BOOK REVIEWS

CASES AND MATERIALS ON CORPORATIONS AND ASSOCIATIONS

(2nd ed.), *by A. B. Afterman and R. Baxt,* Butterworths, 1975, i-xlxii, 1-722 pp.

The first edition of this work was published in 1972. It adequately met the need for an Australian casebook which drew together the law on three different types of associations — the non-profit unincorporated association, the partnership and the corporation. The new edition, which appears at a time when the Australian Government has foreshadowed significant legislation in both the securities and the company law areas, is not substantially different in content or format. Apart from the inclusion of several important recent cases and some relatively minor reorganisation of several chapters, the main structural changes are, on the debit side, the deletion of the general index and, on the credit side, the inclusion of a useful comparative table of the companies legislation of Australia, the United Kingdom, Hong Kong and Singapore.

It is proposed to examine the main changes made to the material on each of the three forms of association and to indicate possible weaknesses in the new edition.

Unincorporated Non-Profit Associations

The sixty-two page chapter on non-profit associations contains several new Australian single-judge decisions on various aspects of this unsatisfactory legal area. Mr. Justice Adam's decision in *Re Goodson* ([1971] V.R. 800) is aptly described by the authors as "satisfying morally (but not legally)". His Honour virtually ignored the Privy Council decision in *Leahy* v. *Attorney-General (N.S.W.)* ([1959] 2 All E.R. 300), and the High Court decision in *Bacon* v. *Pianta* ([1960] A.L.R. 104) when he upheld the validity of a bequest expressed to be "on trust for the general purposes of the Royal Orange Institution of Victoria".

The judgements of Helsham J. in *Harrison* v. *Hearn* ([1972] 1 N.S.W.L.R. 428) and Street C.J. in *Grogan* v. *McKinnon* ([1973] 2 N.S.W.L.R. 290) are also included in the new edition. In granting an injunction to a student to restrain an improper use of funds by the Students' Council of Macquarie University, even though there was held to be no contract or proprietary interest involved, Helsham J. has reopened the vexing question of the limits of the court's jurisdiction to intervene in the internal affairs of an unincorporated association.

Ever since the High Court decision in *Cameron* v. *Hogan* ((1934) 51 C.L.R. 358) it has been thought that usually no contract exists between members of social, political or sporting associations. That view has been brushed aside in several N.S.W. Supreme Court decisions, including *Grogan* v. *McKinnon*. Without referring to any authority Street C.J. thought that a rugby league football club was "not of such a transitory or insubstantial character as to be beneath the intervention of the court in aid of the contractual rights arising between members under the constitution and rules". One wonders what Street C.J. would say of the Australian Labor Party!

The following criticisms may be made of the chapter on unincorporated associations.

1. There is an inadequate discussion of the important associations incorporation legislation which exists in all territories and states except Queensland, Victoria and New South Wales.

2. Page 1 of the text contains several inaccurate and misleading statements.
(a) The South Australian Associations Incorporation Act was enacted in 1956 and not 1895.
(b) Section 14(3) of the Companies Acts is not in fact uniform. The South Australian section does not include the words "the carrying on [of] any business".
(c) The author's statement that in those jurisdictions which have associations incorporation legislation "there may still be a breach of the law if the association is carried on for any form of gain for its members" is misleading. It suggests that an association which is incorporated under the legislation, and not the Companies Act, may breach s.14(3) of the Companies Act if it is carried on for the gain of its members. Section 14(3), however, states that the section does not apply to associations formed in pursuance of any other Act. Consequently, the fact that an association, incorporated pursuant to associations incorporation legislation, makes gains for its members may bring into question its right to be so incorporated but it will not of itself mean that the association is infringing section 14(3) of the Companies Act.

3. There is virtually no material on the meaning of the vital concepts of "gain", "pecuniary profit" and "trading". "Gain" is crucial to the necessity to incorporate under the Companies Act, whereas the concept of 'pecuniary profit" and "trading" assume vital importance in those jurisdictions with associations incorporation legislation.

