres Strait Islander peoples from the new Australian nation (**Arcioni, 2012**).

Aboriginal and Torres Strait Islander peoples have long advocated for reform to the Australian Constitution to recognise their unique status and rights. In 1937, for instance, Yorta Yorta man William Cooper, Secretary of the Aboriginal Advancement League, gathered 1,814 signatures for a petition to King George V, calling for Indigenous representation in the federal Parliament. The petition was passed to PM Joseph Lyons, but Cabinet refused to forward it to the King (by then George VI). While racial prejudice undoubtedly contributed to Cabinet's decision, the federal government also pointed to section 51(xxvi) to note that it had no legislative authority in the field of Indigenous affairs (except for in the Commonwealth Territories). This changed in 1967. That year, a constitutional referendum repealed section 127 and amended section 51(xxvi) to provide the Commonwealth Parliament with a concurrent power to legislate with respect to Indigenous affairs. This was a momentous change that has facilitated significant beneficial legislation to protect and promote the rights of Aboriginal and Torres Strait Islander peoples, but the amendment fell far short of providing substantive equality and of meeting the aspirations of First Nations peoples (Hobbs, 2021).

The limits of the referendum were laid bare in a 1997 High Court decision. In *Kartinyeri v Commonwealth* 1998, the Court was asked whether section 51(xxvi) required the Parliament to enact laws for the benefit of Aboriginal and Torres Strait Islander peoples. Although the Court did not reach a definitive conclusion, the effect of the Court's decision is that the race power permits the federal Parliament to enact laws that impose a disadvantage on Aboriginal and

Torres Strait Islander peoples. This power has only ever been used in relation to Aboriginal and Torres Strait Islander peoples. The decision in *Kartinyeri* focused renewed attention on the need for substantive structural reform to the Australian Constitution to protect and promote the interests of First Nations peoples.

The 1967 amendments also had the effect of entirely removing any reference to Aboriginal and Torres Strait Islander peoples from the Constitution. This textual absence motivates a distinct project of symbolic, rather than substantive, constitutional reform. As then PM Tony Abbott explained, this project seeks constitutional recognition to 'complete our Constitution rather than change it' (**ABC News, 2014**). In 1999, a proposal that responded to the symbolic project of constitutional reform by proposing the insertion of a preamble 'honouring Aborigines and Torres Strait Islanders' but otherwise not making any structural amendments, was soundly defeated in a referendum. Nevertheless, calls for both symbolic and structural constitutional reform have increased over the last decade.

As Aboriginal and Torres Strait Islander peoples have highlighted, formal equality under the Australian Constitution fails to empower the unique voices and interests of First Nations peoples and communities in the processes of government. Australia's system of governance is 'built upon confidence in a system of parliamentary' representation (*McKinlay v Commonwealth* 1975, p.24), but the absence of comprehensive rights protection, together with the non-recognition of their distinctive status, leaves First Nations peoples vulnerable to the 'wavering sympathies of the Australian community' (Behrendt, 2003, p.8). Over the last decade, this vulnerability has motivated sustained focus on whether and how the Australian Constitution could be changed.

Contemporary debate on constitutional recognition commenced in 2007. In the lead-up to the federal election, PM John Howard revived the idea of a preambular statement of recognition that would be inserted in the Constitution. Howard was defeated at the 2007 election by Kevin Rudd, but the concept persisted. Constitutional recognition was raised by several groups at Rudd's 2020 Summit, though the government committed only to 'considering further' the idea of constitutional change (**Commonwealth of Australia, 2009**, p.187). As such, it was not until 2010, as part of PM Julia Gillard's negotiations to form a minority government, that the first major public process focusing exclusively on this issue commenced. Between 2010 and 2015, three public inquiries were conducted. These processes were the 2012 Expert Panel on Constitutional Recognition of Indigenous Australians, the 2014 Aboriginal and Torres Strait Islander Peoples Act of Recognition Review Panel and the 2015 Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples.

