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Speech at launch of

***Australian Constitutional Law and Theory:
Commentary and Materials***

Blackshield and Williams, 4th edition

The Art Gallery of New South Wales, 24 February 2006

It is an honour to have been invited to launch the 4th edition of this book, a book which has enjoyed great and deserved success since I launched the 1st edition 10 years ago. There is every reason to think that the new edition will be as warmly received as its predecessors.

Much has happened since the 1st edition was published. The High Court has delivered many important decisions, some of which have altered our understanding of fundamental principles. None more so than *Combet v Commonwealth*. One has only to read the dissenting judgment of Justice McHugh to gauge the impact of the decision on traditional thinking. So it is not surprising that the Preface to the 4th Edition tells us that the new edition “has involved a thorough re-write”.

The authors attribute responsibility for this cataclysmic development to the High Court. According to the authors:

“Gone are the days when the Court ... first implied a freedom of political communication ... Such implications are now more likely to be narrowly construed, or indeed bypassed due to the use of principles of statutory construction that enable the Court to avoid the need for constitutional analysis at all.”

Although this comment may well be correct in the particular context in which it is made, its accuracy is best left for others to judge. The reference to the principles of statutory construction may indicate why the book begins with a Delphic, yet revealing, quotation from Michel Foucault, the cultural theorist, taken from *The Archaeology of Knowledge*. The quotation discusses the shadowy relationship between commentary and the primary text of an instrument, with all the multiple and hidden meanings with which it may be credited.

The authors draw heavily on Foucault and Jacques Derrida, the French deconstructionist. The authors seem to be as familiar with their works as they are with High Court judgments, as the lengthy extracts from Foucault in the opening Chapter and the multiple extracts from Derrida in the Chapter on Constitutional Interpretation demonstrate. Is there a hidden message here? Is the key to understanding High Court judgments to be found in the almost mystical writings of the French philosophers of language and culture? Although High Court judgments were described in my time as “dense”, the writings of Derrida are, at least in my experience, impenetrable. The Court would be extremely ill-advised to engage a disciple of Derrida to distil the essence of its judgments for the benefit of the media and the public.

The writing of the 4th edition has resulted in substantial changes, though many of the changes are directed to the goals of greater clarity and to restructuring.

The opening Chapter has been reduced very considerably by including the discussion of political liberalism in a second chapter dealing with that topic. The new separation of constitutionalism and political liberalism marks a recognition of the way in which modern politicians have come to view our form of democratic government. The non-observance of old conventions shows that they are more correctly treated as elements of political liberation than constitutionalism. So, for example, today the doctrine of individual ministerial responsibility for the acts of the minister’s department, sanctioned by ministerial resignation, is best regarded as an element of traditional political liberalism rather than as a principle or convention of

our form of government. The Chapter on political liberalism contains a new section on Church and State which draws on the writings of John Locke and the history of Church-State relations as they developed from the early days of Christianity in the Roman Empire down to more modern times in the United States.

Chapter 12 on the Executive has been rewritten so as to give the discussion greater coherence and to take account of more recent decisions. This chapter includes a discussion of the effect of privative clauses in the context of s. 75(v) of the Constitution. Central to the discussion is the effect of the High Court's decision in *Plaintiff S157 v Commonwealth* on the *Hickman* principle. *Plaintiff S157* reaffirmed the proposition that *Hickman* enunciates a principle of statutory construction but denied that the application of the principle resulted in the privative provision controlling the meaning of the remainder of the statute, whatever the statutory context may be. *Plaintiff S157* placed important limits on the Commonwealth's capacity to oust s 75(v) judicial review, more particularly in cases where there has been a denial of natural justice. The effect of *Plaintiff S157* is to give less weight to the *Hickman* principle than Sir Owen Dixon was understood to give it.

