BOOK REVIEWS

BROADCASTING LAW AND POLICY IN AUSTRALIA *by M Armstrong* (Butterworths 1982) pp xxviii, 291.

Venturing into an examination of the regulation of the electronic media in Australia is no easy task. This country has one of the most diversified systems of broadcasting in the world with the Australian Broadcasting Commission, Special Broadcasting Service and Commercial and Public Broadcasters. A complex mixture of legal and policy determinations by the national government and the Australian Broadcasting Tribunal provides the bulk of regulatory activities which operate in this field. New technological developments such as satellite broadcasting and almost constant policy initiatives by governments and others also tend to make the regulation of broadcasting seemingly an ever changing kaleidescope. Mark Armstrong is fortunately well versed in the intricacies and nuances which accompany this area of media control in Australia. As he shows in his title and then in the discussions which follow the regulation of Australia's electronic media is not an arena for hidebound traditionalists who sometimes still vainly try to regard even law in areas like this as something to be isolated from policy considerations. With a purposeful sense of realism he mostly succeeds in drawing together the often tangled web of law and policy which actually determines the nature of the day to day regulation of broadcasting in this country. If there is any deficiency in his over-all scheme, it rests in a failure to move more affirmatively beyond this at times. By more consciously sharpening the relationship of detailed policy considerations on specific matters to more broadly based philosophical, commercial and other attitudes a greater sense of awareness could have been created of the way in which these affect current regulatory practices and provide foundations to assist in predicting the future application of controls on the electronic media.

The greatest strength of this book promises to give it a long accepted, well used place on many bookshelves. This is the effective way in which the first five chapters examine the history of the regulation of the electronic media, together with the long accepted general and special rules affecting radio and television broadcasters. Systematically, the author exposes clearly the historical interaction of the Wireless Telegraph Act with the Broadcasting and Television Act and the ways in which a plethora of government influences in the past half century or so have determined the course of legislative action affecting the electronic media. This is essential reading for anyone who wishes to develop a working knowledge of the thrust of the legislative and regulatory mechanisms dealing with broadcasting. From this flows the many and sometimes seemingly almost idiosyncratic provisions in the Broadcasting and Television Act which have dealt with such matters as medical advertisements, programme standards and the blackout on the electronic media disseminating political material prior to elections. Without this background, it is difficult, sometimes impossible, to comprehend the ambiguity which can understandably and rightly pervade the actual application of some of these regulatory provisions in relation to radio and television broadcasters. Side by side with this, the author deals specifically with the ways in which key clauses of the Broadcasting and Television Act on the regulation of programming content and related

matters have been applied. In doing this, he does not, however, always seem to be at his best in dealing with the interaction of some of these clauses with the ordinary law, as in the case of s 118 of the Broadcasting and Television Act which forbids the broadcast of blasphemous, indecent and obscene material. Understandably, as in his brief discussion on defamation as it relates to the electronic media, he has not sought to provide any detailed analysis of general legal principles which might be relevant to a full consideration of these matters. Otherwise, the over-all balance and thrust of his narrative for both lawyers and non-legal readers alike would have been affected adversely. But even within such constraints, there is a tendency to fuzziness in these discussions which might have been avoided. Similarly, although there is an important, pertinent paragraph on the operation of the Commonwealth legislation on broadcasting in relation to State laws which might be applied to the electronic media, this is not as clear as it might have been, particularly as a means of assisting lay readers to understand the sometimes unanswered issues involved in this.

The final six chapters of this book are again well researched and presented. Unfortunately, the areas covered by these are congenitally prone to legislative and other initiatives concerned with regulating the electronic media. They deal with the Statutory Broadcasters, the Australian Broadcasting Commission and the Special Broadcasting Service, planning and technical issues on broadcasting and the roles of the national government and the Australian Broadcasting Tribunal in licensing and controlling commercial and public broadcasters. Some evidence of the fluidity of the situation in discussing some of these matters is to be seen in a chapter on the ownership and control of commercial radio and most particularly television stations which misleadingly confuses the presentation of the statutory limits on this, no doubt as hasty editing sought to meet legislative and other moves in this context. This and some other aspects of these chapters cannot therefore be regarded as being anything more than a valuable starting point for determining the operation of regulation in these fields. Thus, if proposals to implement aspects of the report of the Committee of Review on the Australian Broadcasting Commission are enacted by the Commonwealth Parliament a good measure of the discussion on this statutory broadcasting organisation will become a matter of history. Similarly, while the conduct of licensing and other proceedings by the Australian Broadcasting Tribunal promises to become more settled, not least because of the overseeing role of the Australian Administrative Tribunal, there can be no certainty that what prevails today in terms of practice and procedures adopted there will necessarily be operative in the future.

