

BOOK REVIEW

***Constitutional Conventions and the Headship of State: Australian Experience* by Donald Markwell (Redland Bay: Connor Court Publishing, 2016) pages 1–226. Price A\$49.95 (hardcover). ISBN 978-1-925501-15-5.**

MICHAEL CROMMELIN AO\*

Dr Markwell is a prominent scholar in the field of headship of state in Australia and the United Kingdom. This book consists largely of a selection of his extensive writings over a period of more than thirty years in this challenging, changing and contentious field. The selection includes book chapters, journal articles, conference papers, biographical notes, book reviews, public lectures, speeches, addresses, obituaries, opinion pieces and letters to the editors of newspapers. Most items have been published previously, but some have not always been readily accessible. Others have never been published.

The book is organised into eight chapters and three appendices. The chapter titles provide a good indication of the breadth of the work: ‘Introduction’; ‘Constitutional Conventions and Responsible Government’; ‘The Crown and Australia (1987)’; ‘The Early Governors-General and the Consultation of High Court Judges’; ‘Three Governors-General: Hasluck, Kerr, Cowen’; ‘The 1975 Constitutional Crisis and the Conventions of Responsible Government’; ‘Debating the Headship of State — Monarchy to Republic?’; and ‘The Office of Governor-General (2014)’. Appendix 1 lists the Monarchs, Governors-General, Chief Justices of the High Court, and Prime Ministers since 1901. Appendix 2 is titled ‘Glimpses of Two Modern Governors-General: Dr Peter Hollingworth and Dame Quentin Bryce’. Appendix 3 pays tribute to ‘Two Constitutional Scholars: Sir Kenneth Wheare and Dr Eugene Forsey’.

The ‘Introduction’ is new. It explains the scope of the work, and identifies several themes that recur within it. Markwell acknowledges the curious nature of constitutional conventions as ‘essentially unwritten rules based on principle and precedent, which are considered binding although usually not legally

\* BA, LLB (Hons) (UQ), LLM, PhD (UBC); Zelman Cowen Professor of Law, Melbourne Law School, The University of Melbourne.

enforceable.<sup>1</sup> Conventions by nature are prone to controversy. This is best illustrated by the constitutional crisis of 1975 that culminated in the dismissal of the Prime Minister by the Governor-General, a matter to which Markwell devotes considerable attention.

A major theme of the book is the role of constitutional conventions in determining the relationship between the Governor-General and the Prime Minister in general, and the existence and scope of the 'reserve powers' of the Governor-General in particular. The Governor-General is usually obliged to act on the formal advice of the Prime Minister; the reserve powers are exceptions to this rule. Other major themes are the relationship between the Queen and the Governor-General (in particular, who is Australia's head of state?), the evolution of the role of the Governor-General since federation as part of a broader 'Australianisation' of the Crown, and the sources of informal advice appropriately available to the Governor-General on the exercise of reserve powers.

Markwell makes three related points in the 'Introduction' that apply generally to the materials in the following chapters. First, while Australia inherited the idea of constitutional conventions from the United Kingdom, it does not follow that the content of particular conventions should be identical in the two countries. For example, Markwell suggests that:

there are various forms of responsible government under different constitutions, and the *Australian Constitution* embodies a particular form of responsible government that is similar, but not identical, to that in the UK and some other countries.<sup>2</sup>

Secondly, constitutional conventions evolve continuously, making the task of identification especially challenging.<sup>3</sup> Thirdly, that task of identification requires 'close attention both to precedent — the often little-known history that is relevant — as well as to the constitutional principles in play.'<sup>4</sup> The works of the constitutional scholars are of great importance in this regard, and the book is dedicated to the memory of two of them, Sir Kenneth Wheare and Dr Eugene Forsey.

Lastly, Markwell acknowledges in the 'Introduction' that, as a 'selection of diverse pieces written in various contexts', the book does not provide complete

<sup>1</sup> Donald Markwell, *Constitutional Conventions and the Headship of State: Australian Experience* (Connor Court Publishing, 2016) 13.

<sup>2</sup> Ibid 14.

<sup>3</sup> Ibid 16–17.