The final reports of these parliamentary and expert inquiries recommended a similar suite of constitutional reforms. However, they were beset by two major challenges. First, although the aspirations and views of First Nations peoples were given significant weight in these processes, this was only one element to consider in finalising a report that could obtain broad public support across the entire Australian community. For this reason, several potentially contentious proposals, such as sovereignty and treaty-making, were not included as part of the final package. Cobble Cobble woman and professor of law Megan Davis, a member of the Expert Panel, later revealed that 'resentment' over this decision percolated throughout the Indigenous community (Davis, 2017, p.136). Compounding frustrations further, no Commonwealth government ever publicly committed to a set of proposed reforms.

The reluctance of successive governments to engage meaningfully with the recommendations proposed by their own inquiries was an ongoing cause of concern for many Aboriginal and Torres Strait Islander peoples. So too was the fact that these processes seemed to foreclose

discussion on matters of importance to Indigenous communities. As Aboriginal and Torres Strait Islander peoples consistently explained, the form of recognition eventually adopted must be suitable to those intended to be 'recognised'. A simpler and more appropriate process would engage first with Indigenous communities to ascertain their views on what 'constitutional recognition' means. The persistence and advocacy of Aboriginal and Torres Strait Islander leaders eventually forced the government's hand. In December 2015, PM Malcolm Turnbull established a Referendum Council that would specifically consult with Indigenous communities.

The Referendum Council held 12 dialogues across every state and territory. Meetings were capped at 100 participants to promote discussion. Attendance was by invitation, with the organisers seeking an inclusive mix of Traditional Owner groups, community organisations and key individuals in the region. A balance was sought between genders and across age groups, while Stolen Generations were also represented. The dialogues were conducted as a deliberative forum. Each took place over three days and included opportunities for large- and small-group discussions. The Referendum Council assisted delegates by providing information on the Constitution and the history of constitutional reform. This allowed delegates to discuss and assess different reform options in an informed manner, and to explain what recognition would mean for their communities. At the end of the three days, delegates confirmed a statement of their discussion and selected 10 representatives for a final convention at Uluru.

At Uluru, delegates issued the Uluru Statement from the Heart. Grounded in the delegates' inherent rights as the 'first sovereign Nations of the Australian continent', the Uluru Statement outlines three proposals to empower Indigenous peoples so that they can take 'a rightful place in our own country' **(Uluru Statement from the Heart, 2017).** Characterised as 'Voice, Treaty, Truth', the delegates called for a First Nations Voice to be put in the Constitution, with the power to advise the Australian Parliament on laws that affect Indigenous peoples, and a Makarrata Commission to oversee a process of treaty-making and truth-telling. The Uluru Statement was not unanimous. Seven delegates walked out in protest the day before the Uluru Statement was issued. Nonetheless, it reflects a formidable consensus among First Nations peoples, reached through a process of deliberation unmatched in Australian history.

It took five months for the Commonwealth government to officially respond to the Uluru Statement. When the government finally did respond, it rejected the Uluru Statement in its entirety, though its primary focus was on the First Nations Voice. In a press release, PM Malcolm Turnbull explained that the government 'does not believe such an addition to our national representative institutions is either desirable or capable of winning acceptance in a referendum'. He asserted further that the Voice was a 'radical change' that would undermine the 'fundamental principle' of 'all Australian citizens having equal civic rights' (**Prime Minister, Attorney-General and Minister for Indigenous Affairs, 2017**). However, this statement is not true. The First Nations Voice would have been advisory. It would not have had the capacity to veto, delay or vote on proposed legislation. A First Nations Voice would not have undermined equality but would have rectified a persistent democratic fault in Australian society. Although First Nations peoples have enjoyed equality in the electoral arena, their position as a demographic minority has made it difficult for them to be heard by government. A constitutionally enshrined First Nations Voice would have empowered First Nations peoples with the capacity to actively participate 'in the democratic life of the state' (Davis, 2017, p.131).