In sum, this is a valuable, pioneering work on the control of the electronic media in Australia. It is obviously no fault of the author that some of the discussions it contains have already begun to be dated by legislative and other changes. This is no more nor less than what must be expected in the face of the technological and policy developments which are part and parcel of this aspect of media regulation in Australia, as elsewhere. At the same time, important sections of this book have the potential to be long needed and used by those interested or concerned with broadcasting. Importantly, the generally perceptive way in which the author blends together history, law and policy determinations also provides a lesson in itself for those interested and concerned with the

regulation of the electronic media. It shows that the lawyer's traditional technical skills are not necessarily sufficient in themselves to provide a sound basis for working in the area of broadcasting regulation in Australia. By the same token, it also demonstrates to the many non-lawyers who have made it their business to become involved in matters relating to the electronic media that no matter how much politics and pressure group tactics may effect developments in this context it can be perilous to ignore the substratum of law operating in this field.

*A C Castles**

THE LAW OF UNJUST CONTRACTS, *by J R Peden* (Butterworths 1982) pp xix, 187.

It is somewhat surprising that there has apparently been no English or Australian monograph of any note on the topic of unjust or unconscionable contracts; rather, one has been forced to rely on the occasional seminal article. The interest sparked in legal circles by Lord Denning's identification in *Lloyds Bank Ltd* v *Bundy*[1] of the "single thread" of inequality of bargaining power as running through the existing instances of specific relief against unconscionability, has not resulted in a comprehensive study of the attitude of English and Australian courts to unjust contracts. Such a study is long overdue in view of the volume of case-law and of the judicial[2] and academic[3] recognition of the influence of the relative bargaining strengths of the parties in the formulation and enforcement of many aspects of the law of contract.

Unfortunately, this book is not that comprehensive study. The exposition of the common law (and equitable) rules on unjust contracts amounts merely to a cursory examination in order to set the scene for the treatment of the main subject, the New South Wales Contracts Review Act 1980. In Anglo-Australian terms, this Act breaks new ground by giving the courts a general power to reopen a contract in favour (broadly) of a consumer, on the ground that it is unjust (s 7(1)), "unjust" being defined by s 4(1) to "include unconscionable, harsh or oppressive". Who better than Professor Peden to give an account of this Act? It was his report[4] to the NSW Minister for Consumer Affairs that resulted in a Contracts Review Bill being presented to the NSW Parliament in 1979. When this bill met with fierce opposition, it was withdrawn and replaced by a second bill which, after a much more favourable reception, was passed and became the present Act. The success of the second bill apparently owed much to the fact that it reverted to a large extent to the shape of Peden's original

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1 [1975] QB 326, 339.

2 *Lloyds Bank Ltd* v *Bundy,* supra; *Schroeder Music Publishing Co Ltd* v *Macaulay* [1974] 3 AII ER 616; *Clifford Davis Management Ltd* v *WEA Records Ltd* [1978] QB 69; *Photo Productions Ltd* v *Securicor Transport Ltd* [1980] AC 827.

3 See Clarke, "Unequal Bargaining Power in the Law of Contract" (1975) 49 ALJ 229; Sayton, "The Unequal Bargain Doctrine: Lord Denning in *Lloyds Bank* v *Bundy*" (1976) 22 McGill LJ 94; Trebilcock, "The Doctrine of Inequality of Bargaining Power: Post-Benthamite Economics in the House of Lords" (1976) 26 U Toronto LJ 359.

4 Peden, *Harsh and Unconscionable Contracts: Report to the Minister for Consumer Affairs and Co-operative Societies and the Attorney-General for New South Wales* (1976).

recommendations, as contained in a draft bill attached to his report. While this influence gives Peden's analysis of the Act considerable authority and makes his comments of real value in assessing the practical workings of the provisions, it is hardly designed to produce a compelling critical review of the Act, since his views are unlikely to have changed significantly since 1976.

Nevertheless, the account of the Act merely occupies Part II of the book. Part I is devoted to a brief study of the common law doctrine of unconscionability and legislative attempts to control or invalidate unjust contracts. The first chapter examines the common law. It traces the early common law notion of a "just price" (as manifested, for example, in the attitude to usury) back to the Aristotelian concept of justice and the *laesio enormis* of Roman Law. With the (perhaps illusory) dominance of the principles of *laissez-faire* and freedom of contract in nineteenth century English thought,[5] any broad notions of judicial freedom to interfere with contracts, despite apparent consent by the parties, merely on the ground of unfairness, disappeared in favour of the development of undue influence, duress and fraud. These more specific grounds of relief were restrictively defined, particularly the latter two.[6] With the retreat of freedom of contract, the rise of collectivism and the Welfare State and increasing judicial awareness of the problems of contracts of adhesion, perceived as the most common source of unconscionability, the courts have to some extent reverted to their original position. But rather than developing a general doctrine of unconscionability, as Lord Denning, for one, envisaged, they have been content to deal with such problems by using devices such as collateral warranties, implied terms, fundamental breach, etc.

