BOOK REVIEWS

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Administrative Law: Commentary and Materials, 2nd edition

By R Douglas and M Jones
The Federation Press, Softcover $80.00

In the opening chapter of Asking the Law Question, Margaret Davies sets out to demonstrate three theses, the least controversial of which is that "Jurisprudence is Boring". Dr Davies argues throughout the book that one cannot separate the "inside" of law, that is, some sort of self-sufficient system of rules and justifications developed in purely legal terms, from the "outside" of law, the political and social context which gives it meaning. In her first thesis, she explains that "the really boring thing is... to say that there is an underlying reason for things, a first cause, which explains the world. I find philosophy which attempts to make the world or any part of it into a static system or structure very depressing, and think it ought to be avoided for that reason."

Where does that leave all of us who really quite like the law of contract, the law of tort, or the law of judicial review? Those people who quite enjoy playing with technical rules without considering the wider context?

Well, one could argue that the actual use of these rules and concepts is not covered by Davies' injunction. That is, using these rules to achieve a result in litigation is putting them into a context, and not examining them on their own. They are incidents in a wider dramatic event, the court case, and hence their study might be excused.

This is, of course, a furphy, a hopeless attempt to conceal the truth. This is, that many of us actually enjoy black letter law for itself, in and of itself, with a fascination which grows in the same way that one becomes fascinated by stamp collecting or meccano sets. We are as thrilled by a new case on fiduciary duties as a child by the new Underwater Lego - witness the rash of enthusiastic articles which greets every such case. This honourable necessary regard to their policy. (And incidentally, the syndrome might be related to one detected in many bureaucracies where there is a similar fascination for rules without context)

What, then, does one do with a book like Administrative Law by Dr Roger Douglas and Ms Melinda Jones? This book is unusual, in that it is a full-blooded attempt to locate the subject within its context, from the widest level (relating to the transformation of society and the state identified by Charles Reich) to more specific developments, such as the need to address corruption in government, and the new managerialism. The law is emphatically not decontextualised.

Most texts nowadays do make an effort to expand serious coverage beyond judicial review plus a token chapter on merits review and freedom of information. However, this book provides a great

deal of background material on every aspect of the subject. The introductory chapters are entitled "Issues and Problems in Australian Administrative Law" and "The Rise of Administrative Law" and provide a historical and political analysis of the role, development and inadequacies of administrative law. Further, this analysis does not cease at that point, to be replaced by chapters on technical rules. The chapters continue to include materials and/or commentary which place the materials in a wider context. Thus one can find out, among other things, what eventually happened to the Kioas following their High Court victory.

This is the book's great virtue - it shows the subject fully rather than partially, and poses questions about current directions (and their application in the light of those directions). This virtue is not necessarily found in lawyers' textbooks, or indeed in Administrative Law courses. For instance, in a recent book review, His Honour Justice Kirby considered what apparently such a book was, writing that:

> [The author] does not take sides in the privatisation versus public enterprise debate. That is a subject he leaves to political theorists and others. His is a lawyer's book, illustrating once again that the brilliant mosaic of our law is extremely interesting when the spotlight is put upon a little section of it (70 ALJ 500).

If one can have such a book, if one is able to focus upon the brilliant mosaic without the political debate, then is the special content of Australian Administrative Law just that much surplusage - interesting to read, perhaps, but ultimately irrelevant? The answer is a resounding "no". Context of the sort provided by Douglas and Jones is always enlightening.

Even in courses which stick mainly to judicial review the book will illustrate and assist students in understanding how the principles work in practice. A fortiori, the book will be useful for practitioners, for the following reasons.

First, the field of judicial review of administrative action is notorious for its abstract and manipulative tests relating to invalidity. Jurisdictional error, ultra vires and standing are areas where this tendency is particularly pronounced. In such areas, general rules may be stated quite simply, but provide little or no guidance without an understanding of the context of each decision, to put it crudely, the real reason that the decision was made. This book assists considerably in that regard.