The government may have been eager to move away from the Voice. Given its origins in the deliberative process that led to the Uluru Statement from the Heart, however, it became clear that the Voice remained the only viable option for constitutional reform. This fact was

recognised by another parliamentary committee in 2018 (**Joint Select Committee, 2018**, p.2). Initial public support for the Voice placed more pressure on government to reassess its approach. Replicating its roots in community deliberation, proponents of the Uluru Statement travelled widely across the country to educate the Australian public and build support for its recommendations. This strategy appeared to have been successful; a survey of poll data since 2017 conducted by the Centre for Aboriginal Economic Policy Research suggested that 70–75 per cent of voters with a committed position supported the Voice (**Markham and Sanders, 2020**, p.20).

The Commonwealth government under PM Morrison refused to engage fully with the Uluru Statement, but it did subtly reframe its position. Following his surprise re-election in 2019, Morrison initially called for 'more detail' to be provided on how the Voice could operate, but later forcefully ruled out holding a referendum on the body (**Hobbs, 2020**, p.631). Instead, the government sought to separate the idea of a First Nations Voice from its legal form. In late 2019 it established a National Co-Design Group, tasked with developing models for an Indigenous voice to government (not Parliament). The terms of reference specifically stated that constitutional change was 'out of scope' (**NIAA, 2019**, p.3). The Co-Design process nonetheless recommended that the government reconsider its position.

It took a federal election for that reconsideration to take place. In May 2022, the Labor Party formed a government. In his victory speech on election night, incoming PM Anthony Albanese affirmed that his government would hold a referendum to put a First Nations Voice in the Australian Constitution (**Morse, 2022**). Following on, the government moved slowly and deliberately. In July 2022, on the lands of the Yolngu nation at the Garma Festival, PM Albanese offered a starting point for discussion on the wording of the proposal. In September 2022, it set up two working groups to facilitate the involvement of Indigenous leaders in developing the referendum arrangements. These included the wording of the question (announced in March 2023), the timing of the poll and how to build community understanding, awareness and support for the referendum. In June 2023, following the release of a parliamentary committee report, the final wording of the proposed amendment was agreed:

> *In recognition of Aboriginal and Torres Strait Islander peoples as the First Peoples of Australia:*
>
> 1. *There shall be a body, to be called the Aboriginal and Torres Strait Islander Voice.*
> 2. *The Aboriginal and Torres Strait Islander Voice may make representations to the Parliament and the Executive Government of the Commonwealth on matters relating to Aboriginal and Torres Strait Islander peoples.*
> 3. *The Parliament shall, subject to this Constitution, have power to make laws with respect to matters relating to the Aboriginal and Torres Strait Islander Voice, including its composition, functions, powers and procedures.* (**Reconciliation Australia, 2023**)

A referendum was held in October 2023, but was decisively defeated (see Chapter 4).

Formal constitutional amendment is important, but it will not conclusively resolve issues arising from invasion and colonisation. The status and place of Aboriginal and Torres Strait Islander peoples within the Australian nation will continue to be the subject of debate. A recent High Court decision highlights this fact and places more pressure on Parliament and the government

to engage meaningfully with First Nations peoples. In 2020, in *Love v Commonwealth; Thoms v Commonwealth*, the High Court was asked whether two First Nations people who were not citizens of Australia could be deported under the *Migration Act 1958 (Cth)* as 'aliens'. A four-member majority held that First Nations Australians, understood according to the test in *Mabo v Queensland (No 2)* 2020, 'are not within the reach of the "aliens" power' in the Constitution (2020: [81]). First Nations Australians therefore cannot be deported even if they are not citizens of Australia.

The decision caused immediate controversy, but it highlights the ongoing need to seriously engage with First Nations peoples and recognise their relationship to the Australian state. Two of the judges in the minority noted this in their dissent. Justices Gageler and Keane both expressly recognised that the plaintiffs' arguments were 'morally and emotionally engaging' and acknowledged that 'a strong moral case' (2020: [128] (Gageler J)) could be made for 'special recognition of Aboriginal people in the *Constitution*' (2020: [178] (Keane J)). In their Honours' view, these issues must 'be addressed by the Commonwealth Parliament in the outworking of those political processes' (2020: [130] (Gageler J)).

An Australian republic?

