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HUMAN RIGHTS
★ under the
AUSTRALIAN
CONSTITUTION

SECOND EDITION



GEORGE WILLIAMS
DAVID HUME

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AND DAVID HUME



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under the
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Preface

The first edition of this book was published at the end of a particularly active period for the development of rights protections in the Australian Constitution. In the 1990s, the High Court discerned in the Constitution an implied freedom of political communication (*Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 and *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106), constraints on the functions which could be exercised by state courts (*Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51) and possible constraints on the Commonwealth's power to detain without judicial imprimatur (*Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1), while also holding that the Constitution recognised a form of native title (*Mabo v Queensland (No 2)* (1992) 175 CLR 1). Decisions such as these saw the High Court criticised for judicial activism and for creating rights, rather than simply interpreting the Constitution.

The 14 years since the first edition have not seen the High Court hand down decisions attracting the same public attention and criticism as those in *Mabo* and *Australian Capital Television*. The Court has nevertheless gone about entrenching and expanding the rights developed in the 1990s, while also discerning still more rights. The implied freedom of political communication has been accepted and applied in a number of cases. The principle in *Kable* has been applied in novel ways to impose significant constraints on the ability of states and territories to deny due process to those whose rights and interests can be affected by decisions made by judges. The principle articulated in *Lim* has formed the basis of many challenges to executive detention, particularly of asylum seekers. At the same time, the High Court has discerned what is effectively a constitutional right to vote (*Roach v Electoral Commissioner* (2007) 233 CLR 162) and has increasingly applied fundamental rights and freedoms in the process of statutory construction. These developments have taken place alongside the enactment of statutory charters of rights in Victoria and the Australian Capital Territory.

When you tell people that you are writing a book on human rights under the Australian Constitution, the standard retort is that it must be a short book. It is commonplace to observe that the Australian Constitution does not contain a Bill of Rights or Charter of Rights. A purpose of this book is to demonstrate that, even absent such an instrument, many of the values and interests protected by human rights have still found protection in the Australian Constitution, often in surprising ways. Nevertheless, the human rights protection afforded by the Constitution is far from comprehensive, and human rights advocates continue to call for a national instrument such as a Bill of Rights or human rights Act.

In this book, we provide an overview of how the Australian Constitution safeguards and protects many of the values and interests protected by human rights. We do so in a form which we hope will be of use to students, academics and practitioners in Australia and overseas. The book intersperses discussion and analysis of existing doctrine with critique and, where appropriate, suggestions for possible development of

the law. This second edition updates the material in the first edition to reflect subsequent developments and expands the discussion of areas, such as judicial power, which have increasingly drawn the High Court's attention in human rights contexts. Our overall aim is to render this important area of the law more accessible and more coherent.

We thank our colleagues who reviewed early chapter drafts. We also thank Rafe Andrews, Lisa Burton and Lyndon Goddard for their research assistance. We also owe a considerable debt to the scholars whose arguments and analysis have inspired many of the ideas expressed in this book.

This book states the law to July 2013.

George Williams

David Hume

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