<sup>4</sup> Ibid 19.

answers to all of the questions that it raises; nor does it provide a comprehensive history of the office of Governor-General.<sup>5</sup> By way of partial remediation, he draws attention to three recent developments involving the role of the Governor-General and the conventions relevant thereto. The first is the ‘mistaken view’ that the Solicitor-General should provide independent legal advice to the Governor-General, upon request.<sup>6</sup> The second is the ‘undesirable’ prospect that the growth of the office of Official Secretary to the Governor-General could lead the Official Secretary to attempt to act as a ‘de facto constitutional adviser’ to the Governor-General.<sup>7</sup> The third is the now established practice of rapid publication of documents relating to the Governor-General’s exercise of constitutional and related discretions, recently exemplified by the Prime Minister’s advice to the Governor-General in March 2016 to prorogue and shortly afterwards recall the Parliament.<sup>8</sup> Markwell invites further examination of these matters and I comment on two of them below.

Chapter 2 (‘Constitutional Conventions and Responsible Government’) comprises a substantial extract from a paper published in 2007 on Australian constitutional conventions generally,<sup>9</sup> which is then followed by brief case studies of the particular conventions of responsible government relating to a hung parliament and ministerial resignations.<sup>10</sup> The paper marks out the dimensions of uncertainty surrounding conventions, which inhabit ‘the territory between legal rules, moral principles, and political practices.’<sup>11</sup> It lists numerous questions that must be considered in determining the nature and content of Australian constitutional conventions and argues strongly for more sustained and rigorous attention to them, both in their domestic context and from an international comparative perspective. At the same time, however, it recognises the evolutionary quality of conventions that makes them inherently unstable and politically contentious.<sup>12</sup>

<sup>5</sup> Ibid 22.

<sup>6</sup> Ibid 23.

<sup>7</sup> Ibid.

<sup>8</sup> Ibid 23–4.

<sup>9</sup> Ibid 27–31. Originally published as Don Markwell, ‘Constitutional Conventions’ in Brian Galligan and Winsome Roberts (eds), *The Oxford Companion to Australian Politics* (Oxford University Press, 2007) 131–2.

<sup>10</sup> Markwell, *Constitutional Conventions and the Headship of State*, above n 1, 39–48.

<sup>11</sup> Ibid 28.

<sup>12</sup> Ibid 31–8.

Chapter 3 reproduces the 1987 Trevor Reese Memorial Lecture on ‘The Crown and Australia.’<sup>13</sup> It begins with a valuable historical account of the startling changes in the constitutional roles of the Crown and its various Australian representatives, Governors and Governors-General, from the colonial era until the acquisition of Australian nationhood and independence from the United Kingdom. Markwell neatly demonstrates the evolutionary nature of a radical transformation that was achieved substantially through revision of constitutional conventions rather than formal amendment of the *Australian Constitution*.<sup>14</sup> He then advances five propositions on the constitutional role of the Governor-General: (1) that the Governor-General ‘acts in almost all cases on and only on the advice of Ministers’;<sup>15</sup> (2) that the Governor-General, like the Queen, has the ‘Bagehot’ rights to be consulted, to encourage and to warn;<sup>16</sup> (3) that the Governor-General has limited reserve powers relating to the appointment and dismissal of ministries, and dissolution of parliament;<sup>17</sup> (4) that the Governor-General is free to consult, in the exercise of his or her functions, whomever he or she believes it prudent to consult;<sup>18</sup> and (5) that the Queen has ‘no part in the constitutional functions of the Governor-General’.<sup>19</sup> Recognising that not all of these would command universal agreement, he provides supporting arguments based on principle and precedent, especially for the third and fourth of them. He concludes the chapter with interesting ruminations on two big issues: the transition from monarchy to republic and the desirability of codification of constitutional conventions.<sup>20</sup> These issues were noted by Markwell in his 1987 lecture, and they remain unresolved almost 30 years later.

Chapter 4 (‘The Early Governors-General and the Consultation of High Court Judges’) contains a 1985 book review<sup>21</sup> and a 1999 article published in

<sup>13</sup> Ibid 49–70. Originally published as D J Markwell, *The Trevor Reese Memorial Lecture 1987: The Crown and Australia* (Australian Studies Centre, Institute of Commonwealth Studies, University of London, 1987).