4. No mention is made of Order 48A of the South Australian and Tasmanian Supreme Court Rules when discussing the liability of an association's common fund. Order 48A is much more important in both states than Order 16, rule 9 which is mentioned on p.59. The High Court decision in *Williams* v. *Hursey* (1959) 103 C.L.R. 30 should also have been noted in this context.

5. Given the paucity of up-to-date texts on unincorporated associations it is surprising that the authors have not referred to several significant law review articles. There is, for example, no reference to Keeler's articles ([1966] *Adelaide L.R.* 336; (1971) 34 *M.L.R.* 615). Similarly a reference to Ford's 1954 *Sydney Law Review* article and to Chafee's 1930 *Harvard Law Review* piece would have been useful.

Partnerships

There has been no alteration to the material contained in the chapter on partnerships. The authors must have had considerable trouble determining the case law content of this section for there are few really significant or helpful decisions to be found. Many of the cases that have been included merely provide illustrations of the way courts have applied well-established principles of partnership law to particular fact situations. They are of only marginal usefulness. This is particularly true of most of the decisions on just what a partnership relationship is. The decisions in, for example, *Smith* v. *Anderson* ((1880) 15 Ch.D. 268) and *Beckingham* v. *Port Jackson and Manley Steamship Co.* ([1957] S.R. (N.S.W.) 403) are not beyond criticism, and it is to be hoped that readers and, in particular, students are not unduly influenced

by them. The tenuousness of the Court of Appeal decision in *Smith v. Anderson* could, perhaps, have been better conveyed if the authors had included the judgement of Jessel M.R. at first instance.

The only real criticism that may be levelled at the chapter is that the judgement of Edmund Davies L.J. in *Keith Spicer Ltd.* v. *Mansell* ([1970] 1 All E.R. 462) should have been included instead of that of Harman L.J. The judgment of Edmund Davies L.J. best illustrates the critical importance of the evidence to the decision in that case.

Corporations

The following seventeen chapters and two appendices account for the remaining 600-odd pages of the text. With the exception of chapters 16 and 19, on trading in securities and taxation respectively, all of the chapters are devoted to what may be called company law. It is not possible extensively to evaluate each chapter here. Instead only the most significant of the structural changes and weaknesses in the new edition will be noted.

First the changes. The chapter on share trading has been enlarged to embrace several recent cases and material on the Senate Select Committee on Securities and Exchange. Appendix B contains extracts of some of the Committee's findings and recommendations. It is questionable whether a chapter on securities trading is appropriate in a work on corporations and associations. The space now given over to this topic may be better devoted to material on corporate loan raising which at present rates a clearly inadequate one and a half page treatment at the end of the chapter on the raising, maintenance and classification of capital.

The chapter on company insolvency has been revamped under the title "Companies in Difficulty" to include material on company investigations (previously covered in a separate chapter). The chapter on takeovers has been considerably modified and enlarged to take account of the enactment of the Eggleston Committee's recommendations.

The following specific criticisms may be made of the company law section of the work.

1. The authors make seemingly conflicting statements concerning the question of whether rights attaching to shares, which are found in a company's memorandum of association, may be altered. On pp. 148 and 206 the authors variously assert:

(a) "If the company has different classes of shares which are set out in the memorandum of association, with no provision for variation of the classes or the rights attached to them, then they are unalterable if no provision is made for the variation of classes of shares in the memorandum. If a variation of rights article appears in the articles then it may be used . . .". (Not only is the expression clumsy but the statement appears to be self-contradictory.)

(b) "In such a case (i.e. where the class rights are stated in the memorandum but there is no variation of rights clause in the memorandum) there is doubt as to whether the company may in any way effect the rights . . ."; and

(c) "If the (class) rights are set out in the memorandum then they will be unalterable."

The confusion is compounded by the inclusion, without critical comment, of the Eggleston Committee's view that the rights may only be altered if the memorandum either has a variation of rights clause or refers to such a clause

in the articles. Anyone reading the author's views on the matter could well be forgiven for being somewhat bewildered!