> "A strong argument can be made that using these devices the courts have achieved what are often admittedly just results but by somewhat surreptitious means. The question arises whether it is better to achieve this 'covertly through the manipulation of technical rules or overtly through doctrines that make the real grounds for decision explicit'." (p 21)

However even an overtly recognised judicial power to reopen contracts might well prove counter-productive because of the uncertainty generated before the development of "clear, conceptionally sound and functional" criteria for application of the doctrine. The conclusion from this is that the best overall result can be achieved by developing the doctrine of unconscionability on the basis of "specific criteria promulgated by the legislature". This is the starting point for the greater part of the book, which is an examination of legislative initiatives in the field of unfair contracts. Thus chapter 1 contains only a sketchy (though adequate) account of the common law on duress and undue influence, and omits any detailed account of particular rules which are manipulated to achieve ad hoc justice. This omission is understandable in view of the brevity of the book and its concentration on statutory intervention; nevertheless it is regrettable that space could not have been found for some consideration of the law on penalty clauses and particularly equitable relief against forfeiture, an area in which Australian courts have been especially active.[7]

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5 See Atiyah, *The Rise and Fall of Freedom of Contract* (1979).
6 See eg *Skeate* v *Beale* (1841) 11 Ad & E 983; *Derry* v *Peek* (1889) 14 App Cas 337.
7 For a recent example, see *Yardley* v *Saunders* [1982] WAR 231.

The second and third chapters are devoted to various legislative attacks on unfair contracts. As a precedent for a generalised right of intervention, art 2-302 of the American Uniform Commercial Code is considered in some detail. The comparative analysis devoted to this measure and, to a lesser degree, analogous German provisions[8] is extremely helpful for those (such as the reviewer) to whom the concept of the discretionary reopening of contracts is unfamiliar and indeed somewhat daunting. It is significant that Peden concludes that, while art 2-302 "has been used sensibly in order to strike down the worst abuses particularly in consumer contracts of adhesion" (p 29), it has not been entirely successful: there have been considerable divergencies and inconsistencies in the cases decided under the article and this has been attributed by commentators to its failure to specify criteria that might assist in finding unconscionability in individual cases. This "lesson" from the American experience was instrumental in leading Peden to recommend in 1976 that "specific but non-exclusive descriptions of elements of unconscionability" be included in the NSW legislation. The approach was adopted (see s 9(2)) and is essential to the Act's scheme in attacking unjust contracts.

A number of other statutory provisions are considered: in the Australian context these include hire-purchase legislation and the Moneylending Acts. Peden notes that the traditional formula used in these statutes, under which courts are given power to reopen "harsh and unconscionable contracts", has been restrictively interpreted, thus negating any potential effectiveness. In marked contrast has been the success of s 88F of the Industrial Arbitration Act 1940 (NSW), which employs the wider and less precedent-encrusted formula of "unfair, or harsh or unconscionable, or against the public interest" in regard to labour contracts. "[Section 88F] has proved to be a flexible and useful instrument for relieving workers, contractors and franchisees from the harsh consequences of contracts or arrangements involving the performance of work." (p 71). Again the Contracts Review Act reflects the desire to escape the stultifying effects of any definition which will allow the courts to sacrifice innovation in favour of the safety of precedent – see the definition of "unjust" in s 4(1).

The remainder of the book deals with the Act itself. Chapter 4 is an examination of some of the policy issues raised in deciding on the nature and scope of the provisions. In Part II the Act is set out, together with annotations. These are comprehensive and informative; indeed they almost justify the book in themselves. However, the major defect of the treatment of the Act is that the author fails, except in regard to s 17(3) (preventing contracting out of the Act by means of an artificial choice of law clause), to make a *critical* appraisal of the crucial features of the Act. This cannot be attributed to a reluctance to criticise his own brainchild for, in the most vital respect, the legislation as enacted differed from the draft in the Peden Report. Peden originally recommended that the Act apply to all types of contract, consumer or otherwise, although the Crown, public and local authorities, and corporations would be precluded from claiming relief. But, as it stands, the Act also denies relief to a party entering into a contract "in the

8 German Civil Code para 138; Law on Standard Contract Terms (1977).

course of or for the purpose of a trade, business or profession carried on by him", other than a farming undertaking (s 6(2)). This effectively restricts the ambit of the legislation to consumer contracts. Despite the author's clearly favourable attitude to UCC art 2-302 which applies to all contracts, and though the effect of the insertion is to remove any protection for small businessmen (who may be on the receiving end of an abuse of superior bargaining power in just the same way as a consumer), criticism is conspicuous by its absence. The American experience shows that, in practice, commercial contracts will rarely be upset: but when they are there are compelling reasons for doing so. Article 2-302 meets the predictable argument, that exposing commercial contracts to the scrutiny of an unconscionability test will result in uncertainty and unwarranted disruption of the risk-allocation undertaken by the parties, by making it mandatory for the court to hear evidence of the commercial setting and purpose of the contract, once found to be unjust. This has been successful in deterring over-use of the section in commercial cases; in this report Peden envisaged the same occurring under the NSW legislation, and to this end a similar criterion was included in the unconscionability factors listed in the Act (s 9(2)(l)). It is surprising then that there is no attempt to fault the Act for its failure to cover the minority of commercial contracts, where protection is required against abuse of superior bargaining power.