<sup>14</sup> Markwell, *Constitutional Conventions and the Headship of State*, above n 1, 50–60.

<sup>15</sup> Ibid 61.

<sup>16</sup> Ibid, citing Walter Bagehot, *The English Constitution* (Collins/Fontana, first published 1867, 1963 ed) 111.

<sup>17</sup> Markwell, *Constitutional Conventions and the Headship of State*, above n 1, 61–3.

<sup>18</sup> Ibid 63–4.

<sup>19</sup> Ibid 64.

<sup>20</sup> Ibid 65–70.

<sup>21</sup> Ibid 71–3. Originally published as Don Markwell, ‘Masters of Dissolution’, *Times Literary Supplement* (London), 12 April 1985, 402.

the *Public Law Review*<sup>22</sup> that both discuss one of the major themes of this work: the sources of informal advice appropriately available to the Governor-General on the exercise of reserve powers. The 1999 article recounts the findings of a thorough and searching historical enquiry into the relationships between Governors-General and two members of the High Court of Australia, Sir Samuel Griffith (the first Chief Justice) and Sir Edmund Barton, during the first two decades of the Australian federation, including the extensive consultations of the Justices by the Governors-General on constitutional matters. This enquiry reinforces Markwell's fourth proposition, outlined previously in Chapter 2, that the Governor-General is free to consult, in the exercise of his or her functions, whomever he or she believes it prudent to consult.<sup>23</sup>

Chapter 5 ('Three Governors-General: Hasluck, Kerr, Cowen') recounts the personal qualities, achievements and activities of three incumbents of the vice-regal office. It consists of an entry published in 2004 in the *Oxford Dictionary of National Biography* (co-authored with Geoffrey Browne) on Sir Paul Hasluck (Governor-General from 1969 to 1974);<sup>24</sup> two published obituaries for, and one reflection piece upon, the life of Sir John Kerr (Governor-General from 1974 to 1977), all written in 1991;<sup>25</sup> and a 1977 speech of introduction to Sir Zelman Cowen (Governor-General from 1977 to 1982) together with an address delivered at his state funeral in 2011.<sup>26</sup> Appendix II supplements the chapter with brief sketches of the lives of Dr Peter Holling-

<sup>22</sup> Markwell, *Constitutional Conventions and the Headship of State*, above n 1, 74–98. Originally published as Don Markwell, 'Griffith, Barton and the Early Governor-Generals: Aspects of Australia's Constitutional Development' (1999) 10 *Public Law Review* 280.

<sup>23</sup> However, it now seems highly unlikely that a Justice of the High Court would be prepared to provide such advice to a Governor-General: Chief Justice Robert French, 'The Chief Justice and the Governor-General' (2009) 33 *Melbourne University Law Review* 647, 656.

<sup>24</sup> Markwell, *Constitutional Conventions and the Headship of State*, above n 1, 99–105. Originally published as Geoffrey Browne and D J Markwell, 'Hasluck, Sir Paul Meernaa Caedwalla (1905–1993)' in H C G Matthew and Brian Harrison (eds), *Oxford Dictionary of National Biography* (Oxford University Press, 2004) vol 25, 717–19.

<sup>25</sup> Markwell, *Constitutional Conventions and the Headship of State*, above n 1, 105–13. The pieces were originally published as D J Markwell, 'The Sacking of Gough Whitlam's Government', *The Guardian* (London), 26 March 1991, 33; Donald Markwell, 'Sir John Kerr' *The Independent* (London), 30 March 1991, 14; Donald Markwell, 'Sir John Kerr: A Reflection' (1991) 23 *Australian Journal of Forensic Sciences* 18.

