

Speech by The Hon Michael McHugh QC AC, given at launch of *Australian Constitutional Law and Theory 5th edition*, Friday 19 February 2010.

I am honoured to be asked to launch the fifth edition of *Australian Constitutional Law and Theory*, particularly since this is the last edition of this classic work that Tony Blackshield will co-author. Because that is so, it would be remiss of me not to mention, however briefly, his remarkable career as a lawyer, teacher and author.

Tony graduated from the University of Sydney Law School 50 years ago this year. As was a common practice in those days, he had served five years as an articled law clerk with a Sydney law firm while completing his studies. Then, upon his admission as a solicitor, he worked for that firm as a solicitor for another nine months. I suspect few lawyers are aware of that flirtation of Tony's with the practising profession. However, his real love was academia, not the practising profession. He had been a student of Julius Stone and at the beginning of 1961 he took up a full time position as a Research Assistant in the Department of Jurisprudence and International Law, doing research for Stone's 1960s trilogy - *Legal System and Lawyers' Reasonings*, *Human Law and Human Justice* and *the Social Dimensions of Law and Justice*, the successor volumes to Stone's *The Province and Function of Law*. It would be remarkable if this research work did not have a profound influence on Tony's approach to law in his subsequent writings and teaching, and I have little doubt that it did.

Tony remained a research assistant for three years; but in addition he lectured in Jurisprudence. In his first year as a lecturer in that subject, he taught Murray Gleeson and Michael Kirby who Tony has said were two of the best students he ever taught. Tony's influence on one of them has been plain to see; I am not too sure about the other. Tony was then appointed a Lecturer and later a Senior Lecturer in the Department of Jurisprudence. After six years in the Department, he switched universities being appointed Senior Lecturer in Law at the University of New South Wales in 1974 and Associate Professor of Law in 1974. In 1979, he switched cities and became Professor of Legal Studies at Latrobe University, staying there for 9 years until he was appointed Professor of Law at Macquarie University, a position he held for the next 11 years. Since then he has been an Adjunct Professor of Law at the Australian National University, Emeritus Professor of Law at Macquarie University and Visiting Professor of Law at the University of New South Wales.

Over a 40 year period, his services have also been in great demand by overseas universities and institutions as a Visiting Professor or Scholar, as a lecturer, as a consultant and adviser and as a participant in high-level seminars and conferences on a variety of legal subjects.

One of Tony's best known students told me that he was an inspirational teacher with a remarkable encyclopaedic knowledge of law, especially constitutional law. Over the years, he has given courses on an extraordinary variety of legal subjects including Jurisprudence, General constitutional law and theory, Australian federal constitutional law; Public International Law; the Uses of Logic in the Service of Law; the Moral and Ethical Aspects of Lawyers Justice; Legal Systems; the Judicial Process; Theories of Justice; Law, Lawyers and Society; Racism,

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Aborigines and the Law; and Comparative Law as well as courses in private law subjects such as contracts, torts, commercial law, equity and other subjects.

In addition to major publications to which Tony has contributed such as *The Oxford Companion to the High Court of Australia* and *Australian Constitutional Law and Theory*, Tony has published widely on a variety of legal subjects in a variety of publications. They even include an article as co-author on the subject of evidence in a sexual offence trial which criticises a judgment of the High Court to which I was a principal contributor. One of his most impressive publications is his article, "National Constitutions In An International World" in the *Indian Journal of Constitutional Law* in 2008 which shows Tony's mastery of comparative constitutional law. In that article, he analyses the case law of the South African, Indian, Australian and United States courts to show the extent to which the interpretation of Constitutional provisions have been influenced by international standards. Only a master of the case law and legal doctrines of each those jurisdictions could so confidently and lucidly expound his thesis, as Tony did in that article. Not everyone would agree with his conclusion that "one would have to conclude that a national Constitution must always be interpreted in conformity with international law, whether or not it includes provisions like those in South Africa and India." As Tony recognises, this is a much stronger claim than those advanced in the United States by Justice Kennedy in *Lawrence v Texas* 539 US 558 (2009) and by Justice Kirby in a series of High Court cases. But, whether one agrees or disagrees with Tony's conclusion, this article is certain to be influential and the first point of reference for anyone, Justice Scalia aside, concerned with the use of international law in interpreting national Constitutions.