2. A reference to s.65(6) and regulation 5 of Table A of the Fourth Schedule of the Companies Act would seem appropriate after the case of *White* v. *Bristol Aeroplane Co. Ltd.* ([1953] 1 All E.R. 40).

3. Chapter 6 on pre-incorporation contracts and promoters would be improved by a reference to United Kingdom developments such as section 9 of the European Communities Act 1972.

4. The authors incorrectly assert on p. 266 that no Australian jurisdiction has legislation similar to the English Misrepresentation Act. South Australia has had such legislation since 1972.

5. The 1973 Victorian decision in *Niemann* v. *Smedley* appears in chapter 8 on the raising, maintenance and classification of capital and dividends. It was held that a shareholder in a limited liability company is not liable to pay unpaid premiums on shares in a winding-up under s.218(1)(d) of the Companies Act. However, the Full Court of the Supreme Court also held that a shareholder may be liable to pay the premiums pursuant to a contract between him and the company. It is a pity that this important part of the judgement is missing from the extract in the casebook.

5. The authors incorrectly state on p.351, when discussing the transferability of shares, that public companies cannot restrict the transferability of shares. This statement, of course, is only true of public companies whose shares are listed on a stock exchange and then only because of the stock exchange listing requirements. There is no law which says that a public company must not restrict the free transferability of its shares.

6. The authors assertion, on p. 430, that regulation 54 of Table A of the Fourth Schedule allows a proxy to vote on a show of hands is incorrect. The wording of regulation 54 distinguishes between "proxies" and other "representatives". Whereas both proxies and representatives are given the right to vote on a poll only representatives are given the right to vote on a show of hands.

Apart from the weaknesses noted above the second edition of this work is well researched and compiled. For those who do not have the first edition it provides an interesting and useful collection of important cases and materials. For those who do have the first edition it is doubtful whether the relatively few changes made to it would warrant the acquisition of the new edition. The price of the work, together with the fact that significant changes to both securities and company law are in the Australian Government melting pot, might well cause a first edition holder to wait for the third edition.

*J. Hambrook**

AUSTRALIAN YEARBOOK OF INTERNATIONAL LAW 1970-1973, Volume 5, *by R. H. Miller* (ed.), Butterworths, 1975, i-viii, 1-175 pp.

The history of the *Australian Yearbook* has not been without its vicissitudes, as the publication of Volume 5, two years after the period it covers, would tend to demonstrate. Nonetheless its reappearance is welcome, and it is to be hoped that it will be published both more regularly and more promptly.

---

* Lecturer in Law, The University of Adelaide

This edition is devoted in large part to the theme of human rights: six of the eight articles deal with some aspects of the international law of human rights, or with Australian practice in the field. Unfortunately, many of these articles are now at least two years old, nor would they have been exhaustive had they been published contemporaneously with the events they discuss. Gareth Evans' article on 'Prospects and Problems for an Australian Bill of Rights', for example, was written in October 1973, prior to the introduction into the Parliament of the Human Rights Bill. He is thus reduced, on his own admission, to speculation as to the provisions of the Bill (p.11 n.2). The other two articles on Australian practice are brief and fairly general discussions by officers of the Attorney-General's Department. Though written more recently, neither of these articles provides a detailed critique of the Human Rights Bill or of the Racial Discrimination Bill; nor is any attempt made, either in the Preface or elsewhere, to indicate the subsequent legislative history of these measures. The impression of the present status of human rights publications in Australia that an otherwise uninformed overseas reader would get from this *Yearbook* is thus quite misleading.

