

**LAUNCH OF 5TH EDITION OF WINTERTON'S AUSTRALIAN
FEDERAL CONSTITUTIONAL LAW**

**The Hon A S Bell
Chief Justice of New South Wales**

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Banco Court

1. I have been given many speaking challenges over my time, the most challenging to date being being asked to deliver the 29th Sir Ninian Stephen lecture during a Black Tie Gala Ball to celebrate the University of Newcastle Law School's 30th anniversary late last year!
2. But to be asked to launch a new edition of a constitutional law casebook at 7 pm on a Friday night after such an outstanding Winterton lecture delivered by Chief Justice Kiefel AC, and when most of you are unwinding with a well deserved glass of something, is right up there with that challenge.
3. In any event, we struggle on!
4. And, there is a logic to it as the Casebook bears George Winterton's name not only as one of the founding editors but as a mark of respect to a significant Australian scholar in the field of constitutional law who taught a generation of students, initially at UNSW before transferring to the University of Sydney.
5. The casebook in its fifth edition has no less than 6 contributing editors from Sydney, Melbourne, Brisbane and Perth, spookily reflecting the geographical origins of the current judges of the High Court of Australia. I note that the distinguished Professor Simon Evans, with whom I attended primary school at Neutral Bay, has left the editorial team to discharge heavy administrative responsibilities as the acting Vice Chancellor of the University of New England.

6. Five years have passed since the previous edition of this book and those years have seen some very significant constitutional decisions including:
- *Love v The Commonwealth* (2020) 270 CLR 152; [2020] HCA 3 (dealing with the proper construction of the aliens power);
 - *Palmer v Western Australia* (2021) 272 CLR 505; [2021] HCA 5 (dealing with whether Western Australia's border closures were inconsistent with s 92 of the Constitution);
 - *Clubb v Edwards* (2019) 267 CLR 171; [2019] HCA 11; *Comcare v Banerji* (2019) 267 CLR 373; [2019] HCA 23 and *Brown v Tasmania* (2017) 261 CLR 328; [2017] HCA 43 (all dealing with the constitutionally implied freedom of political communication);
 - *Hocking v Director-General of the National Archives of Australia* (2020) 271 CLR 1 (dealing with whether correspondence between the Governor-General and Buckingham Palace was the property of the Commonwealth); and
 - *Williams v Wreck Bay Aboriginal Community Council* (2019) 266 CLR 499 (dealing with whether territory legislation was void due to s 109 inconsistency).
7. In the area of federal judicial power and implications arising from Chapter III of the Constitution – a field which has been particularly active in the past 5 years – significant decisions include:
- *Falzon v Minister for Immigration and Border Protection* (2018) 262 CLR 333; [2018] HCA 2; *Vella v Commissioner of Police (NSW)* (2019) 269 CLR 219; [2019] HCA 38; *Minogue v Victoria* (2019) 268 CLR 1; [2019] HCA 31 and *Minister for Home Affairs v Benbrika* (2021) 272 CLR 68; [2021] HCA 4 (all dealing with detention or criminal punishment as an aspect of judicial power);
 - *Burns v Corbett* (2018) 265 CLR 304; [2018] HCA 15 (dealing with the ability of State tribunals to adjudicate matters in federal diversity jurisdiction, a decision of immense practical significance); and
 - *Mineralogy Pty Ltd v Western Australia* (2021) 95 ALJR 832; [2021] HCA 30 (dealing with, among many other things, whether the legislative

extinguishment of Mineralogy's rights to bring a claim against Western Australia were inconsistent with Chapter III).

8. A number of these decisions, all of which are picked up in this new edition, have engaged with structured proportionality where the High Court has appeared to have reached a position of what might be described as a polite doctrinal standoff, a kind of constitutional *détente*, if you will. Whatever one's view of that debate, it provides much fodder for law professors and enthusiastic constitutional law students, and the discussion in this casebook will assist in focussing that debate.
9. As is said by Justice Gageler in the Foreword to the fifth edition:

“To learn about constitutional law is to learn about the upheavals and enduring consequences of major events in our national history’ (p.v). As such, it is hardly surprising that the new edition of *Winterton’s* explores several constitutional developments which have emerged out of the COVID-19 pandemic.”
10. One of those cases, *Palmer v Western Australia*, although unanimous in the result, exposed a number of diverse approaches to the *assessment* of the principal question thrown up in that case, namely whether Western Australia's border laws violated s 92's protection against the freedom of interstate intercourse. Whilst Chief Justice Kiefel and Justice Keane, together with Justice Edelman (writing separately) applied a structured proportionality approach to the case, Justices Gageler and Gordon, in separate decisions, strongly resisted that approach.
11. This, in turn, dictated a very different approach to the significance of the facts that had been found separately by Justice Rangiah in the Federal Court. For the Chief Justice and Justice Keane, these findings mattered and really drove the result. They played a far more limited role in the decisions of Justices Gageler and Gordon.
12. The fact that only five judges were able to sit in *Palmer* and that there were four separate judgments disclosing a variety of analytical approaches almost guarantees further contests as and when appropriate vehicles present

themselves. An old friend of many here tonight, the late Professor Michael Coper, would have been terribly excited with the emergence of this new controversy for section 92! Professor Murray highlights these tensions in Chapter 8 of the current edition.

13. Another interesting feature of the fifth edition is the inclusion of additional material on the relationship between First Nations Australians and the Constitution in Chapter 1 entitled “Constitutional Fundamentals”. In particular, the Uluru Statement from the Heart and segments of the Interim Report to the Australian Government on the Indigenous Voice Co-design Process have been extracted (p. 65-67). These extracts are accompanied by thought provoking questions for students concerning the composition of the proposed Voice to Parliament and its significance for both Aboriginal and Torres Strait Islander people and Australian constitutional law more broadly. The relevance of this material for law students and indeed more generally cannot be understated. 2023 will be a busy year for constitutional scholars and commentators as we approach the referendum.
14. Finally, and with your indulgence, I wish to take this opportunity to say something very brief about casebooks and teaching.
15. Casebooks are designed to assist students understand and absorb the leading decisions in the area. By extracting key passages of leading decisions, they are designed to make the student’s task more manageable and, in their commentaries, to provoke consideration of doctrinal controversy or evolving areas of interest.
16. But the key word is “absorb”: no legal subject can be learnt overnight nor can it be properly understood without reading the cases thoroughly so that the principles stated are understood in their proper factual setting.
17. It is in this context that I have a particular concern about on-line teaching which, of course, played an important role during the pandemic but in respect of the continuation of which, there are profound questions as to its desirability.

18. At least where lectures are recorded and accessible to students at a time of their choosing, one of the risks with on-line teaching is that some (and may be many) students will be tempted to “bank” a series of lectures, thinking that if they just listen to them over one or perhaps two sittings, they will have the same experience as if they went to the in person lectures at the designated time. But they will almost certainly not.
19. Students need to do the reading before and after lectures properly to understand a subject. Whilst that can never be guaranteed, I think that it is more likely to be achieved if teaching is undertaken with sufficient breaks in between lectures, seminars or tutorials in order to allow the proper absorption of the material, together with extended discussion before and after classes.
20. Having got that thought off my chest (!), I have great pleasure in launching what is another excellent edition of this leading constitutional law casebook.