<sup>26</sup> Markwell, *Constitutional Conventions and the Headship of State*, above n 1, 113–20. The pieces were originally published as Donald Markwell, 'Speech of Introduction to Sir Zelman Cowen' (Speech delivered at the 49ers Dinner, Melbourne, 15 April 1997); Donald Markwell, 'Sir Zelman Cowen: Educational Leader and Healing Governor-General' (2012) 101 *Round Table: Commonwealth Journal of International Affairs* 23.

worth (Governor-General from 2001 to 2003) and Dame Quentin Bryce (Governor-General from 2008 to 2014).<sup>27</sup>

Chapter 6 ('The 1975 Constitutional Crisis and the Conventions of Responsible Government') comprises four stirring contributions to a constitutional debate that remains stubbornly unresolved more than 40 years on. They are a review published in 1984 of Sir Garfield Barwick's book, *Sir John Did His Duty*;<sup>28</sup> a foreword written in 1992 to Sir John Kerr's unpublished second book, *The Triumph of the Constitution*;<sup>29</sup> a letter to the Editor of *The Sydney Morning Herald* entitled 'Nothing Improper in Advice to Kerr' dated 7 January 1994;<sup>30</sup> and an opinion piece marking the 20<sup>th</sup> anniversary of the dismissal published in *The Weekend Australian* of 11–12 November 1995, entitled 'The Case for Kerr'.<sup>31</sup> In various ways, these items mount a vigorous and sustained defence of Sir John Kerr's actions culminating in the dismissal of the Whitlam Government on 11 November 1975. The hitherto unpublished foreword to Kerr's second book is most revealing in its summary of the broad scope of *The Triumph of the Constitution* and its insight into Kerr's personality and reflections since the publication in 1978 of his contentious book, *Matters for Judgment: An Autobiography*.<sup>32</sup>

Chapter 7 ('Debating the Headship of State — Monarchy to Republic?') contains a 1997 address on 'An Australian Republic?'<sup>33</sup> and a 2005 paper (with John Ritchie) on 'Australian and Commonwealth Republicanism'.<sup>34</sup> The former considers arguments on both sides of the debate over whether Australia should make the transition from monarchy to republic, and if so,

<sup>27</sup> Markwell, *Constitutional Conventions and the Headship of State*, above n 1, 201–6.

<sup>28</sup> Ibid 121–3. Originally published as Don Markwell, 'By Reference to the Voters', *Times Literary Supplement* (London), 20 April 1984, 439, reviewing Sir Garfield Barwick, *Sir John Did His Duty* (Serendip Publications, 1983).

<sup>29</sup> Markwell, *Constitutional Conventions and the Headship of State*, above n 1, 124–47.

<sup>30</sup> Ibid 147–8. Originally published as D J Markwell, 'Nothing Improper in Advice to Kerr', *The Sydney Morning Herald* (Sydney), 7 January 1994, 8.

<sup>31</sup> Markwell, *Constitutional Conventions and the Headship of State*, above n 1, 149–54. Originally published as Donald Markwell, 'The Case for Kerr', *The Weekend Australian* (Sydney), 11–12 November 1995, 25.

<sup>32</sup> Sir John Kerr, *Matters for Judgment: An Autobiography* (Macmillan, 1978).

<sup>33</sup> Markwell, *Constitutional Conventions and the Headship of State*, above n 1, 155–64. Originally published as Donald Markwell, 'An Australian Republic?' (Speech delivered at the Constitutional Centenary Foundation's National Schools Constitutional Convention, Canberra, 1 March 1997).

<sup>34</sup> Markwell, *Constitutional Conventions and the Headship of State*, above n 1, 164–77. Originally published as Jonathan Ritchie and Don Markwell, 'Australian and Commonwealth Republicanism' (2006) 95 *Round Table* 727.

whether the powers of the head of state should be codified in the *Constitution*. The latter includes a brief account of Australian republicanism since the colonial era together with further discussion of the related topic of the Australianisation of the Crown since 1901, one of the major themes of the book.