Secondly, it is questionable whether in a field such as this one may remove the prescriptive from the descriptive and leave the latter coherent. This is because this is an area where the rules are generally related quite directly to the policy underlying them. Thus, the extent of judicial review depends directly on caution in indulging in what is effectively merits review; thus, arguments about the public interest in the confidentiality of documents are directly opposed to the over-riding policy of freedom of information legislation. Thus, the level of natural justice to be provided to plaintiffs might or might not be linked to the intention of the legislature as to the operation of the decision-making process, and therefore ultimately to political values of the day. This subject naturally raises the broad administrative questions which are the subject of this book, and practitioners and students will be better equipped to tackle them if they possess this book.

Thirdly, the book takes in many subjects of very practical interest, such as freedom of information; reasons, discovery and evidence; the Ombudsman; merits of review; and, unusually corruption and the mechanisms designed to deal with it. Not all of these are necessarily taught in a law school course. A practical lawyer will find these chapters welcoming when dealing with the investigation and initiation of a potential case, or advising a client who is under investigation.

Fourthly, the book highlights trends in the law. For instance, it is the authors' opinion that the focus of the law has, in recent times, moved from the control of abuse of power by the executive to the control of corruption within the executive. Knowledge of such trends will be of use in interpreting and understanding new case law as it is created in response to these trends.

Fifthly, it is not boring, although in some of the later chapters it comes dangerously close; the wider analysis tails off some extent. This fifth point is a virtue of itself, as far as interest and readability go.

Sixthly, the technical coverage of rules is generally good, although naturally briefer than would be in a book devoted entirely to these rules.

Similarly, standing is treated as one separate topic, with remedies treated later. This can lead to dangerous confusion, given that standing is a function of the remedy desired; for instance, the authors comment that it is difficult to reconcile the *ACF case* (1980) 146 CLR 493 with the apparently more liberal *Ogle v Strickland* (1987) 13 FCR 306 which is said to have proceeded on the basis that similar rules (as to the "equitable remedies") were applicable to the remedies in both cases. But this is to ignore the fact that different remedies were requested, and the "person aggrieved" test in the latter is more liberal than the Boyce test applied in the *ACF case*. Lumping various remedies together in sections enables an approach to be taken consistent with the overall purpose of the book, namely discussion of the policy and reasoning of the cases in an attempt to provide a wider understanding of them, but this is done at some expense in terms of separating and explaining the individual heads of standing for each remedy.

Lastly, there are occasional comments in the commentary which might be treated with reservation. For instance it is said, seemingly in passing, that the doctrine of separation of powers is "Largely irrelevant in the context of State constitutions", presumably because it is not entrenched. One might comment that the doctrine is still, at the state level the organising feature of the government, at least as much as the original model found in England which so appealed to de Tocqueville. However, generally the commentary is both informative and stimulating.

In conclusion, the book covers a wide area well, in a manner that is unusual and likely to be of assistance to practitioners and to students. It is also a bold attempt to reconcile the "inside" of administrative law with its "outside".

Nicholas Shaw

Fulbright Scholar

The law and the market

Edited by Megan Richardson and Philip Williams

Federation Press, 1995. $60.00
ISBN 1 86287 174 4

This is a collection of papers delivered by economists and lawyers in October 1994 at a conference to honour Professor Maureen Brunt, a pre-eminent economist, member of the Trade Practices Tribunal and general guru in the trade practices area.

Although its title suggests a focus on the concept of the market in trade practices matters, there are a number of papers which canvass the general relationship between the law and economic theory and practice in trade practices matters. Areas include:

- authorisations and the public benefit test under the Trade Practices Act 1974 (Cth);
- case management of complex trade practices litigation;
- telecommunications regulation and more generally the area of break up of statutory monopolies; and
- misleading and deceptive conduct

One suspects from the content of the papers a continuing struggle by lawyers on the one hand and economists on the other to come to grips with the others' discipline and role in dealing with a statute which is based on a mix of legal and economic concepts. No doubt after many years of practice, each discipline is starting to get to know the other better and their respective merits (and draw-backs).