More generally, Peden fails to address himself to the obvious question-mark which must be raised against enactments like the Contracts Review Act and the UK Unfair Contract Terms Act 1977 – what effect will the legislation have *in practice* in controlling injustice and abuse of bargaining power? [9] To date there has been no reported instance of the NSW Act being invoked,[10] which does not augur well for the future. It may be asked to what extent the conferment of jurisdiction over applications for review upon the NSW District and Supreme Courts is responsible for this situation. It is remarkable that Peden, while recognising and commending the success of s 88F of the Industrial Arbitration Act in controlling unconscionability, particularly in the flexibility of its application, does not stress, much less seek to draw any conclusion from, the fact that it is the Industrial Commission which supervises the provision, rather than the courts.

To some extent this book is more notable for what it isn't, than for what it is. It isn't an exposition of the law on unconscionable contracts, except in so far as there is some relevance to the Act, nor is it a critical examination of the scope and likely effect of the Act. Nevertheless it is an extremely useful guide to the provisions of the Act: the annotations are helpful and for NSW practitioners and consumer advisors there are sample pleadings for use in an application for review. It will be of considerable interest to see whether the practical working of the Act develops along the lines envisaged by Professor Peden. The success or otherwise of the Act may well determine whether similar legislative schemes are attemped in other jurisdictions.

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9 See Goldring, Pratt and Ryan, "The Contracts Review Act 1980 (NSW)" (1981) 4 UNSWLJ 1.

10 See *CCH Consumer Sales and Credit Law Reporter,* vol 1, 5001.

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THE LAW OF EDUCATION *by B Boer and V Gleeson* (Butterworths 1982) pp xxix, 211.

Considering the increasing number of circumstances in which legal issues relating to schooling and the school environment are raised, the dearth of texts which deal with the law in this area is surprising. One reason perhaps is that these issues can extend over a number of different areas of law, both public and private, including tort, contract, family and administrative law. Textually at least these subject-matters are generally treated as discrete, but the law relating to education must deal with social situations in which persons interact in many different relationships and circumstances, giving rise to a wide range of complex legal issues. It is these notional boundaries of subject-matter behind which the law relating to education has been concealed, making it difficult for persons concerned with education to easily inform themselves of the legal questions and problems which may affect them. The scope of the problem created is recognised by Boer and Gleeson in their preface when they state that "the legal and other issues which arise in the school environment affect most of the population."

Such a book as this has a very useful function to fill since there is a considerable demand from persons involved in education at all levels to have some reference book or material from which fundamental rights and obligations and liabilities can be determined. Boer and Gleeson's book does fulfil this need at least in a basic sense, as it sets out the principal relevant statutory material throughout Australia, and describes briefly the pertinent common law. Very little is described in any detail or subjected to much analysis, but this is hardly possible in such a short book which needs to cover so many diverse areas of law from an introductory standpoint. Nor would it be appropriate since the book is generally intended for the benefit of non-lawyers.

The authors state their purposes and intended audience in their preface: educators and educational administrators, students, parents and those advising them. Consequently their intention is "to keep legal jargon to a minimum", though it is not always avoided. They describe the book as "something of a hybrid; it attempts to set out as clearly and concisely as possible the more important law relating to our concerns, whilst at the same time trying to put that positivist approach into an historical-socio framework." It is where the book attempts the latter task that it is at its weakest.

They begin with a general discussion of sources of law in Australia, including the federal system and the hierarchy of courts, and a discussion of federal-state relations in the provision of finance for education in both the public and private sectors. This part of the book contains not only this introductory legal material, but also outlines the differences in legal terms between government and non-government schools, and their relationships with government. The different legal position of teachers, parents and students vis-a-vis non-government schools is also touched upon: in these schools the relationship must be purely contractual whereas in government schools it is largely governed by statutory and quasi-statutory terms.

