

Australian Constitutional Law and Theory

Commentary and Materials

Tony Blackshield and George Williams; The Federation Press 1998; 2nd edn; 1256 + xxxix pp; \$90.00 softcover.

They're back! And they've written back!

Only three years after the first edition of their ambitious reimagining of the ground of Australian constitutional law studies was first reviewed in these pages, Blackshield and Williams have produced a second edition. Readers will get a sense of the intellectual politics of the volume when they read the cover blurbs: (Justice) Michael Kirby praised the first edition for reflecting on the big questions; (Professor) Neil Rees' assessment is: 'Brilliant! The best Australian casebook I have read in any area of law'. For those with less knowledge of the personalities of Australia's legal establishment but a sense of the ghosts that trouble our unhappy constitutional hybrid, there is the closing sentence of the preface:

The law is stated as at 11 November 1997.

There is also the epigraph — what Foucault might have said about common law constitutional jurisprudence if we had asked him in time.

And there is the fact that causes me — as well no doubt as other professional commentators on the profoundly consequential drama that is the contemporary making of Australia's constitutional imaginary — to (self-) reflect both on recusance in all its forms and on the ethics of judgment. Blackshield and Williams have responded, thoughtfully and imaginatively, to criticisms made of the first edition by scholars and teachers, including your reviewer. However, accepting that reviewing, like compiling casebooks or rendering judgments in constitutional cases, is a positioned phenomenon — that we write from where we stand, if you like — is something that Blackshield and Williams and this writer have in common.

To the eyes of an Australian teacher of law this is an exciting variation on the legal casebook genre. Its choice of readings beyond the boundaries of black-letter law and the reflectively pedagogical way it introduces materials and discusses issues are groundbreaking. This time the range of sources is often inspired, as in the inclusion of work by the leading political theorist Wendy Brown and Cardozo's Michel Rosenfeldt. Together with Yale's Jack Balkin, represented in both editions, these are among the most exciting contemporary thinkers on the broad question of national identity — although an extension further across disciplinary boundaries into writing by Benedict Anderson or Homi Bhabha, say, would have been a welcome stretching of the envelope. To writing on legal categories by Reg Graycar and Margaret Davies on subjectivity has been added a piece by the late Mary Jo Frug on identity politics. Foucault is now offered as a counterpoint to Kelsen in the acute framing of the constitutional relevance of the sharpening conflict between traditional and poststructuralist conceptions of knowledge that marks our era in the history of ideas.

These are just part of this text's appeal as a teaching and learning resource. The imaginative reworking of the early chapters on constitutional theory and history enables students to conceive of legal study as an intellectually and ethically engaging pursuit. The taking-up of Mary Crock's suggestions in adding a chapter on the immigration and aliens power to the sample powers explored is as constitutionally

significant to this volume as the chapter on 'Indigenous peoples and the Question of Sovereignty' was to the first — and critical to students' understanding of the intimate connections between the study of constitutional law and the crises of identity currently besetting our nation. The expansion of the material on implied rights and freedoms into three chapters enables students to view constitutional law from the cutting-edge. If the authors' representation of and selection from cases does not always bear out their conviction that the contested and contingent nature of judicial decision making inevitably leads judges 'to draw upon deeper and ultimately more personal conceptions of the purposes, principles, values and practical impact to which a constitutional system of law and government ought to aspire (including ... a personal conception of the appropriate scope and limits of the judicial process)', the effort makes this a marked innovator in the Australian legal casebook field.

US scholars and teachers of constitutional law are generally bemused when they register that teaching the subject in this country is not the glamour assignment it has traditionally been in theirs. With the new edition of *Australian Constitutional Law & Theory: Commentary & Materials* their Australian counterparts have only ourselves to blame if it remains the Cinderella of the Priestley 11.

PENELOPE PETHER

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Just Words

Constitutional Rights and Social Wrongs

Joel Bakan; University of Toronto Press 1997; 152 pp + notes, references and index; softcover.

Joel Bakan's nicely titled *Just Words* provides an excellent introduction to the Critical Legal Studies critique of rights in the Canadian context. It also provides a salutary tale for those on the left who support the idea of a Bill of Rights for Australia (myself, though somewhat ambivalently, included). The book canvasses the cons (and pros)

of the entrenchment of rights in the Canadian Constitution by way of the Canadian Charter of Rights and Freedoms. Bakan is clearly a rights-skeptic, notwithstanding his more moderate claims in the conclusion.

The book is divided into four parts. First is an analysis of the legitimacy of judicial review of legislation and