# REVIEW ARTICLE*

# TEACHING AUSTRALIAN CONSTITUTIONAL LAW

*Australian Federal Constitutional Law: Commentary and Materials*, by G WINTERTON, HP LEE, A GLASS and JA THOMSON (Australia: LBC Information Services, 1999) pp xlviii + 967. Recommended retail price $110.00 (ISBN 0455 21550 2).

Teachers of Australian federal constitutional law now have three current casebooks available to them: the Winterton, Lee, Glass and Thomson casebook ("WLGT"), Hanks and Cass, *Australian Constitutional Law: Materials and Commentary* ("HC"), now in its sixth edition, and Blackshield and Williams, *Australian Constitutional Law & Theory* ("BW"), which has entered a second edition. The recent publication of WLGT provides an opportunity to review it in the context of these other works.

WLGT consists of ten chapters, eight of which deal with topics of substantive constitutional law, framed by an introductory chapter on 'Australian Constitutionalism' and a concluding chapter on 'Constitutional Interpretation'. The eight substantive chapters deal with 'Inconsistency', 'Commerce and Corporations', 'External Affairs and Defence', 'Commonwealth Financial Powers', 'Freedom of Interstate Trade', 'Excise Duties', 'Rights and Freedoms' and 'Intergovernmental Immunities'. WLGT also includes a Table of Cases, a Table of Statutes, two Appendices setting out the Justices of the High Court, an extensive Bibliography and Index. Each section of the book typically consists of a brief introduction to a particular case, an extract from the case, followed by notes which raise questions for discussion.

As in all academic endeavour, *selection* is unavoidable, and the richness of the available material in Australian constitutional law renders this necessity all the more arduous, as well as regrettable. What principles of selection guide us as teachers and scholars? While many of us will probably want to resist any categorical statement of the confines and scope of the courses that we teach, in practice at least some limits must be adopted, if only to give due regard to the dictates of professional bodies and faculty decisions regarding curriculum

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content. Within these unavoidable constraints, teachers of Australian constitutional law must decide on an appropriate scope for their courses. In the preface to WLGT, the authors indicate their intention "to cover the material included in virtually all Australian Federal Constitutional Law courses".

How, then, do we define the possible limits of this academic specialty we call 'Australian constitutional law'? Our concern with *Australian* constitutional law immediately suggests a criteria in the territorial jurisdiction of Australian courts and legislatures. But a number of questions immediately arise: What of the residual links between the Australian constitutional system and its British origins? What of the burgeoning interest in and relevance of comparative constitutional law? What of the developing 'internationalisation' of Australian law? What of the internal jurisdictional limits implicated by Australian federalism? And what of the question of indigenous sovereignty?

Unlike BW, WLGT does not address the British context and 'origin' of the Australian constitutional system as a separate topic. Consideration of the issue is inevitably triggered by the discussion of the *Engineers* case (pp 16-19, 746-57, 898-9), intergovernmental immunities (pp 736-818), implied rights and freedoms (pp 606-735), fundamental constitutional doctrines (pp 847-65) and indigenous rights (pp 96-116), for example. But if constitutional law is about 'fundamentals', 'sources' and 'sovereignty', then the absence of a discrete treatment is regrettable. Members of the High Court have often grounded their interpretive approaches by reference to the imperial, federal and popular 'origins' of the Constitution, and it would seem worthwhile to introduce students to this question at the outset.

WLGT is not a casebook in comparative constitutional law, but comparative and international law materials are also unavoidable. HC, for example, contains a very useful survey of the 'international dimension' of Australian constitutional law. The United States and Canadian Constitutions served as models for the Australian framers, and decisions from these and other jurisdictions emerge in the Australian case law on topics such as implied rights, intergovernmental immunities and the trade and commerce power (pp 198-201). In WLGT, useful references to such cases regularly appear in the notes and the excellent bibliography provides many further leads. The authors state that it was their intention to provide a bibliography useful to advanced researchers; in this they are undoubtedly successful.