The following chapter on *Children, Schools and the Law* contains a general rundown of children's rights, obligations and liabilities in relation

to schooling and the school environment, and the liabilities which parents, teachers and schools might incur on behalf of children for whom they are responsible. The chapter is marred however by a curious note that runs through it suggesting that the rights of children are being infringed by compulsory education requirements, and that children in countries where no such requirements exist are accorded more "rights", as they are treated as adults who can "choose" to be educated. Such children of course, have no "right" to literacy and numeracy which enables them to read such books as this and to recognize and enforce their "rights". Obligations placed on parents to have their children educated are also discussed, and consideration is given to the types of education in systems or otherwise among which parents and children may choose. The relation between parents and schooling, government and non-governmental, is also dealt with.

The two best chapters are chapter five, *Teachers and the Law,* which deals with the legal relationships between teachers and schools and teachers and students, and the legal obligations placed on teachers in their employment, and chapter six, *Injuries in the School Environment* which discusses the most frequently litigated matters arising from this context. The law of negligence is discussed specifically in relation to teaching, schools and school governing authorities, and in particular the type of duty of care resting upon teachers in various circumstances. Boer and Gleeson are at their best in setting out clearly and fairly baldly the legal principles which govern different situations, without becoming enmeshed in philosophical or analytical discussion. The concluding chapters are in a similar vein, concerning the maintenance of order in schools, and educational administration.

The book concludes with an Appendix of the Declaration of the Rights of the Child, and an adequate index. There is a "further reading" list at the end of each chapter to expand the brief statements of law given.

The later chapters dealing with some legal analysis stand out in this book, ironically perhaps, given the authors' intended lay readers and their intention to present an integration of law and the school society. The limitations in the book are principally set by the vast scope of the material needing to be covered, and the largely non-legal audience to which it is addressed. Both these factors tend to diminish the expansion of legal analysis and discussion. This book is better than the only other general work on education law in Australia, as it is much more comprehensive and up to date. It is a very useful book, despite its limitations: this is not to damn with faint praise, for the function of the law is to be useful, and a book which pulls together and can render clear and useful the law in its application to such an area as education in all its complexities has achieved a significant goal. Finally, for this reviewer, the book achieves another desirable goal: it is most gratifying to see a text written in non-sexist language, and demonstrating that the use of such language is neither clumsy, obtrusive nor distorting.

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PROPERTY LAW CASES AND MATERIALS *3rd edn by R Sackville and M Neave* (Butterworths 1981) pp lxxi, 936;
CASES AND MATERIALS ON REAL PROPERTY *by P Butt, G Certoma, C Sappideen and R Stein* (Law Book Co 1980) pp xlvi, 667;
INTRODUCTION TO LAND LAW *by P Butt* (Law Book Co 1980) pp xxxi, 395;
LANDLORD AND TENANT *2nd edn by M Partington* (Weidenfeld & Nicolson 1980) pp xxxviii, 554.

The cupboard of an Australian property law teacher is no longer bare. The availability of a number of texts and case-books poses the problem of selection. The first three of the books listed for this review are aimed principally at use by students in basic land law or property courses. In assessing these books their adaptability to the aims and methods of the course for which they are contemplated is of primary importance. It is impossible to separate an assessment of the books from an evaluation of teaching aims and methods.

Sackville and Neave has been widely used in Australian law schools for a little over a decade now. Butt, Certoma, Sappideen and Stein are all members of the lecturing staff at the University of Sydney (hence their case-book will be referred to as the *Sydney Case-book*) and their case-book provides an opportunity present a different approach to the subject. Already one reviewer of their book has taken the occasion to relate different attitudes to case-books and to highlight the individuality of the Sydney law school (Professor Tarlo, (1982) 9 Sydn LR 715). The *Sydney Case-book* differs from *Sackville and Neave* in some obvious ways: its focus is land law rather than property law and it is divided on a simple pattern according to the major interests in land without any reference to the functional or conceptual relationship between doctrines and interests.

From the time of its original edition *Sackville and Neave* has had much more ambitious aims. It attempts a structure relating to the nature and range of proprietary interests, their enforcement, and means of acquisition. Its conceptual arrangement owes much to Professor Jackson's challenging analysis (*Principles of Property Law* (Law Book Co 1967)) and many of the changes since the first edition can be traced to Professor Jackson's review of that original edition ((1972) 8 MULR 728). *Sackville and Neave* also stresses the relationship between legal rules and the social conditions within which the rules operate. There is even a short review of the role of private property in society (pp 16-22).

Not surprisingly the ambition of the authors of *Sackville and Neave* has never been matched by the contents of the work. The authors have submitted to forces favouring familiar groupings rather than the dictates of their own concepts. In several cases even chapter headings remain a puzzle after detailed consideration of their contents. The Torrens System, for example, is introduced as part of "The Statutory Regulation of Proprietary Interests in Land"; yet the authors never justify how the system regulates interests rather than the means of dealing in them. Moreover easements and covenants affecting land have been labelled as techniques for "Planning Land-Use by Private Agreement" with little explanation, particularly needed in the case of easements, as to how successfully the interests achieve the aim and whether they serve other aims. And surely leases are a means of obtaining the use of land without

the capital commitment of ownership rather than a nebulous commercial interest; moreover the function of leases is significant in assessing the social status of residential tenants. A book concerned with social impact of proprietary doctrines requires some reference to government treatment of home-owners and tenants – such as an extract from the Victorian Government *Green Paper on Housing* (Government Printer 1980). Given the emphasis upon social significance, a brief explanation should also be provided to assist students to understand why at the completion of a study of the materials contained in the book they have learnt very little about the acquisition of wealth in our society.

