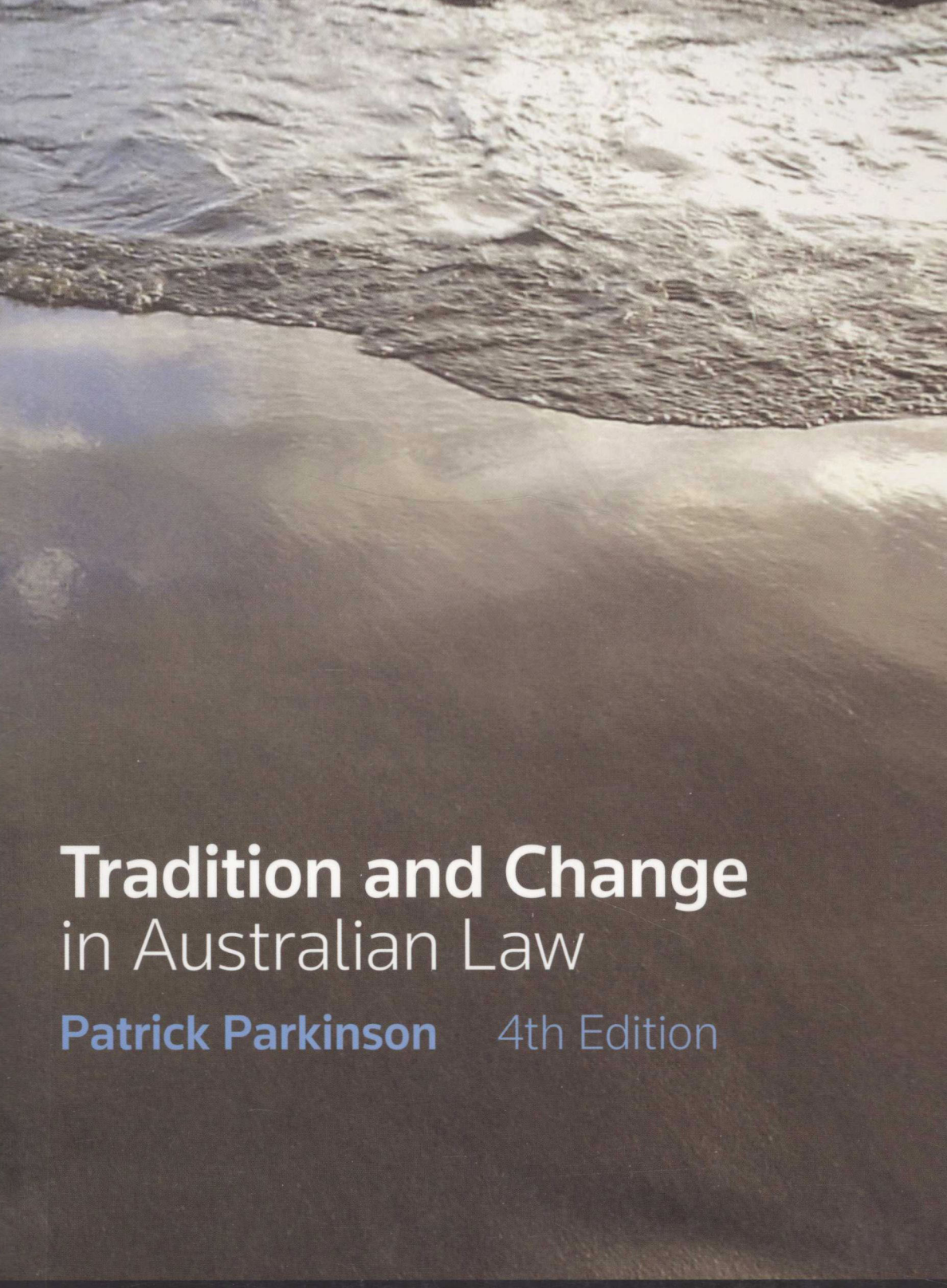

Tradition and Change in Australian Law

Patrick Parkinson

4th Edition

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Preface to the First Edition

There are many different ways to introduce the law to students for the first time. Some books set out to introduce legal method, the courts and other aspects of the modern legal system. Others take a more theoretical perspective, introducing students to the law through the interpretative filters of critical theory.

This book begins from the premise that law cannot be understood properly without an awareness that law is, in its very essence, traditional. This is not the same, of course, as saying that the legal profession is resistant to change or that lawyers tend to be politically conservative. Both of those things may well be true, but that is not what is meant by emphasising the significance of law as tradition. Rather, what is significant about the traditionality of law is that law involves a constant dialogue between the present and the past. Legal reasoning, formally at least, relies upon finding authorities, many of them the work of judges long dead, or Parliaments long since dissolved. Yet law is constantly changing, and not only because present day Parliaments continually pour out new enactments. Change occurs continuously in the law, but it does so only by means of the processes ordained within the legal tradition.

