

BOOK REVIEWS

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Constitutional Law and Policy Review

General Editor **George Winterton**

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When I first heard that there was to be a new journal entitled *Constitutional Law and Policy Review*, under the general editorship of George Winterton, it sounded like an exciting idea. When I saw the size, format and price of the first issue my excitement dissipated. However, on reading the articles I have decided that it is, after all, a worthy new journal. Let me explain.

A *Constitutional Law and Policy Review* sounds like an exciting idea. For many decades the High Court pretended that it could decide constitutional issues by "strict and complete legalism"¹, while actually advancing one policy or another through its decisions. For reasons very well explained by Elaine Thompson at pages 10-14 of the journal under review, the Court, unlike the United States Supreme Court, was not willing to admit that it made 'political' decisions. In those same decades most lawyers writing on constitutional law also stuck to legal analysis, leaving political debate to politicians and political scientists. Now that our highest court has abandoned pretence², and commentators on constitutional law feel that mixed

law-and-policy discussion - or even pure policy discussion - is legitimate in *law* journals, what could be more appropriate than a new journal that, by its title, invites discussion of both constitutional law and policy, perhaps mixed in the same article?

My expectation was that a journal of this title would necessarily have space for articles of some length. In my opinion, a full, thoughtful discussion of the law and policy relating to many constitutional issues simply cannot be covered in short pieces. The Review, however, states, in its inaugural issue, that its aim is to publish "relatively short articles". This first issue of 20 pages includes four articles and an editorial introduction. The annual subscription is \$195 for four issues per year (presumably all issues will be of the same approximate length). Even in 1998, few journal subscriptions cost almost \$2.50 per page!

However, it must be said that each of the four articles (written by members of the editorial panel) presents an interesting and useful discussion of a currently relevant constitutional issue. Clerk of the Senate Harry Evans suggests, in a discussion of the recent challenge³ by New South Wales Legislative Councillor Franca Arena to the legislation⁴ authorising an inquiry into her allegations of a conspiracy to limit the reach of the Wood inquiry into paedophilia, that the High Court's explorations in the implication of fundamental constitutional principles may yet extend to holding that some aspects of parliamentary privilege are so fundamental that even parliament cannot legislate them away. Geoffrey Lindell discusses the recent controversy in Queensland as to whether Attorney-General Beanland should have resigned, or been dismissed, after the Legislative Assembly's vote of no confidence in him. As noted above, Elaine Thompson perceptively discusses the different understandings of what is a 'political' issue in the United States and Australia and the inhibiting effect this has had on the High Court's readiness to be open in discussing policy.

¹ Sir Owen Dixon on his swearing-in as Chief Justice; (1952) 85 CLR xi at xiv

² See, e.g. The admission by McHugh J that policy factors are decisive in hard cases: 'The Law-Making Function of the Judicial Process - Part II' *Australian Law Journal* 62 (1988) 116 at p124

³ *Arena v Nader* (1997) 42 NSWLR 427; leave to appeal refused by the High Court (1997) 71 ALJR 1604

⁴ *Special Commissions of Inquiry Amendment Act 1997* (NSW)

issues Dennis Rose, former General Counsel in the Commonwealth Attorney-General's Department, discusses the High Court's reasoning in recent cases on the definition of an 'excise' duty, especially *Ha v NSW*⁵, and criticises the reasons of both majority justices and dissenters for their lack of consideration of various practical considerations in relation to the taxing of goods.

The strength of the Review is that it is a 'review' not like a university's law review, but in the sense that a certain kind of stage performance is a 'revue' - something devoted to shortish pieces on topics of current interest, a kind of Current Affairs Bulletin of constitutional law and policy. Libraries which service teachers, students or practitioners of constitutional law should subscribe to it if their budgets can afford nearly \$50 per issue for a current affairs bulletin - because, even allowing for discounts and tax deductibility, few students or underpaid academics will want to pay that much.

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Advocacy in Practice

by **J L Glissan** and **S W Tilmouth**

Butterworths, 1998

ISBN 0409 309 745 \$89.00

As noted by the learned authors of this text, it is more a new work than the 3rd edition of *Cross-examination Practice and Procedure*. It provides an instructive and practical overview to all facets of the forensic process from case preparation to appeals. There is even a detailed chapter on etiquette and ethics.

In my respectful opinion it should be required reading for all those who would be advocates and it will also provide a very useful reality check for many who, some may say mistakenly, believe that there is nothing new in this field.

As well as being informative and authoritative this book is a delight to read. Quotations from such insightful, but lighthearted, works as WS Gilbert, *The Lord Chancellor's Song* and Lewis Carroll, *The Hunting of the Snark*, are littered throughout the text as chapter headings. These fable-like extracts bring home the need for organisation, clarity of expression and attention to detail in a quite disarming fashion.