As a property case-book *Sackville and Neave* has always been thin in its coverage of personal property. Undoubtedly the authors have had to be concerned that their book is only just within manageable limits and that they had to adapt to the demands of courses for which the book might be used. To this reviewer the authors have been unduly cowered by the fact that commercial law courses in this country have traditionally presented a section by section analysis of the Sale of Goods Act. For completeness of analysis in *Sackville and Neave*, the topics of the impact of a contract of sale and the passing of title cry out for sale of goods material. Judge White's judgment in *Re MacKay* (1972) 20 FLR 147 would be an invaluable example of the application of the doctrines of estates and trusts to chattels. The commentary could better relate to concurrent ownership and extend adverse possession to chattels. A little reorganisation could introduce chattel morgages alongside land mortgages – and introduction of increased value as the consumer credit legislation outside South Australia draws closer. The third edition marks one retreat in the comparison of real and personal property through the omission of the material on bailment.

Some other minor criticisms may be made. At no point does *Sackville and Neave* define the land in relation to which proprietary interests exist and so omits a further fragmentation. The application of the Torrens System to doctrines discussed prior to the Torrens System chapter is not sufficiently explored: the role of possessory title under the Torrens System, particularly the role of possession as evidence of title, is explored but briefly; more importantly, protection under the Torrens System for interests arising by virtue of the equity of acquiescence doctrine is ignored, together with the broader issue of the responsiveness of the Torrens System to new interests. More could be done to explain, in relation to the Torrens System provisions of the various States, the differences and similarities between the statutory provisions relating to easements and restrictive covenants.

Despite these criticisms, *Sackville and Neave* is a work of many qualities. Its coverage is most extensive and provides amply for a variety of emphases. At no point is it a mere collection of leading cases; the notes provide a range of references which any text would find creditable – in the absence of Australian texts this feature has extended the book's use well beyond a mere teaching tool. Its references to statutory provisions in all States have been almost complete – against this feature has created a further practical use of the book. In this respect it came as a surprise and disappointment to discover that state-by-state lists of statutory provisions were not included in the section on statutory procedures for the recovery of land from squatters (p 81). However, above all is the fact that no reader could ever leave *Sackville and Neave*

without unanswered questions. It suggests new directions, explores the social impact of results, exposes inconsistencies of doctrine and constantly probes.

The *Sydney Case-book* is not attempting to examine anything other than land law and so is not as concerned to construct a framework of doctrine. Its contents emphasise the analysis of recognised interests in land. One reviewer has expressed concern about its failure to address equitable interests and possessory interests (Morgan, (1981) 13 MULR 292). This failure is but a symptom of the approach of the book. Its concentration is upon the rights and obligations of parties to the various forms of transaction. There is a small chapter on "Old System Title and Registration of Deeds Act" and one on "The Torrens System". Otherwise the book is not concerned with the acquisition and enforceability of proprietary interests. It eschews proprietary conflicts and leaves this reviewer wondering whether the authors have any philosophy as to the significance of their subject. The lack of consideration of priority issues is reflected in the chapter on mortgages where, of 104 pages, 19 lines are devoted to the nature of Torrens System mortgages and 18 lines to priority disputes involving such interests. A 140 page chapter on leases has four lines on informal leases which do contain some inconclusive cross-references.

The exclusion of proprietary conflicts allows the *Sydney Case-book* to avoid many of the challenges of the subject. Land law is presented as a collection of fairly established rules. In the chapter on the Torrens System no mention is made of the potential of in personam claims to detract from the immediate indefeasibility of title; and relative priorities of unregistered interests apparently present no difficulties as the sole note to *J & H Just (Holdings) Pty Ltd* v *Bank of New South Wales* (1971) 125 CLR 546 provides only some dated references to articles. Since equitable interests are so briefly dealt with, the possibility of a category of equities does not arise to create any disturbance. Overall the claims of the material contained in the book for publication rest more on the service to students at the University of Sydney Law School than the advancement of scholarship. The authors have provided a collection of material which although accurate contains so little insight and so little challenge that this reviewer would be disappointed if a student of a course for which he was responsible found it of value other than as an incidental reference.

