

Anne Twomey\*

## ***ANNOTATED BIBLIOGRAPHY OF PRINTED MATERIALS ON AUSTRALIAN LAW, 1788-1900***

Alex C Castles

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**C**OLONIAL legal and political history has been the subject of a resurgence of interest in recent years. In some part this is due to the present republican debate. Those who seek to change the Constitution and those who seek to defend it in its current form both look back to the formation of the Constitution to gain an understanding of its substance and the process leading to the agreement of its terms.

At the same time, recent controversial judgments of the High Court on constitutional law have renewed interest in methods of constitutional interpretation and whether the original intent of the framers of the Constitution should be the basis of constitutional interpretation. Recent discussion of the 'original intent' approach to constitutional interpretation, and the alternative view of the Constitution as a 'living force', can be found in the judgment of Justice Deane in *Theophanous v Herald & Weekly Times Ltd.*<sup>1</sup>

Finally, the judgment of the High Court in the case of *Mabo v Queensland [No 2]*,<sup>2</sup> which recognised the existence of common law native title to land, has sent researchers back to the archives to identify how land was dealt with in the colonial period in order to ascertain whether native title has been extinguished.

In the midst of these developments, Professor Alex Castles' *Annotated Bibliography of Printed Materials on Australian Law, 1788-1900* is a timely and much needed work. It covers all the parliamentary, judicial and legal materials of the colonial era, and is an essential starting point for someone embarking on research into colonial legal history.

## THE HISTORY OF PRINTED MATERIALS IN AUSTRALIA

The book commences with a fascinating chapter outlining the history of printed legal materials in Australia. The familiarity which most lawyers and legal researchers have with British published legal materials going back to the sixteenth and seventeenth centuries means that we expect the laws of Australia, produced in the eighteenth and nineteenth centuries, to be readily accessible on our library shelves. Castles challenges the foundations of that expectation, by noting that the publication of laws in the early years of Australian settlement depended on the existence of printing presses and the ability of people to work them. He records that although a printing press was brought to Australia on the First Fleet, it was not until 1796 that a convict was found who could work the press.

As other printing presses gradually arrived in the Australian colonies in the early 1800s, newspapers were published, filling the dual role of providing news and publishing the laws and orders of the colonies. Hence our very first legal publications took the irregular and impermanent form of newspapers. Castles notes that these newspapers were popular in their time, especially amongst the bushrangers of Van Diemen's Land, who liked to be aware of the laws they were breaking.

The establishment of legislatures meant that there was a need for more formal publication of laws. Acts or ordinances (as they were variously known) were initially published in pamphlet form. It was not until 1827 that New South Wales first published three volumes of Acts and Ordinances. In the poorer, less populated colonies, volumes did not appear until many years later.

In tracking down colonial legislation, one of the great problems is the different numbering systems used in the Australian colonies. On page xv of his chapter on Printed Materials, Castles gives an invaluable explanation of how the different Australian colonies numbered and cited their legislation, and traces these idiosyncrasies into the twentieth century.

The printing of court judgments proved even more difficult in colonial Australia than the printing of legislation. While the publication of legislation was at least supported by government funds, the publication of judgments was left to private enterprise, as in the United Kingdom. With a small population, however, this was not a commercially feasible enterprise for some time in the Australian colonies, and, accordingly, efforts to publish court judgments in the early nineteenth century were

sporadic. Even when judgments were published, the results were often less than accurate. On page xx of his chapter on Printed Materials, Castles describes the efforts made in each of the colonies to print reports of judgments.

The *South Australian Law Reports* appear to be the first long term, systematic series of law reports in an Australian colony, commencing in 1866. It should be noted, however, that they lapsed in 1892, and were not revived until 1899. The *Victorian Law Reports* followed in 1875 (although there had been a number of precursors to this series). The *Queensland Law Reports* commenced in 1876 and the *New South Wales Law Reports* commenced in 1880. The *Western Australian Law Reports* only just preceded Federation, commencing in 1897, and the *Tasmanian Law Reports* did not commence until this century, in 1905. It is extraordinary to think that our published records of Australian jurisprudence extend little more than one hundred years, but this is indeed the case.

In the absence of published law reports, the newspapers played a very important role in publishing accounts of important cases. Some newspapers, such as the *Sydney Morning Herald* and the *Melbourne Argus* treated court reporting as an important part of their role, and their accounts were relied upon by lawyers and judges alike. In addition to newspaper reports (or sometimes relying upon them), digests of cases were published towards the end of the nineteenth century, which included cases from the several colonies, thus giving a 'federal' perspective on law in Australia.

