

THE HON T F BATHURST
CHIEF JUSTICE OF NEW SOUTH WALES
BOOK LAUNCH
WINTERTON'S AUSTRALIAN FEDERAL CONSTITUTIONAL LAW
THURSDAY 13 FEBRUARY 2014

1. It has been a great pleasure to join you this evening for the fifth annual George Winterton Memorial Lecture and for what was a fascinating presentation by Professor Fiona Wheeler. Professor Wheeler has written extensively on both formal and informal extra-judicial activities,¹ and, for those members of the judiciary present this evening, it is perhaps a further reminder of the difficulties that can arise from engaging in extra-judicial work.

2. It is also my privilege to have been invited to launch the third edition of *Winterton's Australian Federal Constitutional Law*. As you are no doubt aware, this is the first edition in which Professor George Winterton's name has been included in the title of the text. Much has already been said this evening about Professor Winterton; he was undoubtedly one of this country's foremost experts on constitutional law and was held in the highest regard by his students, colleagues and the broader legal community. Can I simply add that the revised title of this textbook is a further testament to Professor Winterton's contribution to the field of constitutional law, and a fitting reminder

¹ See, for example, "Anomalous occurrences in unusual circumstances? Extra judicial activity by High Court justices: 1903 to 1945" (2013) 24 *Public Law Review* 125; "Sir John Latham's Extra-Judicial Advising" (2011) 35 *Melbourne University Law Review* 651.

to all who will pick up a copy of the text – be they students, practitioners or judicial officers – of Professor Winterton’s lifetime of work and his legacy.

3. While this casebook will inevitably be of great use to academics and legal practitioners, as the preface notes, it is a work intended primarily for students. In that respect, I can’t help but notice that it is significantly heavier than the textbook I carried to my constitutional law classes just a few short years ago. If I remember correctly we used Patrick Lane’s *Some Principles and Sources of Australian Constitutional Law*, which ran to only 300 or so pages. Sadly I probably must accept that a substantial body of case law has been produced in those intervening years. I was surprised to discover that Lane’s text only stated the law up to and including Volume 108 of the Commonwealth Law Reports. However, you should not assume from that fact that I was studying law as long ago as 1961 to 1962 when that particular volume was published.

4. This third edition of *Winterton’s* contains a number of additional chapters that will be of great use for students and practitioners alike. Students will benefit particularly from the new “Constitutional Fundamentals” chapter, which provides commentary and materials in relation to a range of foundational concepts including representative and responsible government, separation of powers and the rule of law. It is also not a bad thing for the more seasoned amongst us to revisit material on these essential concepts from time to time.

5. This edition also includes a new chapter covering executive power, while a previous chapter addressing constitutional rights and freedoms has been expanded into two separate chapters that respectively consider express and implied constitutional rights. The addition of a separate chapter regarding the Executive is significant in two respects. First, it traverses the complexities of executive power and explores recent decisions in the area such as *Pape v Federal Commissioner of Taxation* and *Williams v Commonwealth*.² Second, it represents the necessary inclusion of material covering an area on which Professor Winterton wrote extensively; the text contains a number of references to his influential publications and, importantly, a significant extract from his book *Parliament, the Executive and the Governor-General*³ is reproduced in Chapter 1. Of course, executive power was also the subject of the inaugural Winterton Lecture delivered in 2010 by Chief Justice French.
6. The addition of separate chapters considering express and implied constitutional rights is also an important feature of the new edition. In recent years there has been a re-emerging focus by courts on the implied freedom of political communication. In this respect, the text includes extracts from the recent and evenly divided decision of the High Court in *Monis v The Queen*.⁴ I am certain that space will be made in the next edition for consideration of

² *Pape v Commissioner of Taxation* [2009] HCA 23; (2009) 238 CLR 1; *Williams v Commonwealth* [2012] HCA 23; (2012) 86 ALJR 713.

³ George Winterton, *Parliament, the Executive and the Governor-General* (1983, Melbourne University Press).

⁴ [2013] HCA 4; (2013) 87 ALJR 340.

the much-publicised decision from December last year in *Unions NSW*.⁵ Among other things, the decision addresses the application of the freedom of political communication in a State context, the nature of political communication including in relation to entities and groups in the community, and the process of considering the relevant statutory purposes with respect to the second limb of the *Lange* test. I have little doubt that the nature and scope of the implied freedom of political communication will remain an issue of particular interest for both courts and commentators in the coming years.

7. It may be a little strange to admit, but I generally look first to the index of a new textbook. A well-prepared index is essential for navigating a text, particularly for students and even more so when handling a comprehensive casebook of this size. Indexes can also contain some surprising and unusual references. For instance, some of you may not be aware that *Judicial Review of Administrative Action* contains a range of enticing entries in its index including “smells”, “nude”, “cats, too many”, “plebs to Tories”, the cryptic “natural justice, tragic choices” and the particularly tantalising, “Volvo driver”.⁶ The index to *Winterton’s*, while perhaps less colourful, is extremely comprehensive and will be of great assistance for students and practitioners. The only entry that did stand out for me was the slightly troubling “Supreme Courts, continued existence”. However, a quick check of the relevant pages and the fact the entry is phrased as a statement and not a question reassured

⁵ *Unions NSW v New South Wales* [2013] HCA 58; (2013) 304 ALR 266.

⁶ Mark Aronson, Bruce Dyer and Matthew Groves, *Judicial Review of Administrative Action* (3rd ed, 2004) at 874-902 cited in Keith Mason, *Lawyers Then and Now* (2012, Federation Press) at 169.

me that the New South Wales Supreme Court was unlikely to be going anywhere in the near future.

8. The only other feature of *Winterton's* that I would like to mention this evening is Professor Gunther's observation that appears in the foreword to all three editions. The authors of *Winterton's* hope that like Professor Gunther, readers will find constitutional law "important, serious, endlessly intriguing and constantly enjoyable". To that I would add Sir Ninian Stephen's remark that:

*"One of the rarely appreciated charms of our Constitution is the capacity of its text, bland enough to the eye, to provide both plot and ramifying subplots for countless human dramas; providing as well a supply of conundrums with as many solutions as there are judges on hand to solve them."*⁷

I am sure that the commentary and materials in this new edition of *Winterton's* will introduce many young students to the fascinating conundrums that we are regularly asked to consider. I too hope that the text and the teachers who refer to it will encourage students to scrutinise both the legal problems and the various solutions that have been put forward.

9. To conclude, Chief Justice French wrote on the passing of George Winterton that his voice will be heard through his intellectual legacy "in our lecture halls and constitutional debates and will make its contribution to the development

⁷ Michael Coper, *Encounters with the Australian Constitution* (1997, CCH Australia) at v.

of our nationhood for many years to come”.⁸ This newly titled third edition of *Winterton’s Australian Federal Constitutional Law* gives further voice to Professor Winterton’s legacy. I congratulate the authors for their dedication and hard work, and particularly Professor Gerangelos for his stewardship as general editor. I have no doubt that the third edition of *Winterton’s Australian Federal Constitutional Law* will be an excellent resource for both students and members of the legal profession.

⁸ Chief Justice Robert French, *The Australian*, 21 November 2008 extracted in Sarah Murray (ed) *Constitutional Perspectives on an Australian Republic* (2010, Federation Press) at xiii.