

# Book review:

## **Hanks Australian Constitutional Law: Commentary and Materials (10th Edition)**

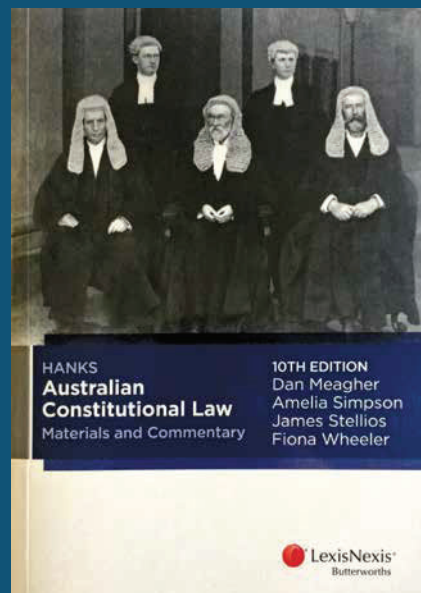
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Now forty-five years old and in its tenth edition, Hanks Australian Constitutional Law might not be a household name but in the legal circles in which it is read it must be close to that. It is not alone in its field by any means—in fact, the same publisher also maintains three other textbook style publications on Australian constitutional law. Yet this text's durability and continued relevance are well deserved. It has, since its first edition in 1972, provided an erudite, thorough and measured consideration of its vast subject in a manner that is accessible both to practitioners and students. This newest edition is no different, it builds upon the foundation of past editions and also extends in some new directions. True to its title, it aims to provide a single convenient access point to both source materials and commentary. There is of course nothing particularly novel in this approach but it is effective and the balance between cases and commentary is nicely struck (unlike some other books of this genre that are light on analysis and heavy on case law extracts). All of the areas one would expect to see covered in a reference book of this nature are covered in-depth.

The book begins with a necessarily pedestrian introduction to some of the foundational concepts of Australian constitutional law: federalism, the separation of powers, parliamentary government and sovereignty, representative and responsible government. This is followed by a number of chapters covering the different aspects of each of the three pillars of power: the legislature, the executive and the courts. Perhaps the most interesting



chapter here, at least to this reader's mind, is that on the Commonwealth so-called spending power in s 81 of the Constitution. This has been a particularly significant site of contest in Australian constitutional law over the last decade. To consider questions such as: "how far should the Commonwealth's spending power permit it to encroach on constitutionally prescribed areas of action traditionally left to the states?" is to go to the very heart of the Australian federal system. The determination of such questions by the High Court, and the resounding implications for the way in which Australia is governed, also throws into sharp relief the separation of powers and the Court's special function as the final arbiter of disputes as to constitutional interpretation. It is by no means uncontroversial that seven unelected men and women can sit in judgment on the

Commonwealth's proposals to spend money that it has lawfully levied through taxes or other means.

Moving further through the book one finds that it is, in a sense, back-loaded. The final two chapters cover the sexiest areas of constitutional law (if that description is not internally contradictory): express and implied constitutional freedoms. Always a hot topic in law schools, constitutional freedoms rocketed back into the public consciousness in 2015 with the publication of the final report of the Australian Law Reform Commission's 'Freedoms Inquiry'. Hanks *Australian Constitutional Law* dedicates almost three hundred pages to express and implied constitutional freedoms and the result is an impressively thorough and thoughtful survey of a complex area of jurisprudence. Perhaps most interesting for readers from the Northern Territory will be the discussion of *North Australian Aboriginal Justice Agency v Northern Territory* [2015] HCA 41. That case, it will be remembered, involved a challenge to the validity of the 'paperless arrest' provisions in the *Police Administration Act (NT)*. The plaintiffs claimed that the provisions infringed the constitutional separation of powers by conferring on the executive (police officers) a punitive power of detention, such powers being the sole province of the judiciary. Six members of the Court found that the provisions did not confer a punitive power and thus the constitutional issue did not arise. Gageler J was alone in holding the provisions invalid. The authors of the text under review do little to hide their enthusiasm for Gageler J's judgment, writing "[i]t was, arguably, Gagler J ... who provided the clearest explanation as to the importance of and the justification for the Lim principle in Australian constitutional law." It is interesting to note that Gageler J was the sole dissident in the another recent constitutional 'freedoms' case emanating from the Northern Territory—*Attorney-General (NT) v Emmerson* [2014] HCA 13—which case concerned the apparent tension between certain criminal property forfeiture laws and the constitutional protection against the acquisition of property otherwise than on just terms. In that case, the plurality upheld the validity of the laws, writing:

"The Territory legislature has determined that a person who is proven to have committed at least three qualifying drug offences within a specific period is liable to have his or her property confiscated or forfeited. Characterising these provisions as an acquisition of property without provision of just terms is erroneous. The requirement of just terms is

'incompatible with the very nature of the exaction', being a punishment for a crime."

Not wishing this review to become a catalogue of the Solicitor for the Northern Territory's successes in the High Court it is best to move on to what is perhaps the one shortcoming of the book. The authors of the tenth edition have abolished the separate chapters on 'Indigenous People and Constitutional Law' and 'The Territories'. Whilst much of the material that was previously contained in those chapters remains in the book in different places it is unfortunate that readers no longer have the single reference point for these discrete issues that was previously offered. Furthermore, the decision to abolish the former chapter appears to be particularly poorly timed. We are headed, albeit haltingly, towards a referendum on the constitutional recognition for Australia's Indigenous people. In such circumstances, it would have been preferable for the authors to maintain the earlier editions strong commitment to thinking through the Constitution's operation on Indigenous Australians.

A final note needs to be made of the unfortunate, but unavoidable, fact that this edition contains no commentary on the recent spate of election law cases in the aftermath of the 2016 federal election. Going to print in August 2016 meant that whilst the book covers *Day v Australian Electoral Officer for the State of South Australia* [2016] HCA 20, it omits *Re Culleton (No 2)* [2017] HCA 4 and *Re Day (No 2)* [2017] HCA 14. Most importantly, however, the book was just weeks too early to incorporate a discussion of *Murphy v Electoral Commissioner* [2016] HCA 36, which is surely one of the most significant constitutional law cases of the last few years. There is, however, much to be said for keeping your readers waiting for the next instalment and it is with this in mind that one can already begin to look forward to the next edition of Hanks *Australian Constitutional Law*.

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