This book also places emphasis on the history both of Australian legal institutions, and of the idea of law in the western legal tradition. Australian law cannot truly be understood without a deep awareness of its history. A description of the modern day institutions of the law would only provide knowledge of what those institutions are, and not why they came to be. History provides a context which explains that which could otherwise seem incomprehensible; and it helps us to evaluate our rules and our institutions afresh. To understand why something came into being is an indispensable first stage to evaluating why, if at all, it should continue to be. There is an inherent tendency in all institutions to find reasonable justifications for why things are as they are. Often, however, history may show that what is now, need not have been; that those things which seem writ in stone are themselves the product of particular circumstances and accidents of history. At other times, an awareness of origins may give new meaning to aspects of the tradition which seem unnecessary or irrelevant in the modern era, and enable us to treat old traditions with a renewed respect.

However, the history which it is necessary to study is not merely, or even mainly, the history of institutions or rules, but also of legal theory. For this reason, one of the aims of this book is to introduce students to some of the major ideas about law and legal reasoning which have shaped the development of Australian law today. Australian law is a part of the western legal tradition as a whole, and shares with the civil law countries of continental Europe, some common perceptions of the nature of law and the role of law in society.

Of course, that tradition is under attack in some circles. Perhaps there will be those who would wish that this book had taken a more critical approach to its subject matter, and had given more extensive coverage to contemporary movements such as feminist legal theory and critical legal studies. No doubt those who are teachers will make up for these deficiencies in their own courses. If discussion of these contemporary movements does not fill the pages of this book, it is not because the author is unaware of them or

regards them as unimportant. Rather, it is because at this juncture, it is difficult to know which ideas will last. Like the 1990s, the 1960s was, in many ways a period of great social change, yet the intellectual heroes of that generation are now merely names in the index of discarded ideas. From the intellectual ferment of the North American academy in particular, there is no doubt much which will prove to be of lasting value; but all that glistens is not gold. Indeed, a close reading of feminist legal theory or the writings associated with critical legal studies, results in a prism effect. What is often portrayed as a single source of light refracts, through prism, into a great variety of different perceptions and inconsistent world views.

Many have counselled against endeavouring to write a history of one's own age. The distance of time offers the benefit of perspective. More particularly, with the greater perspective of time, we may come to see more clearly that some ideas which are claimed today as being of universal application, are in fact deeply rooted in the cultural soil from which they grew.

With a profound understanding of the Australian legal tradition, its history, its formative ideas, its modes of thought and means of change, there is a strong foundation both for critique of the law, and for a sense of perspective which will be useful in evaluating those critiques. It is with that aim in mind, that this book has been written.

The book departs from the normal convention of using gender neutral language in the historical sections of the book where to have been gender neutral would have been completely inaccurate as a matter of history.

I am grateful to the secretarial staff and librarians of the University of Sydney Law School for the extensive assistance they have given me during the time in which this book was being written. I also owe an intellectual debt to many people. The debt I owe to numerous scholars both in Australia and overseas will be apparent from these pages. I am also indebted to many of my colleagues at the University of Sydney. My own understanding of legal ideas has benefited greatly from their stimulus. Many of the themes and ideas in this book were first developed when I was teaching in the first year law course, Legal Institutions. The syllabus and materials of that course resulted from the contributions of a large number of the staff over a period of time. My especial thanks must go to Professor Christine Chinkin, now of the University of Southampton, with whom I began to write a different sort of book, and with whom I have had many interesting discussions about the tradition of law in Australia. I am also grateful to Ross Anderson, Don Rothwell and Wojciech Sadurski for comments on individual chapters.

My thanks are due also to Judith Fox and Anne Maree O'Neill of The Law Book Company for their constant encouragement and considerable patience. This book was meant to be completed a very long time ago. In retrospect, I am glad it wasn't. My thanks finally for the continuing encouragement of my wife, Mimi, who has also shown very great patience with this, and other, writing projects.

The challenge for the future of Australian law is to develop its inherited legal tradition to meet the changing needs and aspirations of Australian society at the end of the 20th century. In shaping that tradition, the words of the Apostle Paul seem apt:

"Test all things; hold fast to the things which are good." (1 Thessalonians 5:21)

PATRICK PARKINSON

Sydney
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Preface to the Fourth Edition

The fourth edition of *Tradition and Change in Australian Law* has been thoroughly revised and updated to take account of recent scholarship and developments.

As we approach the second decade of the 21st century, the tension between maintaining traditions and promoting change continues. All legal systems need to undergo a continuous process of adaptation and renewal to changed circumstances. The pace of that change varies between nations.

Australia is not a country that has lurched from one experiment to another in terms of political processes. Even the Federation was some 50 years in the making from the time the issues were first raised in 1850 (see [6.10]). Australians have also been reluctant to engage in serious constitutional change since Federation.

In recent years, discussions have occurred about more major changes to the landscape of Australian law. Ten years ago, the great debate was the Republic. In 2009, it has been a statutory Charter of Rights and the politicisation of the judiciary that would most likely accompany it.

The view that "if it ain't broke, don't fix it" is, in its own way, an expression of respect for tradition. Nonetheless, all healthy traditions undergo incremental change, and that is so of healthy legal traditions also. The challenge of inclusion in Australian society is a continuing one, and requires continual adaptation to the changing needs of Australian society.

My thanks to Cindy Liu for her excellent research assistance, and to Merilyn Shields of Thomson Reuters, for her diligent work as editor. My thanks also to the many colleagues of mine at the University of Sydney Law School who commented on passages or in other ways gave me the benefit of their expertise in writing this new edition.

PATRICK PARKINSON

Sydney
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