

Book Reviews

Australian Constitutional Law: Materials and Commentary

Peter Hanks and Deborah Cass

Sixth Edition, Butterworths, 1999, pp 950, \$124.00

This is the sixth edition of a highly regarded text, which was first published in 1972. Its latest manifestation has been substantially revised, with Deborah Cass sharing authorship with Peter Hanks. The new edition not only updates the material; as emphasised by the authors, the revisions and additions reflect significant shifts in emphasis in Australian constitutional law.¹ Domestic and international factors have changed the constitutional landscape in several ways, including increased recognition of indigenous issues, the putative diminution of Australian sovereignty through the impact of globalisation and international legal arenas, and debate concerning the prospects for republicanism and the existence of rights and freedoms under the *Australian Constitution*. These important topics are dealt with in new or substantially revised chapters that contribute significantly to the value of this volume.

The introductory chapter, 'What is Australian Constitutional Law?', examines the nature of constitutional law, and is useful as a brisk overview of fundamental issues and concepts. It provides good introductory material on topics with which such a book should be concerned, such as the relationship between law and politics, theories of constitutional interpretation, and principles of characterisation.

Chapter 2, on 'Indigenous People and Constitutional Law', is new to this edition and has been contributed by Jennifer Clarke. It is much more than a series of extracts from relevant cases. Recognising that the subject matter engages politics, history and sociology, as well as law, and with a thorough grasp of the material, Clarke raises topics such as the construction of indigenous identity by the law and the distinction between public and private ethnicity. She concludes that it may be the case that 'law cannot respond adequately to the particularity of Aboriginal "private ethnicity"'.² The chapter is also strengthened by Clarke's comparative perspective. Examples from the United States, Canada, and the United Kingdom are frequently explored; the law relating to extinguishment of native title is profitably discussed in

¹ At xvii.

² At 51.

relation to the United States position on extinguishment of Indian title. Clarke also includes a discussion of offshore sovereignty, with reference to *Yarmirr v Northern Territory*.³

Clarke's discussion of the history of colonialism is both sensitive and extensive. Clarke discusses the place of colonialism in the history of international law and its interrelationship with the doctrine of sovereignty, and draws on the views of Locke, Vattel and Vitoria. Clarke's discussion of the *Constitution* as it applies to Aborigines is also framed in its historical context, particularly the exclusion of Aborigines from the franchise and the use of the 'race power' under s 51(xxvi), which is also discussed with reference to *Kartinyeri v Commonwealth*.⁴ Furthermore, Clarke explores recent developments, such as the impact of the *Racial Discrimination Act 1975* (Cth), and the issue of whether the Crown is a fiduciary for indigenous people, again with reference to the position in the United States and Canada. Other topical issues explored include the prospects for a treaty between the federal government and Aboriginal Australians, and the proposals for a new constitutional preamble in the light of the 1998 Constitutional Convention. Although illuminating, these topical excursions would have been more appropriately situated in the context of a discussion of the political and social reaction to cases such as *Mabo* and *Wik*. A discussion of the political reaction to these cases would have greatly benefited the chapter. Nevertheless, Clarke provides a wealth of historical material on the subject matter, and her chapter is a sensitive and balanced introduction to this important aspect of Australian constitutional law and history.

Chapter 3, 'The International Dimension', is an extensively revised discussion of the relationship between Australian municipal law and international law. Whereas previous editions dealt only with the operation of the external affairs power (s 51(xxix)), this chapter has been substantially augmented to include a discussion of the mechanics of treaty making and implementation, and an analysis of the 'indirect influence' of international law upon Australian municipal law. Extended commentary, analysis and historical discussion complement case extracts. For example, the outline of treaty implementation contains a detailed discussion of legislative reforms in the wake of the High Court's decision in *Minister for Immigration and Ethnic Affairs v Teoh*.⁵

³ (1998) 156 ALR 370.

⁴ (1998) 152 ALR 540.

⁵ (1995) 183 CLR 273.

The history and development of the external affairs power is prefaced by an important overview of the relationship between international law, federalism, and the separation of powers. The examination of international law indirectly influencing municipal law is treated in less detail. This is unfortunate; the impact of customary international law on Australian law is a topic deserving more thorough treatment, and comparison with the United Kingdom position would have been beneficial. A discussion of the influence of international norms upon constitutional interpretation should involve reference to the impact upon Australian parliamentary sovereignty. Furthermore, it is surprising that there is no mention of the interpretative rules used by the High Court when construing legislation that gives domestic effect to treaties, which received extended consideration in *Applicant A v Minister for Immigration and Ethnic Affairs*.⁶ With an important recent decision on the impact of international customary law on Australian domestic law receiving academic interest (*Nulyarimma v Thompson; Buzzacott v Minister for the Environment*),⁷ this section will undoubtedly be expanded in future editions.

Chapter 11 is the longest chapter in the volume and deals with rights and freedoms under the *Australian Constitution*. It begins by examining express rights in the *Constitution*: protection against unjust property acquisition (s 51(xxxi)), the right to trial by jury (s 80), religious freedom (s 116) and the prohibition against interstate discrimination (s 117). The treatment of implied rights includes a detailed discussion of the impact of the decisions in *Nationwide News v Wills*⁸ and *Australian Capital Television v Commonwealth*⁹ on the implied right to political communication and the effects for representative democracy. Other implied rights which receive analysis are the implied right to equality of voting power (*McGinty v Western Australia*),¹⁰ freedom of movement, and freedom of association (*Kruger v Commonwealth*).¹¹ The chapter also deals with rights derived from Chapter III of the *Constitution*. The analysis here is thorough, detailed and considered, with lengthy case extracts.

Extracts from cases are clearly set out and are invariably relevant to the discussion and of appropriate length. The index, case table and

⁶ (1997) 142 ALR 331.

⁷ (1999) 165 ALR 621.

⁸ (1992) 177 CLR 1.

⁹ (1992) 177 CLR 106.

¹⁰ (1996) 186 CLR 140.

¹¹ (1997) 190 CLR 1.

statute table are of high quality and facilitate easy navigation. Hanks and Cass have succeeded admirably in updating and refining this important volume. *Australian Constitutional Law: Materials and Commentary* is ideal as a companion to a more detailed textbook of constitutional law, but it can stand on its own as a fine introductory handbook.

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Prisoners As Citizens: Human Rights in Australian Prisons

David Brown and Meredith Wilkie (eds)

The Federation Press, 2002, pp 384, \$49.50

This text provides a comprehensive analysis and discussion of a wide range of the human rights issues faced by prison inmates in Australia. The editors, David Brown and Meredith Wilkie, have included 17 articles, each written by a different author. Each article contributed constitutes a chapter within the text. The articles selected come from a wide range of authors, including such academics as Greta Bird (Associate Professor and Director of the National Centre for Cross Cultural Studies in Law and Director of Research at Southern Cross University) and Jenny Green (Sydney University of Technology). However, other professionals such as Anne Warner (President of Sisters Inside) and Tony Woodyatt (legal and social policy researcher) have also contributed commentary. The variety of sources included in *Prisoners As Citizens* ensures that a diverse range of viewpoints is presented.

The text is divided into three parts: Prisons and Prisoners; Regulating Prisons and Prisoners' Rights; and finally, Citizenship and Rights. Parts 1 and 2 each contain five articles, however, part 3 is lengthier, containing seven articles. In addition to the analysis and commentary provided by the various authors, this text is also interspersed with passages written by prisoners themselves, establishing a direct dialogue with the reader in describing their experiences. This adds a more personal touch to *Prisoners As Citizens*.

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