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Book Review 9 of Volume 3, 1999

BY SUSAN BOTHMANN

Title: [Australian Constitutional Law, Materials and
Commentary](#)

Authors: Peter Hanks and Deborah Cass

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This is the sixth edition of what has come to be one of the classics in Australian Constitutional Law. Peter Hanks has been one of its authors throughout and he was solely responsible for editions two to five. In this edition he is joined both by Deborah Cass as co-author and Jennifer Clarke, in chapter two, where she is solely responsible for new material covering " *Indigenous' People and Constitutional Law*" (50).

The introductory chapter, ' *What is Australian constitutional*

law?' (1) highlights the special aspects of constitutional law which are peculiar to Australia arising from the specific textual terms and historical background of the Australian Constitution. The nebulous question of when Australia actually achieved sovereignty is covered as a preliminary matter as are the general principles of characterisation.

Ms Clarke's chapter on Aboriginals is timely and comprehensive and also covers issues of sovereignty as they relate to Aboriginal rights in the aftermath of *Mabo v Queensland (No 2)* (1992) 175 CLR 1 and *Wik Peoples v Queensland* (1996) 71 ALJR 173. The 'races' power in section 51(xxvi) and the cases arising thereunder; state and commonwealth relations concerning Aboriginal issues; and constitutional implications of native title developments are well treated. There is also coverage of the two topical and controversial issues of the terms of proposals for a new preamble to the constitution and whether the Crown can be said to be a fiduciary for Aboriginal and Torres Strait Islander people.

Chapter three deals with '*the international dimension*' (113) and covers treaty making, international law, the 'external affairs' power and the thorny issue of the extent to which international law can and should be a '*legitimate influence*' (171) on Australian law. Relevant and recent cases such as *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 are outlined and discussed.

The 'case reference with commentary' mode of presentation for legal textbooks is a well established one and this book maintains a suitable balance between direct extracts from the cases and discussion about their importance in the context of the issue under consideration. Whilst the mode can have the tendency to confuse, when chunks of the same cases appear in different sections of the book and continuity is lacking, in the context of Australian constitutional law it is virtually mandatory and its usage here is skillfully handled. High Court constitutional cases are invariably lengthy, dense and complex but a knowledge of them is fundamental to achieving an understanding of Australian constitutional law.

The Australian constitution entrenches the notion of the separation of powers within the commonwealth government administration and so the main body of the

book examines these three arms of government; parliament, the judiciary and the executive, in detail in chapters four to seven (inclusive).

Australia is a federation and the legal relationship between the states and the commonwealth is perhaps the most important feature of Australia's constitution and the development of its constitutional jurisprudence. Chapters eight and nine of the book cover issues to do with inconsistencies between state and commonwealth legislation, intergovernmental immunities, tax and financial arrangements between the two and examine the case authorities dealing with these issues.

Chapter ten covers '*control of economic and commercial activity*'. While this broad issue has a commonwealth/state aspect, Australian public law at both levels has been experiencing a process of great change, as both state and commonwealth governments have become more involved directly in commercial activities. Equally, governments have embarked on a process of privatising, what have otherwise been publicly administered activities and responsibilities. As the authors note:

In the Australian federal system, a decision by government to regulate some aspect of business or commercial activity...raises two...questions... [D]oes the Commonwealth Constitution assign power over that activity to that government...[a]nd... does the regulation, or government participation, infringe any of the prohibitions in the Constitution?(741)

The Australian constitution has virtually no express provisions assigning rights and until recently '*the High court's interpretative method*' (850) paid little regard to fundamental freedoms. These issues are canvassed in the final chapter of the book.

The book necessarily covers an extensive amount of material. The layout and format are clear and fairly easy to follow. Footnotes and Endnotes have been excluded in favour of line references in the text. While arrangement is a matter of taste, in a book of this type, with case extracts and

commentary liberally interspersed throughout, the line referencing technique does make it difficult to follow the flow of the text in some places. Each chapter concludes with a helpful Reference section divided into the categories: Articles, Papers and reports and Texts.

In the Australian context constitutional law is particularly topical and relevant at this stage of Australia's legal and political history. Debates about whether Australia should become a Republic; the role of the law in relation to indigenous people and the relationships between the states and the commonwealth, have never raged more heatedly or amongst a wider audience than they have of late. However it is to be queried whether this book would have any great relevance in the Pacific region outside Australia because of its parochial subject and content.

The Australian constitution is a unique document drawn up at a time when attitudes were very different from the ideas that fed the preparation and promulgation of most of the constitutions of the South Pacific Island countries. Apart from the accumulated learning relevant to the separation of powers issues there is little in the book that would be of any direct concern to students from Pacific islands, unless they were studying Australian constitutional law specifically or using Australia as a comparative example for some purpose. Unfortunately even in relation to separation of powers, which is generally mirrored in South Pacific constitutions, Australia's federalism makes those aspects of its constitution significantly different from any counterparts in the region.

The absence of anything resembling an Australian Bill of Rights in the constitution makes controversies about fundamental human freedoms all the more difficult to resolve. Most Pacific Island countries have constitutions, which contain some form of enumerated general rights. These constitutional regimes therefore provide a more advanced point of departure than does Australian constitutional jurisprudence.



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