

Australian Federal Constitutional Law: Commentary and Materials

G Winterton, HP Lee, A Glass and J Thomson

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This edition seeks to provide commentary and material on various aspects of constitutional law, namely, Australian Constitutionalism, Inconsistency, Commerce and Corporations, External Affairs and Defence, Commonwealth Financial Powers, Freedom of Interstate Commerce, Excise Duties, Rights and Freedoms, Intergovernmental Immunities and finally, Constitutional Interpretation. It is an impressive attempt to mesh materials from academic, judicial and political arenas recognising the hybrid nature of the forces underlying constitutional law. Moreover the work provides students with a thorough and broad understanding of significant areas of constitutional law. Selected chapters are discussed below.

The first chapter provides a comprehensive outline of Australian Constitutionalism, including an outline of federalism, and a comprehensive section on judicial review and constitutional rights. Of particular interest is the authors' inclusion of a section on constitutionalism and diversity. The section on equality and difference is particularly impressive, as it discusses at some length the significance of self-determination to indigenous Australians.

Chapter 2 addressing Inconsistency begins with an analysis of s109 of the Constitution and outlines situations where inconsistency can occur. The authors consider the purposes of s109¹ and three tests for inconsistency: impossibility of obedience, denial of rights and covering the field. Whilst this chapter seemed to cover s109 well, the 'notes' section of the chapter at times contains useful commentary which would be better suited to the body of the text.

The third chapter considers commerce and corporations, particularly s51(i) and (xx) of the Constitution. Of particular interest is the comparative analysis of the US commerce clause with s51(i), and the recent decision *United States v Lopez*.²

The fifth chapter examines Commonwealth powers in relation to taxation (Constitution ss53 and 55), particularly grants and appro-

¹ In terms of its institutional purpose, its relation to state laws and Commonwealth powers, what is 'law' and a consideration of Commonwealth and State laws.

² 514 US 549, 115 S Ct 1, 624 (1995).

priations. The authors recognised the complexity of the *AAP* case³ as 'not only about the answers, but also to some extent, the issues' of this area. Given the complexity of the decision, further discussion of the differing judgments would have been helpful, for example, the discussion of past governmental practice and public administration by Mason and Murphy JJ.

Chapter 8 contains extensive discussion of the topical area of constitutional rights and freedoms. It includes recent decisions on implied freedom such as *Levy v Victoria*⁴. Of particular use to the student, researcher, or practitioner is the reference to recent academic work on the re-shaping of the common law in relation to implied freedoms. The inclusion of excerpts and notes on *Kruger v Commonwealth*⁵ was interesting: however, only Justice Dawson's judgement was included in any length. Whilst their Honours generally adhered to their views as outlined in *Leeth*⁶, referred to in Justice Dawson's judgement, excerpts from the other judgements would have been of advantage to readers.

The tenth chapter considered three basic approaches to legal interpretation which 'dominate' Australian and American writings, namely, Originalism, Textualism and Contemporary meaning. The authors are quite strident in emphasising 'legal interpretation' as distinct from historical or philosophical interpretations of the constitution, and suggest an 'inconclusiveness' to constitutional interpretations as it necessitates consideration of the role of judicial review per se in a constitutional democracy. A discussion of alternative approaches in other jurisdictions would have strengthened this chapter. Of particular interest to Australian readers is the brief discussion of suggestions to amend the Australian constitution with a new preamble, including the resolution of the Communique issued by the Constitutional Convention in 1998. This chapter also includes excerpts from recent academic works in this area, although references to works following the constitutional convention were not included. This chapter may have been better situated at the beginning of the work, to provide readers with a theoretical context when considering the other chapters.

³ (1975) 134 CLR 338.

⁴ (1997) 71 ALJR 837.

⁵ *The Stolen Generation case* (1997) 190 CLR 1, 71 ALJR 991.

⁶ (1992) 174 CLR 455.

If there is a criticism of this book, it goes to the format rather than the information. It would be easier to differentiate the commentary from the materials if, rather than a lined border, it was in different subsection headings. Also, some of the more extensive notes might well have been included in the main body of the text. This said, it is clear from the current debate on the referendum and amendments to the constitution highlight that constitutional law, with its complex political, philosophical and legal elements, is enjoying a period of increasing interest from students, practitioners, politicians and the public. The recent 'cross vesting' decision on 17 June 1999 in *Re Wakim; Ex parte McNally*⁷ contains numerous implications for areas such as property, corporate and family law, highlighting the pervasive influence of constitutional law on other practice areas. This book provides a valuable discussion of cases and academic works that will contribute to informed debate on and analysis of the plethora of constitutional issues such as those raised by *Re Wakim*, which Australia faces both at present and into the new millennium.

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Australian Commercial Law

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Australian Commercial Law is a general reference text for practitioners, business professionals and students, outlining the principles of business law in Australia. This edition updates the previous edition in light of legislative amendments since 1996. The text has fully incorporated changes in the areas of bankruptcy and workplace relations brought about by the introduction of the *Bankruptcy Legislation Amendment Act 1996* (Cth) and the *Workplace Relations Act 1996* (Cth) respectively.

The chapter on company law has been substantially rewritten in response to legislative amendments to trade practices and copyright laws. In addition, a new section on native title has been included in this edition. Recent court decisions are discussed in the context of their relevance and application to the various areas of commercial

⁷ *Re Wakim; Ex parte McNally, Re Wakim; Ex parte Darvall; Re Brown; Ex parte Amann; Sp* [1999] HCA 27 (17 June 1999) where the High Court by a majority of 6:1 decision held that State judicial power could not be vested in the Federal Courts under the Constitution.

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