The papers present a useful compilation of relevant issues relating to market definition and the current position of market analysis in trade practices matters.

The book does not, and certainly does not purport to, represent a text book on market analysis for trade practices matters. Rather the papers choose to explore particular aspects of the concept and in many cases the economic underpinnings of the concept in specific applications.

Following the format of the conference each paper is followed by a commentary by another expert. In some cases, the commentary is duly deferential. However, in others there is clear disagreement with some of the views put forward in the papers (and in one case, criticism of the methodology used in the empirical research upon which the paper is based).

Because the papers are diverse, they should perhaps be judged on their individual merits rather than on the basis of how well they combine in terms of the overall theme suggested by the title.

I found most papers topical and well written. I must admit (as a lawyer) to finding some of the economic theory in a few papers heavy going.

Because of the diversity of issues, it is not a book I would recommend to practitioners looking to get a grounding in grappling with market definition in the trade practices context. However, for practitioners and others who already have that grounding, the papers represent a stimulating discussion on particular trends and problem areas.

A potential problem for any organisation purchasing the book, and more particularly their librarians, is to alert individuals to the range of topics discussed, some of which, at first blush, bear little connection with the title The law and the market.

David Davies
Partner, Fisher Jeffries
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Australian International Law: Cases and Materials

By Harry Reicher
Law Book Company, 1995, Softcover $95.00, Hardcover $130.00

The term "casebook" covers a wide variety of books. At one extreme, there is a book of convenience. In such a book, materials are gathered together with little or no narrative; the book takes the place of a reading list and a good library bundled together for easy reference. At the other extreme, one finds what are essentially supplemented textbooks, where the materials are used only to support the narrative provided by the author. In between these two extremes are books that not only provide the materials but co-ordinate them, guide the reader and pose interesting questions for further thought.

This casebook tends toward the first extreme. The very useful practice of placing a line down the margin to indicate narrative text, rather than cases and materials, has been continued in this book; but there is hardly a need for it. There is very little in the way of a linking commentary; the reader is usually taken from one extract directly to the next.

This could lead to a dangerously unstructured book, in which the unwary reader easily becomes lost. This danger might be exacerbated by the fact that the book has been assembled in the style of an anthology, which is unusual for a casebook; the thirteen chapters of the book are the products

of fifteen authors, including the editor, Professor Reicher, who co-authored six chapters. The perils of disorganisation and repetition are obviously great.

Fortunately, however, this book suffers from none of those flaws. It is a collection of interesting materials, intelligently organised. If the book is, as suggested, the functional equivalent of a reading list of a library, then in both aspects it excels. First, the "reading list" (that is, the way in which the materials have been selected and grouped) provides steady guidance through the subject. The book is divided into five parts, each with an introductory page explaining the scope of the part and the chapters contained within it. Within each chapter, the materials would on the whole, be less useful than the provision of a commentary. For example, the first topic of the book "The Nature of International Law and Its Sources and Evidence" opens with extracts from the textbooks, and continues to supply such extracts along with the other materials. There does not appear to be any obvious repetition of material, although the book is well co-ordinated in that different extracts from the same cases and texts are used throughout the book, providing a sense of continuity and completeness.

Secondly, the "library" provided by the book is fascinating. The materials have been assembled from many different sources. A large amount of material is departmental material from the Department of Foreign Affairs and Trade, in the form of extracts from handbooks, reports and submissions. Another source has been Hansard; in many places, Ministerial questions and statements have been included which throw light on Australian practice in the area. Australian contributions to international debates have also been reproduced in the appropriate places.