I should add that Tony would have made a great barrister as a counsel in appellate and constitutional cases. Indeed, he was admitted as a non-practising barrister in 1971. However, he chose the Academy and not the Bar for his legal career. Given the reluctance of Australian politicians to appoint academics to judicial office, particularly high judicial office, his choice of an academic career probably deprived this country of a great appellate judge.

By any reckoning, Tony Blackshield's contribution to legal scholarship and education has been enormous. It will be an injustice if his contribution is not soon recognized in the Australian Honours List.

I had always assumed my former High Court Associate was the George Williams who was Tony's co-author of *Australian Constitutional Law and Theory*. However, a review on the website of an Indian bookseller contradicts that assumption. The relevant passage says:

"George Williams has contributed to *Australian Constitutional Law and Theory: Commentary and Materials* as an author. George Williams (1850 - 1928) was born in Dublin, Ireland, and served in the Civil Service of the British Government at Dublin Castle. Converted at age sixteen, Williams was an untiring Christian worker in spite of chronic health problems. His close association with the evangelical revivals of the nineteenth century, especially those of D L Moody in England, brought him into contact with the outstanding Bible expositors and teachers

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of his day. His own evangelistic ministry was conducted throughout Ireland and Europe where his proficiency in French, German, Italian and Spanish allowed him to p..."

Perhaps evangelism and strong beliefs runs in the Williams' genes. Certainly, there has been no lawyer in recent times – perhaps ever- including Michael Kirby, who has preached the gospel of constitutionalism and bills of rights more than George has. Like Tony, he has been a prolific contributor to legal scholarship and legal publications, but he has also sought to reach a wider audience with a continual stream of commentaries on legal topics and cases in the print and electronic media.

The happy collaboration of these two great legal scholars has made *Australian Constitutional Law and Theory* in the words of one reviewer, "the most comprehensive treatment of Australian Constitutional law available today." I have read each edition of the book and, despite the presence of other outstanding constitutional treatises, I agree with that opinion.

The course of this book's development over five editions shows that the authors' learning, like constitutional doctrine, is evolving. The structure of each edition has differed from its predecessor. The difference between the structure and content of the first edition published in 1996 and this fifth edition is great although of course a significant amount of material is common to all editions. The first edition was 1033 pages long; the fifth edition is 1417 pages long, a 37% increase. Gone are the quaint headings such as British Constitutionalism and Diceyan Theory that appeared in Chapter 2 of the first edition. That is not to say that the fifth edition does not discuss Diceyan theory. In fact, whereas the first edition had about 8.5 pages of extracts from Dicey's *Law of the Constitution*, the fifth edition still retains about 7 pages. What has changed is that Diceyan theory is no longer upfront and contained in a single chapter. Extracts from Dicey's *Law of the Constitution* are now scattered throughout the fifth edition and used to explain and illustrate current constitutional doctrine.

Legal textbooks dealing with contemporary subjects of law are usually outdated to some extent before they leave the publisher. It is inevitable that a new edition of any legal text book, dealing with a contemporary subject, particularly one presenting extracts from case law and legislation, will need to discuss the latest cases, legislation, materials and scholarship and either expand its length or jettison older material or both. As was inevitable, extracts from the constitutional cases decided by the High Court since the fourth edition have been added. All the cases you would expect to see are there: *AG v Alinta*, *Bennett v The Commonwealth*, *Betfair*, *Clarke v Commissioner of Taxation*, *Forge v ASIC*, *Gypsy Jokers Motorcycle Club*, *International Finance Trust Co Pty Ltd*, *ICM Agricultural Pty Ltd*, *K-Generation Pty Ltd v The Licensing Court*, *Lane v Morrison*, *Pape v Commissioner of Taxation*, *Roach v Electoral Commissioner*, *Telstra v The Commonwealth*, *Thomas v Mowbray*, *White v The Director of Military Prosecutions*, *the Work Choices Case*, and the *Wurridjal* and *XYZ cases*.