To some extent Butt's *Introduction to Law* is a companion text to the *Sydney Case-book* and causes many of the same reactions. The book is said to aim "to provide an introduction to land law for those coming to the subject for the first time" (p v). It does have the considerable value of providing introductory reading; the text is readily comprehensible and progresses in an orderly fashion. Sadly its use as an introductory text is hindered by two features; its attention to historical material and its confinement to the law of New South Wales. The author discloses that the book was originally planned as a second edition of Hargreaves and Helmore, *Introduction to the Principles of Land Law* (Law Book Co 1964) but that the book evolved a character of its own because of the need for considerable expansion of and additions to those sections dealing with the present-day law. It is a pity that the links were not completely cut and the book entirely written as a statement of principles relevant to the present-day law. Two chapters of the book cover topics

insufficiently covered elsewhere; they are "Strata Title" and "Tenures under Crown Lands Acts and Similar Legislation". These topics contain some peculiar Australian innovations presenting conceptual difficulties and of particular relevance to present conditions.

Partington on *Landlord and Tenant* has been properly recognised as a wonderful book demanding serious attention from any scholar concerned with issues of residential tenancy law. The book would be most unfairly treated if inclusion in this review of basic student references was to be treated as a serious review. But the appearance of a second edition merits reference in this review because of the author's statements as to the philosophy behind its compilation. In the first edition the author refers to its roots at the Warwick Law School in the period 1970-73. To overcome difficulties encountered by real property students and to provide vitality and interest it was concluded that "students might understand the often abstract and difficult language and concepts of Real Property if we were to teach them in the context of the housing situation in this country" (p xxiii). By the second edition these aims have become more muted (p xxxvii) and no reference made to use of the material for an introductory course.

Australian law schools have not challenged the demands for alphabetical acquisition of knowledge to the extent that detailed study of one aspect of land law would suffice for a compulsory course. To some extent four-year law courses require compulsory courses which provide building blocks — one consequence of this approach is that the compulsory subjects provide largely theory and the student taking these subjects is frustrated because he seems not to have acquired sufficient applied knowledge properly to solve the simplest fact situation. In addition the exposure to residential tenancy law provided by Partington on *Landlord and Tenant* is a limited experience — the transference of its lessons to the whole of land law demands much of someone whose training has been so limited. The role of an Australian property law course within the present degree structures emphasises the strengths of *Sackville and Neave* in relation to the *Sydney Case-book*. Not only does a proprietary interests analysis provide a foundation extending well beyond land law but an emphasis upon concepts better equips the student to deal with different situations. An understanding of social significance further allows rules to be related to their purpose and enables some appreciation of the likely expansion or contraction of particular rules.

*A P Moore**

THE TORRENS SYSTEM IN AUSTRALIA, *by D J Whalan* (Law Book Co 1982) pp lxv, 410.
EASEMENTS AND RESTRICTIVE COVENANTS IN AUSTRALIA, *by A J Bradbrook* and *M A Neave* (Butterworths 1981) pp xiv, 422.

The history and development of the law of real property in Australia has been marked by an unresolved tension between two institutions or sources of principle. Each State, at its birth, received those precepts of land law founded in common law and equity — in Australian land law

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parlance, known as the general law. This complex, and highly refined, body of rules and principles needed for its administration and succour, a specialist practitioner: the conveyancer. But ever since the South Australian Real Property Act 1858, championed by Robert Richard Torrens, Australia has seen the introduction and establishment of a second body of rules governing the acquisition, alienation and security of title to land. That institution, now referred to throughout the world as the Torrens System (title to land by registration) was passionately opposed by the conveyancers of the day: for the most immediate effect of the system was the drastic simplication of conveyancing practice — to the extent that, in South Australia at least, the privilege of drawing instruments of title, and handling their execution and registration, was extended beyond the legal profession to specially trained lay conveyancers: land brokers.

Only a few, Dr Kerr among them (*Principles of Australia Lands Titles (Torrens) System* (1927)), saw the Torrens System as a great Australian bite into our inherited land law. The course of history since 1858 has revealed only a slow realization that the Real Property Acts do, or may do, more than merely force the general law into a new conveyancing jacket. An example of the realization is the judgment of Dixon J in *Brunker* v *Perpetual Trustee Co Ltd* (1937) 57 CLR 555, where, in a case concerning an imperfect gift of Torrens title land, His Honour saw the issue as whether the statute alone identified the stage at which a gift of land was perfected, or whether it was simply a matter of applying settled equitable principles in a statutory environment. In this respect, the Real Property Acts remain largely unexplored. The community has been content to reap the benefits of the simplified conveyancing, but otherwise to leave the legislation alone.