Australia is a constitutional monarchy whose head of state is King Charles III. Although the King also serves as head of state of the UK, along with several other Commonwealth countries, his role as head of state of Australia is separate. As a constitutional monarchy, the powers of the sovereign are limited by law and convention and exercised only on the advice of the elected government. The Constitution provides that the powers of the monarch have been delegated to the Governor-General, the King's representative in Australia. As such, the functions of the head of state are performed by Governor-General David Hurley.

Republicanism grew in prominence in the second half of the 20th century as sociocultural and legal changes helped to develop an independent sense of Australian nationhood. Some proponents argued that placing a hereditary monarch as Australia's head of state conflicted with Australian values, such as democracy and egalitarianism. Others wondered whether a British monarch could ever accurately represent Australia to the rest of the world (Jones, 2018). Drawing on this upsurge, in the early 1990s the Australian Labor Party endorsed a republic as its official policy and PM Paul Keating promised a constitutional referendum on the establishment of a republic. Despite polls suggesting a majority supported a republic, in 1999 Australians overwhelmingly rejected the proposed change. Several theories have been offered to explain this result, including division among its supporters over the model adopted.

The republican movement has struggled to attract attention following this defeat. Although successive polls have found that a slim majority of federal parliamentarians are in favour of a republic, no government has sought to expend political capital on the issue. Without effective leadership, support among ordinary Australians continues to slip. In January 2021, an online Ipsos poll found that only 34 per cent of Australians thought Australia should become a republic (**Topsfield, 2021**). The late-2023 defeat of the Voice referendum also damaged the prospects of any similar vote on the republic (**Karp, 2023**).

Two events may signal a shift:

- In May 2022, the Labor Party was victorious in the federal election. The new PM, Anthony Albanese, has long been a strong supporter of an Australian republic. In June 2022, Albanese appointed the country's first Assistant Minister for the Republic, demonstrating that it is on the government's radar.
- In view of the affection that many Australians held for Queen Elizabeth II, proponents of the Australian republic movement were resigned to wait until the end of her reign. The ascension of King Charles III, upon the death of his mother in September 2022, prompted renewed speculation and enthusiasm among republicans.

Several issues will need to be resolved before another referendum is held. These include technical questions relating to the model adopted, but also encompass broader foundational tensions. The most significant of these is Australia's relationship with First Nations peoples and communities. As Aboriginal and Torres Strait Islander peoples have long explained, 'a narrow debate over whether we should have an Australian or British head of state will not satisfy our expectations for change' (Gatjil Djerrkura, 1999, cited in **Arvanitakis, 2011** and in McKenna, 2004, p.47). The question all proponents of a republic must ask is: 'What kind of republic do we want, a reconciled republic or a republic that repeats the injustices, errors and omissions of the constitutional monarchy?' (Gatjil Djerrkura, cited in **Davis, 2018**). An Australian republic will have to engage in the broader project of constitutional recognition of First Nations peoples. Following his election, PM Albanese confirmed that any move towards a republic would come after a referendum on a First Nations Voice. And following the Voice failure, Labor is likely to be wary of another referendum.

Conclusion

Constitutional issues and debates always matter for the quality of Australian democracy, but primarily in a background way. At times, one of the major two parties has had a consistent winning streak at the federal level, and sometimes its leaders seem to 'push the boundaries' of constitutional provisions and conventions (**Forsey, 1984**; Killey, 2014), limiting their use. Then their political opponents may voice fears that the constitutional set-up itself is proving unfair in preserving the political impartiality of the state, or unsafe in protecting the rights of particular groups in society. However, the Constitution is relatively complex and provides multiple balancing mechanisms – for instance, in general oppositions federally control some state governments (sometimes most of them). Majorities in the House of Representatives are often partly offset by a different balance of representation in the Senate. And the High Court has generally reined in abuses of ministerial power that raise democratic concerns. A longer-term concern may be that constitutional complexity and fixedness may in itself store up problems for a rapidly growing liberal democracy.

Judicial decisions

Australian Capital Television v Commonwealth. 1992. 177 CLR 106

Brown v Tasmania. 2017. 261 CLR 328

Kartinyeri v Commonwealth. 1998. 195 CLR 337

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