To illustrate the content of this work, I refer to the chapter on one of my pet areas, cross-examination. The authors begin with the often unappreciated fact of life that, where examination in chief affords the best opportunity to win the case, cross-examination provides an unequalled opportunity to lose it. This theme is elaborated under the heading, 'The deadly sins of cross-examination', which is a not so subtle reversal of the morality in Irving Younger's well known 'Ten Commandments of cross-examination'.

However, should I wrongly paint too negative a picture of this area of the book, I hasten to add that in 'Fields of Destruction' some eight distinct areas are identified which provide opportunities for undermining the evidence of witnesses.

In summary, this text is a well-crafted and welcome addition to the materials available on the forensic art of advocacy.

Michael Byrne QC

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A Practical Guide to Drafting Pleadings

by **Shelley Dunstone**

LBC Information Services, 1997

ISBN 0455 214 76X \$69.00

This is a very readable step-by-step guide to the drafting of pleadings and should be mandatory reading for anyone working in litigation who has no, or limited, drafting expertise.

The text is presented in a logical framework. In the first four chapters, the author gives an overview of the subject. She discusses the purpose of pleadings and provides illuminating examples of how carelessly drafted pleadings can shortchange a plaintiff or

⁵ (1997) 189 CLR 465

defendant at trial. The author then discusses the dangers of relying on precedents and makes the point, again through well-chosen examples, that no precedent can be an effective substitute for a thorough analysis of a case. The author encourages the use of plain language in pleadings and equips the reader with a number of simple techniques which can be used to achieve a clearer drafting style.

Chapters five to ten provide more specific, practical guidance on the drafting of pleadings and give special attention to the drafting of statements of claim, defences and counterclaims. The practical content of these chapters will be particularly useful to practitioners. The final chapter looks at the practical impact of pleadings on the conduct of litigation and how pleadings provide a reference point for the identification of the evidence needed to support a particular claim.

Each chapter concludes with a summary of the points discussed. Practitioners still learning their craft would do well to use these summaries as a starting point when drafting a pleading.

Early on in the text, the author comments that many practitioners develop their drafting skills in an *ad hoc* manner, through a process of trial and error. She refers to a tendency of novice drafters to see drafting as a mechanical, rather than an analytical process and demonstrates how deficiencies in pleadings can result from such a misconception. To address this problem, the author guides the reader through the analytical process necessary to draft effective pleadings and provides comprehensive charts, checklists and formulae which clarify the points made. Although not a digest of precedents, the content includes outlines for a number of types of claims including negligence, breach of contract, misrepresentation and statutory breach. The drafting of defences and counterclaims is also covered in detail and useful frameworks for these pleadings are included.

The author offers this book as a means by which practitioners can 'fast-track' their understanding of the principles involved in drafting pleadings and so improve their drafting skills. I think the author has achieved her objective and I have no hesitation in recommending this book.

Bronwyn Meredith
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Tort Liability of Public Authorities

By **Susan Kneebone**

LBC Information Services, 1998

ISBN 0455 215 200 \$105 00

Texts on the topic of the tort liability of public authorities are the literary unicorns of the law library. The addition of a comprehensive, scholarly and Australian focussed publication, as Dr Kneebone's book undoubtedly is, is most welcome.

The nine chapters of the book follow a proven structure. An exposition of the general nature, scope and history of the subject matter is followed by development of particular topics; liability of public authorities in negligence for the exercise of statutory functions; actions for breach of duty; statutory authority as a defence in nuisance; special protections encompassing statutory clauses and judicial and quasi-judicial immunity; liability of the Crown and claims in the federal jurisdiction. The conclusion includes the author's evaluation of the objectives and policy considerations relating to future directions in this area of law.

Although about the length of a good 'whodunit', this is not an easy read, nor is it an easy topic. Sir Anthony Mason remarks in the foreword:

The tort liability of public authorities is a contentious topic, notorious for divisions and shifts of opinion as courts, judges and academic writers seek to plot a more convincing path to the ascertainment of the liability of a public authority for tortious wrong ... With the possible exception of administrative law, there is no topic which presents as many hazards for an author . . .

The same might be said for a practitioner, who may now at least look cautiously along the path plotted by Dr Kneebone. The author states that she has attempted to cut through the complexities by concentrating on "what I call the basic rule, which is simply that the tort liability of public authorities is governed by the same principles and under the same headings of liability as apply to private individuals."

In this statement lies the key to both the strengths and the weaknesses of this book. This text is based on the author's PhD thesis. It suffers from this in two respects.