Sir William Wade, the doyen of English public lawyers, told me that in assessing the quality of any book on public law he would go first to the chapter on the Crown. He made it clear that very rarely did the chapter satisfy his exacting standards. Perhaps the only texts which passed his muster were the many editions of his own landmark work *Administrative Law*.

If one were to follow Sir William's approach in an Australian context, one would turn to the chapter on the Executive. Whether Blackshield and Williams measures up to Sir William's Olympian standards, we shall never know. If it is any comfort to the authors, I can say that I know of one very highly regarded work on public law which, in the eyes of Sir William, failed to scale these lofty heights. When I asked him what he thought of the particular chapter in that book, he replied "It is very confused".

Judicial power has always seemed to occupy a disproportionate amount of the High Court's attention, a fact noted decades ago by Professor Geoffrey Sawer. If anything, the Court's focus on judicial power has become even more concentrated in the last decade. The arid concept of federal jurisdiction has complicated the exercise of judicial power to a degree never imagined by the framers of the Constitution at the end of the 19th century. The attention which the Court has given, and is required to give, to federal jurisdiction and to the existence of a "matter" has contributed to the rewriting of Chapter 14 on the "Separation of the Judicial Power", although the concept of "matter" is discussed in Chapter 13 on the "High Court and Constitutional Legislation".

If Justice Gummow were to write a book on the Constitution, one would expect to find at least one chapter devoted to the discussion of the constitutional concept of "matter". I doubt that the Judge would agree that the authors have sufficiently acknowledged the importance of the concept.

The separation of the judicial power has been a fertile source of implications in the past. And Justice McHugh, in his address to the NSW Bar Association some years ago, predicted that Ch. III would continue to generate implications in the nature of due process rights. Whether that prediction will be fulfilled remains to be seen. Justice McHugh's departure from the Court may weaken the foundations on which he based his prediction.

This aspect of Ch. III attracts less attention in the text than I would have expected. Maybe the explanation is that implication these days is a "boo" word to be avoided at all costs. Again, I would have expected implication to be discussed in the Chapter on Constitutional Interpretation. I note, with disdain and distaste, the passing fashion to treat constitutional interpretation as if it were simply a sub-set of statutory interpretation. The authors certainly do not subscribe to this passing fashion.

The relevance of international law to the interpretation of the Australian Constitution has become the subject of overheated disputation. The dispute between Justice Kirby and Justice McHugh has its parallel between the dispute between

Justice Scalia and Justice Breyer, although that dispute has been conducted with due deference to the conventions of civility and courtesy. You may have seen Justice Roberts was asked in his examination before the Senate Judiciary Committee on his nomination as Chief Justice whether he would interpret the Constitution by reference to international law. His beguiling answer was that he would be guided by precedent.

The context in which the controversy has arisen is rather different in the United States. There, it has arisen in connection with guaranteed rights provisions in the Constitution, whereas here international law, it is argued, should be applied as a constraining influence on the scope and content of legislative power. The public debates between Justice Scalia and Justice Breyer make very interesting and entertaining reading and exhibit pointedly the opposing points of view. As often transpires in controversies of this kind, the participants are not always using terms in the same sense. The American judges, for instance, appear to be using international law in a portmanteau sense, that is, to embrace not only the rules of international law but also transnational law and comparative legal materials. Justice Kirby now seems to be using international law in the same sense – though this is not entirely clear because in the earlier cases he may have been using it in a more limited sense, whereas Justice McHugh seems to be talking about “rules” of international law and asserting that you cannot apply such rules so as to bind or control the interpretation of the Constitution which, he implies, is what Justice Kirby is doing.

It may be that Justice Kirby’s early judgments announcing his interpretive rule were susceptible to criticism by Justice McHugh. Justice McHugh may not have noticed that Justice Kirby seems to have changed his position.