As its title indicates, WLGT is focused on *federal* constitutional law. It does not discuss State constitutional law as a separate topic, but only in its direct intersection with federal constitutional law (for example, in the treatment of inconsistency, intergovernmental immunities and excise duties). However, it is difficult to give an account of the federal Constitution without dealing with matters of State constitutional law in their own right. Such matters can be explained 'on the run' to our students, but my own view is that our students will not gain an adequate appreciation of the nature of Australian federal constitutional law without an appreciation of State constitutional law. One of the strengths of HC is the way in which chs 2 and 4-7 address State and federal

legislative and executive powers, providing a necessary context to the discussion in chapter 8 of legislative inconsistency and intergovernmental immunities.

WLGT do not discuss the issue of indigenous rights as extensively as BW or HC, but the extracts and further references in the notes sufficiently highlight the central issues as relevant to Australian constitutional law. One would have thought, though, that an extract from *Mabo v Queensland (No 2)* (1992) 175 CLR 1, *Coe v Commonwealth (No 2)* (1993) 118 ALR 193 or *Walker v NSW* (1994) 182 CLR 45 might have been included to illustrate the case law on the question of indigenous sovereignty.

According to Maitland, English constitutional law is part of the seamless web of common law.[1] Can the same be said of Australian constitutional law, or does the existence of the *Commonwealth of Australia Constitution Act* make a difference? More fundamentally, can we draw a line between *law* and other fields, such as legal theory, political theory, political science, economics, and so on? When such questions are raised, differences of theoretical approach are brought to the fore. In the preface to BW, the authors are candid about what they acknowledge to be the "contestable" theoretical perspective which informs the work. They seek to "demonstrate" that there is no "determinate body of objective doctrine which students can expect simply to learn".[2] The authors of WLGT, however, seem to respond by "deliberately eschew[ing] any ideological perspective". On the contrary, they seek to "analyse judicial reasoning, probe the ambit of principle and note the relevant political context" (Preface, p v). Are they successful? Many, perhaps, would be inclined to suggest that this is an impossible goal; the act of choosing (and excluding) materials is an inevitably ideological process.

Yet even the authors of BW aim to "provide students ... with a sufficiently diversified sampling of legal and theoretical viewpoints to enable them to formulate their own conclusions and clarify their own intuitions".[3] When understood in this sense, WLGT successfully avoids *obvious* ideological bias. With the exception of the first and last chapters, the focus is on the text of the cases themselves, and it is difficult to identify partiality in the discussion of the cases. The notes, moreover, are admirably analytical and penetrating, and of a consistently high standard. The treatment of 'Constitutional Interpretation' in the final chapter canvasses various points of view, and the commentary is even-handed. Certainly, some approaches are bypassed. Such choices seem to be dictated by judgments about significance, influence, clarity and persuasiveness. Positions which have not had a patent influence on judicial decision-making in Australia are thereby excluded.

Finally, some comments on organisation and presentation are in order. For one used to the heading styles and indentation of extracts in a smaller font used in BW and the use of bold type for page divisions used in BW and HC, the presentation of WLGT was an initial obstacle. While the small typesetting of the

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1 FW Maitland, *The Constitutional History of England*, Cambridge University Press (1955) p 539.

2 AR Blackshield and G Williams (eds), *Australian Constitutional Law & Theory*, Federation Press (2nd ed, 1998) pp vi-vii.

3 *Ibid.*

BW casebook has been criticized as difficult to read by some reviewers, its layout is a model of clarity and simplicity.

Another contrast between WLGT and BW concerns two practically related issues: the length of extracts and the range of topics. The authors of BW have opted for slightly longer introductions, shorter extracts and a wider coverage; the authors of WLGT have limited the coverage, and lengthened the extracts, apparently in order to "cover the essential topics in some detail because in-depth analysis ensures greater insight into constitutional principle". In conjunction with the excellent set of notes and comments, this admirably meets the authors' objectives of analysis, synthesis and assessment of Australian federal constitutional law. The extensive coverage in BW exposes students to more issues and a wider context than the limited coverage of WLGT allows. But in BW, the marginal tendency of the shorter extracts and more detailed introductions is to direct students to what is relevant in the cases. The longer extracts in WLGT tend, conversely, to require students to develop that skill for themselves.