Certain specific criticisms must also be made. Evans' assertion, in support of a human rights code, that 'Judges do make policy: a bill of rights would just give them quantitatively more opportunity to do so' (pp. 7, 8) can only be described as facile. The Human Rights Bill, had it been enacted as presented, would have given plenary jurisdiction to the Australian Industrial Court with respect to breaches by any individual, corporation or government instrumentality of its substantive provisions. These substantive provisions (contained in Part II of the Bill) were merely restatements of the very general prescriptions of the United Nations Convenant on Civil and Political Rights. The effect of the Bill, as proposed, was thus to give the Industrial Court (in the first instance) the power to determine for example whether any present or future Commonwealth (or, probably, State) law, was valid as providing for 'the equal protection of the law' (Art. 8, Human Rights Bill, 1973 : Art. 26, U.N. Covenant), or the 'right to hold opinions without intereference' (Art 11, Human Rights Bill : Art 19, U.N. Convenant). A more sweeping use of the inconsistency power can hardly be imagined. Few would argue that a more stringent form of human rights protection in Australia is desirable, but in view of the implications of the Bill, it might well be doubted whether this was the most efficient method of protection. Nor is it clear that the Industrial Court was the proper body in which to vest jurisdiction under the Bill. Different answers to these questions are no doubt possible, but in any thorough study of Australian practice the questions should surely have been asked.

In this context, it is also noteworthy that Evans' discounts (pp. 10-11) the relevance of the doctrine of implied immunities. But, as de Stoop quite rightly infers (p.39 n.32) implied immunities would have been very much in issue had the Court been asked to apply s.15 of the Human Rights Bill (Art. 25(a) of the Covenant), which requires 'universal and equal suffrage' for 'every Australian citizen', to the electoral laws of some of the States.

Three further articles deal with more general human rights issues. There is a report of the Australian Branch of the International Law Association on human rights in the Asian Region, and specifically on two seminars held in Tokyo in 1960 and 1962, on the Criminal Law and penal sanctions, and *(inter alia)* on women and property law. Regional enforcement of human rights is of course an important avenue for the progressive development of human rights

generally, but it is not without its difficulties. For example the Report refers to the need for protection of 'the right to property as it presently exists in the Asian region' (p.67)—a concept both vacuous itself and one which indicates that regional enforcement, and indeed the very definition of the content of human rights, assumes a certain consensus as to the relative importance of the individual, personal property, and the relationship of both to society, which is more often than not absent—not least in the Asian region.

More useful are two studies by Robert Miller and Elizabeth Eggleston on aspects of the United Nations' enforcement of human rights. Miller provides some interesting details of United Nations Fact-Finding Missions in human rights matters, which missions have, of course, been restricted in recent times to human rights issues arising in colonial situations. He is critical of the composition of the Working Group of Experts on Human Rights in South Africa, on the grounds of lack of 'independence and impartiality' (p.45). For this reason the Working Group can only be characterized as a 'quasi-judicial' body, notwithstanding its method of operation (pp. 48-49). This article is, however, marked by a certain unevenness: for example, it is said that Article 2 paragraph 7 of the Charter 'enshrines the traditional legal view that questions concerning human rights and fundamental freedoms fall exclusively within the domain of national states and accordingly are outside the province of other nations and international bodies' (p.40). But Article 2 paragraph 7 does not provide, explicitly or otherwise, that any particular matter (such as human rights) is one of domestic jurisdiction: rather it states in effect that the United Nations may not *intervene* in any matter which it determines to be one of domestic jurisdiction. The content of domestic jurisdiction is undefined and variable: moreover, in view of Articles 1, 13 and 55 of the Charter, it is difficult to accept that violation of human rights enjoys much legal protection under Article 2 paragraph 7.

Nor is it enlightening to be informed that it 'is axiomatic that facts are not constant but relative and the same set of facts may appear to be quite different to two different persons. Parties to disputes over human rights may also not attach the same significance or importance to the facts relevant to the dispute and there are generally few facts in such situations that can be scientifically proven beyond reasonable doubt' (p.41). There may perhaps be an element of truth in this, but its expression is, to say the least, indiscriminate.