There are two lessons to be learned from these debates. One is that there is the world of difference between using international norms on human rights to interpret a modern constitution intended to reflect such norms and using those norms to interpret an old constitution which has no similar background, particularly legislative powers in such a constitution. The other lesson is that under no circumstances should you get drawn into a debate with Justice Scalia. He is the Mike Tyson of the judicial world, at least as a presenter and debater. At the end of the day, with due respect to the High Court Justices, international law and comparative legal materials may have relevance to constitutional law in various situations, that is, the Court may have regard to them but not, in the Australian context, in such a way that they will have a controlling influence, otherwise perhaps than in situations which are exceptional. In other words, international law and comparative materials are unlikely to prove decisive.

There is, as one might expect, an entirely new chapter dealing with detention, headed “Judicial and Non-Judicial Detention”. Adopting their established technique, the authors deal with the modern High Court cases, setting out pertinent extracts from the judgments pointing up differences of approach in the various judgments and raising some questions for consideration. This technique is designed to stimulate critical thinking by students. As one who is no longer classified as a student, I would have welcomed a more extensive discussion in which the authors aired their views on critical questions: for example, was *Al-Kateb v Godwin* correctly decided and what, if any, is the reach of *Kable v DPP* in the light of the more recent cases.

Chapter 16 dealing with “Characterisation and the Trade and Commerce Power” has been rewritten but not, in my view, in such a way as to depart in substance from the approach taken in the earlier editions. Section 92 has been in a deep sleep for two decades but no doubt it will be roused into action once more.

Chapter 30 dealing with “Constitutional Change” contains new material dealing with the Bill of Rights debate. This material relates to rights protection in other parts of the world, notably India, South Africa, Canada and the United Kingdom. The point is made that these developments leave Australia in lonely isolation as the only democracy without a national entrenched or state-based Bill of Rights. The new material also surveys the history of endeavours to introduce general

human rights protection in Australia, endeavours which have so far been unsuccessful, except for the ACT. There are, however, indications that Victoria is moving to embrace a Bill of Rights, a process in which one of the authors has played a significant part. It may be that the tide has turned and that support for a Bill of Rights is growing. But the questions remain: what rights are to be protected and how are they to be protected? The new material lists the options.

If Australia were to adopt a Bill of Rights, even a statute-based Bill of Rights, would that adoption have any impact on the willingness of Justices to have regard to international and comparative law in interpreting the Constitution? I am not suggesting that it would or that it should. But the absence of a Bill of Rights in Australia is one of a number of reasons why Justices would be reluctant to introduce international comparative law norms on human rights into our constitutional jurisprudence.

In a publication of this kind, designed to draw upon a wide range of materials, there is much room for difference of opinion on what should be included and what should be excluded. This comment applies with special force to the selection of decided cases, judgments and extracts from judgments. It seems to me that the authors have done well. Indeed, I am surprised at how well they have done.

My regret that the authors have not favoured us with a greater exhibition of their own views on contentious issues is no doubt out of order. This is not a text book; nor is it written for the reader who habitually turns to *The High Court and the Constitution* for guidance. It is a work which contains materials for the benefit of teachers and, more particularly, students.

There is a Nescafe version of the 4th edition published as an abridged edition. This edition omits the chapters on Political Liberalism, the Westminster Constitution, the High Court and Constitutional Litigation, the Immigration and Aliens Power, the Races Power, the Industrial Relations Power and Freedom of Political Communication. The justification for the Nescafe edition is that students don't have much time – they are working part-time – and lecturers don't lecture on topics such as industrial relations and excise. I am told that even s 92 is not dealt with in some courses. This intelligence beggars belief.

We can imagine what Sir John Latham and Justice Higgins would have to say about these developments, were they alive today. They would insist on a public burning of the Nescafe edition.

The very existence of this truncated edition and the willingness of the publishers to publish it is indicative of the substantial changes which have taken place in constitutional law and in the teaching of constitutional law. They also indicate that the heartland of constitutional law is in process of erosion.

On this sombre note I shall conclude with a declaration that the book is duly launched.