Firstly, it is written and structured more from an academic than a practical perspective. The main text is very heavily footnoted and pervaded by catchwords developed or specifically defined by the author to describe, for example, methods of categorisation of cases ('core', 'administrative' and 'control-reliance').

Substantively, the text was designed to be, and is, argumentative. The reader must constantly be aware that the analysis, interpretation and conclusions are directed to supporting the author's contention that what she calls the 'basic rule' should not only prevail, but be modified by the courts to consistently impose a stricter 'non-protective' standard of liability on public authorities.

However, Dr Kneebone clearly 'declares herself' in the preface, and continues throughout the text to use language which enables the reader to differentiate between her submissions and the objective analysis on which they are based. As a result, there is no sense of hidden agenda that can often accompany legal writing in contentious areas.

This book is far from a 'practitioners ready-reckoner' on tort liability of public authorities. It is an impressively researched and comprehensive examination of the topic, supported by extensive analysis of caselaw. It represents a significant contribution to an area neglected in legal literature.

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Annotated Trade Practices Act 1974

by **Ray Steinwell**

1998 ed., Butterworths, 1998

ISBN 0409 31441 2 \$55.00

The *Annotated Trade Practices Act 1974* is typical of most texts which contain annotated legislation. The text of the *Trade Practices Act 1974* (Cth) is reproduced in full, with the majority of provisions being followed by commentary explaining the provision. The commentary sets out relevant case law and where appropriate, reference is made to Second Reading Speeches explaining the provision.

The text is useful as a first port of call for lawyers wishing to locate the major cases relevant to a particular provision or area and it provides a useful guide when researching this difficult area of law. The complex provisions of Part IV and Part V are explained in great depth with the commentary being generous in its detail.

The volume also contains the three inter-governmental agreements between the States and Territories and the Commonwealth as well as the *Competition Policy Reform (New South Wales) Act 1995* which assist the reader wishing to analyse the National Competition Policy.

The commentary is also cross-referenced to other sections of the text and to cases, other publications and legislation. This is a useful tool for research purposes. Historical information relevant to each section is also included and, in some cases, footnotes containing an editor's note set out the text of amending legislation or related legislation, such as the transitional provisions contained in the *Commonwealth Competition Policy Reform Act 1995*. If there is equivalent State legislation, reference is made to the relevant Acts and provisions at the end of each section of the commentary.

A detailed index assists the reader in finding obscure provisions and related topics.

The cover of the text states that the legislation is "Current to 1 January 1998". However, the "Features of this Volume" states that "[t]he legislation reflects the law as amended to 1 January 1997". This latter reference appears to be a typographical error which could be misleading to some readers.

Some of the provisions contained in the Act such as those in Part IIIA relating to the third party access regime or those in Part X relating to international liner cargo shipping either have little or no commentary or the commentary merely restates the basic points of the provision. However, these Parts do have a short summary at their commencement.

Throughout the commentary there has been a failure to ensure that all references to the Trade Practices Commission or the Trade Practices Tribunal have been

replaced by references to the Australian Competition and Consumer Commission. This becomes more pronounced towards the end of the text.

The text will provide the reader with a sound basis for developing a general understanding of this most complicated and difficult area of the law.

Maree Westbrook

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Butterworths Concise Australian Legal Dictionary

General Editors: **Peter Nygh** and **Peter Butt**

2nd ed., Butterworths, 1998

SC ISBN 0409 31568 0 \$30.00

For many years, Australian law students relied on the UK *Osborn's Concise Law Dictionary*, now in its 7th edition and to a lesser extent *CCH Macquarie Concise Dictionary of Law*. In addition to these were a number of concise legal dictionaries aimed at high school legal studies students.

This publication is a welcome addition to the student concise legal dictionary market. It is Australian and at this stage is more comprehensive than the CCH dictionary.

References are lacking in the CCH dictionary. There are many Latin phrases described, some of which are in the larger *Butterworths Australian Legal Dictionary*, but not in this one, eg. *filum aquae medium*.

This dictionary seeks to address modern issues with terms such as ozone protection, native title, goods and services tax as well as medieval terms such as *grand assize* and *heuard*. Appendices include Table of Law Reports, Popular Australian Case Names, Commonwealth Constitution, Australian Prime Ministers, Justices of the High Court of Australia, Regnal Years of English Sovereigns. What I would have liked would have been a list of Australian courts and tribunals plus a list of Australian Governors-General.

There are many little errors which are evident, eg. round brackets instead of square brackets for (1981)

VR 981 under 'Insurance agent' at p 233, and non law reports listed in the Table of Law Reports. These however do not detract from the usefulness of this work which should be used or acquired by every Australian law student and law librarian.

Colin Fong

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