Chapter 8 ('The Office of Governor-General (2014)') consists of a paper prepared for a symposium held in 2014 in memory of Sir Zelman Cowen.<sup>35</sup> It expands upon the theme of the Australianisation of the Crown since the rise and fall of republicanism in the 1990s, especially during the tenure of Dame Quentin Bryce (Governor-General from 2008 to 2014). It also returns to the disputed assertion that the Governor-General, rather than the Queen, is Australia's head of state, revisits the discussion of the desirable attributes of a person appointed as Governor-General, and again takes up the theme of sources of advice to the Governor-General regarding the exercise of 'reserve powers', noting that Bryce sought and obtained advice from the Solicitor-General in 2011 (in the aftermath of a very close result in the general election) and in 2013 (upon the defeat of Prime Minister Gillard by Kevin Rudd for the leadership of the Australian Labor Party). Markwell suggests that:

It is striking that the Governor-General should, at least twice in three years, seek the counsel of the Solicitor-General or Acting Solicitor-General, and that in the second case she should handle this in part through correspondence through her Official Secretary.<sup>36</sup>

Overall, this book provides rich pickings on matters of enduring constitutional interest, disputation and significance. It is not without its limitations, notably unevenness and repetition, which are perhaps unavoidable in a selection of writings over such a lengthy period. Nevertheless, it subjects a number of important themes to assiduous historical research and analysis. It accepts the inevitability of controversy in its subject matter and does not recoil from it.

As previously noted, Markwell prescribes a rigorous standard of analysis in the identification of constitutional conventions:

<sup>35</sup> Markwell, *Constitutional Conventions and the Headship of State*, above n 1, 179–98. The paper was prepared at my invitation. It is now published in volume 38(3) of the *Melbourne University Law Review*, along with the other papers delivered at the symposium: Donald Markwell, 'The Office of Governor-General' (2015) 38 *Melbourne University Law Review* 1098.

<sup>36</sup> Markwell, *Constitutional Conventions and the Headship of State*, above n 1, 196–7.

One of the key messages of this book is the need for care in seeking to determine what conventions are, and in discussing how they are appropriately applied. This requires close attention both to precedent ... as well as to the constitutional principles in play.<sup>37</sup>

For the most part, Markwell measures up to that standard. Some will question the strength of his defence of Sir John Kerr's dismissal of the Whitlam government in 1975, but that is surely a matter on which reasonable minds may differ, thereby confirming one of the deficiencies inherent in constitutional conventions. More questionable, in my opinion, is his treatment in the 'Introduction' of two matters of recent controversy.

First, Markwell makes a surprising assertion relating to one of the major themes of the book — the sources of informal advice appropriately available to the Governor-General regarding the exercise of reserve powers:

there appears to be in some quarters a mistaken view that the Solicitor-General, a lawyer chosen by a government to advise and serve the government itself, should be treated also as some sort of independent legal adviser to the Governor-General. There is no constitutional or statutory basis for this view, it is contrary to most of Australia's federal constitutional practice, and it risks creating the untenable position of the Governor-General having conflicting advice from the Attorney-General and the Solicitor-General (the first and second Law Officers of the Commonwealth, respectively). With perhaps the rarest of exceptions, the views of the Solicitor-General should only be sought with the prior agreement of the Attorney-General, and even then sparingly.<sup>38</sup>

This assertion does not rest easily with Markwell's acknowledgment in Chapter 4 that Sir Ronald Munro Ferguson (Governor-General from 1914 to 1920) 'had quite a deal of contact' with Sir Robert Garran (Solicitor-General) during Munro Ferguson's term of office.<sup>39</sup> His attempt to dismiss this relationship as 'ad hominem' is unconvincing.<sup>40</sup> Markwell cites s 12 of the *Law Officers Act 1964* (Cth) in support of the assertion,<sup>41</sup> but in my view, that provision has precisely the opposite effect to that claimed. Section 12 provides that the one function of the Solicitor-General is 'to act as counsel for ... the Crown in right

<sup>37</sup> Ibid 19.

<sup>38</sup> Ibid 23 (citations omitted).

<sup>39</sup> Ibid 88.

<sup>40</sup> Ibid 87. This attempt is made in the book, but not in the original article published in 1999: see especially Markwell, 'Griffith, Barton and the Early Governor-Generals', above n 22, 288.