The two treatises under review both attempt in different ways to resolve the tension. True it is, as Blackburn J says in the Foreword to Professor Whalan's work on *The Torrens System in Australia*, that the book's "centre of gravity is the *system*"; and the author continually tests the legislation, and its particular treatment in the courts against the Torrens System philosophy which he carefully expounds. But what, in my view, renders this book an outstanding contribution to the study of Australian land law, is the author's recognition of the legislation as a primary source of substantive property law, independent of, and often replacing, general law principles. The "unresolved conceptual difficulty — the Torrens estate" is raised early (ch 3) and the theme is developed in subsequent chapters: interests that may or may not be registered (ch 13); the nature of the Torrens System mortgage (ch 16); the transfer of Torrens System title, including the nature of pre-registration rights (ch 21); and indefeasibility of title (ch 23). There can, of course, be no glorious conclusion: only a perceptive marking of the accretions and reclamations of statute over the waters of the general law. The result is, nevertheless, an exposure of substantive law secreted within the interstices of the statute.

The work has another theme which is both vital and, hitherto, little explored: the role of the Registrar-General, and the nature and extent of his amenability to supervision by the Courts. In this sense, the Real Property Acts were 19th century legislation anticipating 20th century models. The phenomenal development of administrative law over the past 40 years has been the common law response to just such legislation:

where private rights are affected by the exercise of a statutory power reposed in a public officer. The chapters on administration of the Torrens System and rights of appeal (Part II), the Register and its contents (Part IV), the Registrar's functions in registering instruments (Part V, ch 14, section 5), compensation for deprivation of title and for error by land titles staff (Part VIII, ch 24) and the Registrar's powers of cancellation and correction (Part VIII, ch 25), make new and vital reading.

The linchpins of the Torrens System receive stimulating treatment: thus, for example, there is a very full and detailed discussion of caveats, including the controversial issues (in South Australia, at least) of whether caveats can be amended by leave of the Court (the author argues that they can), and when leave can be granted to lodge a second caveat (not often). Surprisingly, uncritical reference is made to the South Australian authorities on extension of time for removal of a caveat (*Galvasteel Pty Ltd* v *Monterey Building Pty Ltd* (1974) 10 SASR 176; and the *Palyaris Construction* cases (1975) 11 SASR 41, 58, 62, 65). As one would expect, the concept and operation of indefeasibility of title is carefully analysed. And the conclusion reached is, it is submitted, impeccable:

> "It has been submitted that an 'indefeasible title' is not truly so but is best described as a title which if it is examined or attacked at a given point of time cannot be defeated or annulled. It is quite possible for an indefeasible title to be defeated by later registrations; thus indefeasibility under the Acts is relative rather than absolute. If loss is caused to the holder of an antecedent 'indefeasible title' in the registration process, adequate compensation should always be available to the person who suffers loss; in practice such full compensation is not always available".

This book deserves a space in the bookshelf of both academic lawyer and practitioner: there is hardly a practical detail of the system left untouched (see for example, the treatment of Certificates of Title and folios of the Register (ch 12); prescribed or authorized forms for effecting dealings in land (ch 14); execution, certification and verification of instruments (ch 14)) and yet several important themes are maintained and developed throughout the book. The self-conscious and inappropriately conversational style, and occasional abuse of the indulgence of footnotes (either to engage in an excursus, or to advertise the author's numerous writings on aspects of the subject), should not, in the end, be allowed to detract from a bold and fertile treatise on the Torrens System.

Easements and Restrictive Covenants in Australia is quite different in its style and approach, but no less valuable in its achievements. Its primary purpose (according to the preface) is "to examine the rules which govern the creation, enforceability and extinquishment of easements and restrictive covenants". That purpose is pursued exhaustively and inexorably. Part of the methodology includes, in each case, a careful discussion "of the interaction between the operation of the Torrens System and the common law and equitable rules governing easements and restrictive covenants". It might be suggested that such an approach demonstrates an unwillingness to recognize the substantive reach of the Real Property Acts. The suggestion, however, cannot prevail, for it fails to acknowledge the subject-matter. It is basic doctrine that in order to obtain the advantages of indefeasibility and guarantee of title accorded by registration, the interest or estate claimed must be such as is recognized by the general law. But, for the most part, the issue that must be, and is, confronted by the authors is the converse: whether

every estate or interest recognized by the general law is capable of registration. Thus, for instance, can prescriptive easements be acquired over Torrens land (apparently not, in South Australia); and even if restrictive covenants can be protected under the Real Property Acts, is the scheme of development doctrine, or common building scheme (*Elliston* v *Reacher* (1908) 2 Ch 374) applicable to Torrens land? The controversy is not without heat.

It must be said that the work does not vibrate with the same spirit of adventure as does Professor Whalan's: the treatment is too methodical and consistent for such an indulgence. But there is no reason to doubt, as Sir Ninian Stephen puts it in the Foreword, that the authors have presented "in full detail and with full analysis the present state of the law of easements and of restrictive covenants in this country". Conveyancers and teachers of real property law alike will surely be grateful for the industry, tenacity and analyticial discipline of the authors.

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