The usefulness of these materials highlights the best aspect of any casebook. It is quite possible to pass through law school (even with distinctions) without having to read a single case. One may, like a character in Whit Stillman's Metropolitan, read the literary criticism without ever reading the novel. But law is ultimately a doing subject, revolving around argument, judgment and criticism. It is for this reason that the casebook exists; to present cases, doing materials, in order that people can analyse the doing of law; what arguments were put, who decided, how the decision-making process worked, and so on. In this fundamental Australian International Law excels like few others. Matters such as challenges by Aboriginal groups to Commonwealth sovereignty are dealt with by the presentation of parliamentary debates, submissions made by the Department of Foreign Affairs to the Senate Committee, the Report of the Committee, High Court cases, and legislation. This puts the abstract principle back into the particular from which it derived.

Perhaps the other point of a casebook beyond, as has been mentioned, sheer convenience, is to stimulate students by the presentation of interesting material. This book satisfies on that score as well.

It is worth noting the particular focus of this book. The concept of "Australian International Law" is certainly not oxymoronic. Australia does have a practice and a view of the law, and it is worthwhile having a book which highlights that practice. Further, the book covers domestic law which is connected with international law and practice. This is an area of law which would remain uncovered by most books on international law. The interaction between international and domestic law is, of course, a particularly hot topic after Teoh's case.

This focus can occasionally lead to a feeling that the Australian connection is rather forced. For instance, Chapter 1 addresses "fundamental questions" about the true nature of international law. In this context, of discovering the true and pure nature of law, one would assume that a non-Australian can be just as enlightening as an Australian. But, as the covering page of the chapter states, "At all times, the examination proceeds through Australian eyes: decisions of Australian courts; writings of Australian

publicists; statements by Australian spokespersons in various fora, at home and abroad"

But this could only be a quibble, the very minor disadvantage of the admirable decision to devote a book to Australian practice and theory. The preface catalogues an impressive Australian involvement with the continuing development of international law, and the penalty of selecting only Australian connected material has accordingly been slight; there are plentiful materials with a connection. The accent on Australian practice and law inevitably limits the scope for international comparisons and viewpoints.

The book also contains useful tables and an index. It is undoubtedly an excellent product, its usefulness increased by the fact that it relates to an area not already well covered. It will be extremely useful for students and also for practitioners coming to grips with the influence that international law is now exerting on the Australian system.

Nicholas Shaw
Fulbright Scholar

Criminal law and practice (ACT)
By M Ward
Contact: M Ward (06) 217 4387
P.O. Box 2380 Canberra ACT 2601
Cost $150 negotiable for multiple copies

Magistrate Michael Ward of *Ward & Kelly Summary Justice (S.A.)* fame has just privately published a 2 volume work on criminal law.

The work is mainly an annotated *Crimes Act (ACT)* with useful chapters on criminal investigations, police powers, court practice, trial procedure and the *Evidence Act 1995* Cth).

It should be a very useful reference tool for practitioners, students of the law in the ACT and for police. Those practising law in the Australian Capital Territory are aware of the lack of published commentary on ACT criminal law.

This work incorporates some of the criminal code which may ultimately be adopted in whole or in part by the Australian States and Territories. In particular the fraud provisions of the *Model Criminal Code* are based on the ACT theft provisions and the latter are well covered in the book.

As the *Crimes Act (ACT)* is based on the *Crimes Act (NSW)* and as the theft provisions in our ACT *Crimes Act* are based on the English and Victorian legislation and the sexual offences provisions are similar to the SA legislation, this work therefore should also be useful to law students and practitioners in other states.

We hope this work will continue to be updated and be published in a looseleaf format, so the prediction of the Chief Justice of the ACT Supreme Court, Mr Jeffrey Miles from the foreword of the book: "*Ward*, as it is updated from time to time, may be predicted to take its place along side such works as *Watson and Purnell Criminal Law NSW, Bourke's Criminal Law Victoria* and *Carter's Criminal Law* in Queensland as a standard text on the subject in Australia", will come true.

Cesira Costello
Librarian
ACT Director of Prosecutions