Unsurprisingly, however, because the authors have added much new material and significantly rewritten many subjects, they have cutback on a good deal of material that appeared in the

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fourth edition. This, I think, has resulted in a tighter focus on the key contemporary constitutional issues such as federalism and judicial power. Amazingly, the authors have managed to keep the fifth edition shorter than the fourth edition. In fact, the fifth edition is 57 pages or nearly 4% shorter than its predecessor.

I do not think it is going too far to say that the fifth edition is basically a new book. At all events, every chapter has been rewritten and revised to introduce, where appropriate, new material. Even a few paragraphs from Tony Abbott's 2009 book, *Battlelines*, suggesting that s.51 of the Constitution should be amended to give the Commonwealth concurrent legislative power over all subjects, finds a place in the chapter on the federal system while, perhaps to show the authors' political impartiality, Kevin Rudd's article on the "Global Financial Crisis" finds a place in the chapter headed Foundations. The Prime Minister's Apology to Australia's Indigenous Peoples is also set out.

The discussion of judicial power in particular has undergone a significant expansion. It is now 23 pages longer than in the fourth edition and is dealt with in three chapters in contrast to the one chapter of the first, second and third editions and the two chapters of the fourth edition. Thus, we now have chapters on the separation of judicial power, on judicial and non-judicial detention and on the judicial process.

For me, the chapter on constitutional interpretation has always held the greatest interest. It has been rewritten and reorganized. Some older material has been cut down and two important papers on constitutional interpretation find a place for the first time. One is Stanley Fish's 2008 article, "Intention Is All There Is: A Critical Analysis of Aharon Barak's Purposive Interpretation in Law". The other is Justice Heyden's paper, "Theories of Constitutional Interpretation: A Taxonomy". Intriguingly, the authors have left out a sentence from the fourth edition which may indicate that they think that mechanical jurisprudence may be reviving. In the fourth edition they wrote that legalism in its narrower versions held the view that the constitutional text always contains a unique and predetermined "right answer" "and that the task of the judge is to ascertain that uniquely predetermined answer by an essentially mechanical process." The authors went on to say in the next sentence, "That idea is no longer tenable." That last sentence no longer appears in the fifth edition. But perhaps I am reading too much into its omission.

Other chapters that have been substantially revised and rewritten include the chapter on characterization of legislative powers and the chapter on federalism to mention but two.

Reviews of earlier editions of this work have been fulsome, to say the least. Greg Taylor of Monash University said that it was one of the best case books in any country that he had come across. Professor Neil Rees of the University of Newcastle said it was the best Australian case book that he had read in any area of law. But it would be a serious mistake to think that *Australian Constitutional Law and Theory* is or ever was simply a student's casebook. Like its previous editions, it contains a wealth of material drawn from many writers and publications in

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addition to extracts from the cases, material which is often extensive and always relevant. This extra judicial material contains illuminating writings on such subjects as the separation of state and church, liberalism, the social contract, post modernism and much more. It contains extracts of the works of writers such as Austin, Rawls, John Chipman Gray, Hobbes, Locke, Alexander Hamilton, Julius Stone, Foucault, Agamben, Kelsen, Jennings as well as local authors like Greg Craven and Jeffrey Goldsworthy. In the preface to an earlier edition, the authors said that the book contained "the materials and commentary needed to understand the doctrines and theories behind the law". The present edition maintains that approach but, like its predecessors, it does much more. To take but one example, the final chapter deals with constitutional change and discusses not only amending the Constitution but whether there should be an Australian republic and a bill or charter of rights.

In a review in the Law Institute Journal of Victoria, Michael Gronow said that, when he first read the extremely laudatory reviews on the back cover of a previous edition, he doubted whether any book could justify such enthusiasm. But he said he was wrong and that it was a book which one should own, read and revere, comments with which I entirely agree.

I recommend the fifth edition to everyone interested in the Australian Constitution, what it is, how it works and what it ought to be. I congratulate the authors on producing another edition of this classic work.