### THE ANNOTATED BIBLIOGRAPHY

Castles' bibliography is quite extensive, containing 2558 entries. It is compiled alphabetically, primarily based on the author's name, but it also uses titles in the absence of an author. Some of these titles are rather obscure, and the bibliography would be somewhat inaccessible if it were not for the excellent Index which collects all areas under subject and author headings. In addition, there is a separate Table of Cases, a Table of Law Reports, and a Table of Statutes, which will be of great assistance for those seeking specific items.

The subjects of the entries range from accounts of court cases to parliamentary papers, legislation, and general pamphlets or texts on matters relating to the law. Some of them are quite peculiar, such as the Government order, issued by the Colonial Secretary's Office in 1831, on

*Traffic in Human Heads.* Apparently, preserved human heads were in such demand by European museums that people were being killed to ensure that there was a ready supply for this lucrative trade.

The bibliographical entries are supplemented by annotations which often give brief biographical details of some of the more prominent legal or political identities of the age. In some cases references are provided to modern biographical works on these subjects. The annotations provide Castles with an opportunity to express his personal views on these characters. This lightens what might otherwise be a rather heavy tome, and invites browsing. For example, his annotation to the entry on Redmond Barry's *Address and Opening of the Circuit Court at Portland in 1852*, reads in part:

Barry had an inflated view of his own ability and a penchant for self-publicity as evidenced in this and other publications of his speeches which he arranged from time to time.

The annotations sometimes provide the historical context in which the material was used. In his annotation to the entry on Blackstone's *Commentaries on the Laws of England*, Castles notes that this was one of the few legal texts available in the early days of the colony, and was probably the only one available to Governor Bligh. Ironically, the relevant edition was edited by the brother of Fletcher Christian, who was better known to Bligh for his mutiny than his obedience to the laws of England.

The annotations are also useful as a summary of the salient points of the text. For example, the entry on the *Select Committee of the Legislative Council upon the Aborigines* records that the report examined, *inter alia*, the status of Aboriginal law in South Australia. Such records would be extremely useful to those examining native title claims or seeking to establish contemporary legal recognition of Aboriginal customary law.

The frustrating aspect of the book is that in most cases it only solves half the problem involved in researching colonial legal history. It identifies the existence of the material and gives a detailed citation, but it rarely identifies where the material may be found. Given the large number of archives and libraries which have been scoured to create this bibliography, it would have been useful if a further annotation could have been made to each item identifying at least one source from which it may be obtained.

This criticism does not apply in all cases. For example, the annotation on Kingston's draft *Bill for an Act for the Union of the Australian Colonies* notes that it is to be found in Document 6, Griffith Papers, Dixon Library. However, other entries on Kingston, including his pamphlets on *Constitutional Reform and Household Suffrage* give no clue as to where the documents are to be found, despite the fact that they are probably just as rare as the draft Bill.

In some cases the annotations mention whether the document has been reprinted in recent times. For example, the annotation on the collection of legal opinions from British counsel on the validity of John Batman's 'treaties' with Aborigines in Port Phillip, records that extracts from these opinions have been reprinted in more recent works, and gives a further reference for comment on the legal validity of these treaties. These references to recent reprints are also interesting from the point of view of identifying who is taking the effort to bring historical works back to public access. In the case of Sir Henry Parkes' *Fifty Years in the Making of Australian History*, Castles' annotation notes that it was re-issued in facsimile in 1971 by Books for Libraries Press, Freeport, New York. It is curious that such a work was reprinted in America rather than Australia.

Many entries, however, have no annotations at all, and appear tantalisingly elusive. Take for example the following entry:

**Colonist**, A Proposal for the Confederation of the Australian Colonies with Prince Alfred, Duke of Edinburgh, as King of Australia. Melbourne. George Robertson, 1867.

*Castles' Annotated Bibliography of Printed Materials on Australian Law 1788-1900* will become an essential tool for those who are exploring Australia's constitutional history and the history of the legal treatment of Australia's indigenous people. More importantly, it will be a significant reference work to identify works on less glamorous areas of the law, which form an important part of our legal and social history, and which may still be instructive in interpreting law today. Like all good professors however, Castles has not given his students or readers all the answers, and for many this bibliography will be only the starting point of a quest to find these documents somewhere in the dim recesses of the archives and libraries of Australia.

- \* B A, LL B (Hons) (Melb); Lecturer, Law School, University of Sydney. This review is based on a review published in (1994) 2(6) *Australian Law Librarian* 345.
- 1 (1994) 124 ALR 1 at 50-52.
- 2 (1992) 175 CLR 1.