<sup>41</sup> Markwell, *Constitutional Conventions and the Headship of State*, above n 1, 23 n 12.



of the Commonwealth.<sup>42</sup> That seems sufficient to destroy the assertion.<sup>43</sup> Moreover, I suggest that the assertion also lacks support both from precedent (recall the actions of Dame Quentin Bryce in 2011 and 2013) and from constitutional principle (protection of the independence and integrity of the office of Governor-General in the exercise of ‘reserve powers’).<sup>44</sup>

Secondly, Markwell notes that the Prime Minister’s advice to the Governor-General in March 2016 to prorogue and shortly afterwards recall the Parliament was supported by a letter from the Attorney-General and a detailed paper on ‘The Practice and Precedents of Recall of Parliament Following Prorogation’;<sup>45</sup> which, Markwell says, showed that the powers to prorogue and recall Parliament had been used on 28 previous occasions and ‘were always exercised on ministerial advice’.<sup>46</sup> This statement may be unexceptionable, but the real issue is what inference, if any, may be drawn from it regarding the power conferred on the Governor-General by s 5 of the *Constitution* to prorogue Parliament. Does the Governor-General have a reserve power to decline to act on the advice of the Prime Minister to prorogue Parliament? The Attorney-General’s paper includes the following claims that were specifically noted by the Governor-General in the published correspondence:

It has been clear from the earliest authorities that the powers of prorogation and recall of Parliament are exercised on ministerial advice. There is no known

<sup>42</sup> *Law Officers Act 1964* (Cth) s 12(a)(i).

<sup>43</sup> Markwell apparently relies on the provision in s 12(b) of the *Law Officers Act 1964* (Cth) that another function of the Solicitor-General is ‘to furnish his or her opinion to the Attorney-General on questions of law referred to him or her by the Attorney-General’. He offers no reason why the ordinary meaning of the language of s 12(a) should be read down to accommodate the language of s 12(b). See also Sir Anthony Mason, ‘The Parliament, the Executive and the Solicitor-General’ in Gabrielle Appleby, Patrick Keyzer and John M Williams (eds), *Public Sentinels: A Comparative Study of Australian Solicitors-General* (Ashgate Publishing, 2014) 49, 50.

<sup>44</sup> See generally Michael Sexton, ‘The Role of Solicitors-General in Advising the Holders of Vice Regal Offices’ in Gabrielle Appleby, Patrick Keyzer and John M Williams (eds), *Public Sentinels: A Comparative Study of Australian Solicitors-General* (Ashgate Publishing, 2014) 91, 93–6; Anne Twomey, ‘Advice to Vice-Regal Officers by Crown Law Officers and Others’ (2015) 26 *Public Law Review* 193, 203–11; Gabrielle Appleby, *The Role of the Solicitor-General: Negotiating Law, Politics and the Public Interest* (Hart Publishing, 2016) 120–4.

<sup>45</sup> Letter from George Brandis to Sir Peter Cosgrove, 21 March 2016; George Brandis, ‘The Practice and Precedents of Recall of Parliament Following Prorogation’ (Paper, 21 March 2016) <<https://www.gg.gov.au/sites/default/files/files/gg/2016/Documents%20relating%20to%20prorogation%20of%20the%20Parliament%2021%20March%202016.pdf>>.

<sup>46</sup> Markwell, *Constitutional Conventions and the Headship of State*, above n 1, 24.

example of such advice being rejected, and no known suggestion that there is a 'reserve power' to reject advice to prorogue and recall the Parliament.<sup>47</sup>

These sweeping claims do not fare well under rigorous analysis.<sup>48</sup>

But this is not the place to resolve such issues, which demonstrate vividly that constitutional conventions have lost none of their sting. Markwell has produced a readable, relevant, lively and provocative account of a vital ingredient of our constitutional architecture, one still shrouded in mystery and embroiled in contention. He has made a worthy contribution to understanding of Australian conventions, and can hardly be reproached for any failure to deprive them of their uncertain content and fractious quality.

<sup>47</sup> Brandis, 'The Practice and Precedents of Recall of Parliament Following Prorogation' above n 45, 5 [23].

<sup>48</sup> Anne Twomey, 'Prorogation: Can It Ever Be Regarded as a Reserve Power?' (2016) 27 *Public Law Review* 144.