Elizabeth Eggleston writes, in disillusioned vein, on the 'Prospects for United Nations Protection of the Human Rights of Indigenuous Minorities', specifically the Australian aborigines. Her general theme—'the timidity of U.N. bodies when faced with the prospect of having to criticize a government' (p. 70)—is amply sustained by the evidence. Indeed the expectation that international organizations were likely to assist minority groups within metropolitan States—such as the aborigines—seems to this reviewer somewhat naive. But the article has the merit that it brings out the real problem for international political enforcement of general human rights.

Two further articles are unrelated to the question of human rights. Lyndel Prott discusses the 'Style of Judgement in the International Court of Justice'; an interesting prolegomenon to a forthcoming monograph. Space does not permit any detailed critique here: however it may be remarked that, after criticizing the Court for its 'Europeanization' and consequent failure to address itself to its new Third World 'audience' (p. 81), she goes on to discuss, as possible avenues for reform, three 'various possible styles in private law'

(pp. 82-3); that is, German, French and common law! Her article thus possesses a certain engaging schizophrenia—though this criticism, related as it is only to an abstract, may well be unfair.

Professor Ryan's discussion of 'Investment Contracts and the Developing Countries' is also more substantial in content, although not everyone would accept its presuppositions. For some reason it is headed 'Law and Development in Melanesia'.

In addition to these articles there is a section by Pryles (pp. 103-135) on recent developments in private international law, and a brief and selective review by Miller (pp. 136-152) on Australian practice in international law. This latter is perhaps the most important part of a national yearbook, requiring as it does both access to relevant information and some measure of assessment. It is understood that in future this section will be compiled by the Foreign Affairs and Attorney General's Departments, and it is to be hoped that a reasonable measure both of information and comment will be forthcoming.

There is, on the other hand, no section on Australian cases relating to questions of public international law. In the period under review there were a number of these, some of them of considerable interest: for example *Bonser* v. *La Macchia* ((1970) 122 C.L.R. 177), *Bradley* v. *The Commonwealth* ((1973) 128 C.L.R. 557), and *Milirrpum* v. *Nabalco Pty. Ltd.* ((1970) 17 F.L.R. 141). A section discussing these decisions would have been useful; more so, indeed, than the rather cursory book review section.

*James Crawford**

BRETT AND HOGG'S CASES AND MATERIALS ON ADMINISTRATIVE LAW, (3rd ed.), *by R. R. S. Tracy, assisted by E. I. Sykes,* Butterworths, 1975, i-xxxvi, 1-517 pp.

Teachers and students of administrative law in Universities, as well as members of the practising profession, have for long been indebted to the late Professor Brett who pioneered the first Australian administrative law casebook in 1962. This work was continued by Professors Brett and Hogg, who in 1967 collaborated as joint authors on an entirely restructured and expanded second edition. Although there was a revised reprint published in 1972, there was obviously a need for a completely fresh revision of the materials collected in the second edition. This work has been carried out principally by Mr. Tracy, with Professor Sykes assisting in a critical capacity. While this latest edition remains true to its origins, both in terms of arrangement and approach, the new editors have shown considerable industry in selecting and synthesising the large body of new material which has come into existence since the second edition in 1967. Inclusion of new material has, as the publishers point out, in some instances necessitated the rewriting of sections of accompanying text and commentary.

As indicated above, this new edition is very much locked into the formal and substantive guidelines laid down in the second edition. Before offering any view on whether this was in all aspects the most desirable model for the new editors to have followed, it may be as well to give an assessment of the contents of the six chapters included.

---

* Lecturer-in-Law, The University of Adelaide

Chapter I presents the topic of Remedies. It must at best remain controversial as to whether these should be dealt with before any examination of the principles of judicial review. For example, of the many questions appearing between pages 10 and 14 following the extract from *Liversidge* v. *Anderson,* only two relate to the remedial law. The remainder deal with substantive matters, some of which could not reasonably be put without a broader perspective of the principles of judicial review relevant to the review of administrative discretionary powers, and the factors which may affect the scope of such review. Similarly, the questions which follow the *Peachey Property Corporation Case* ([1966] 1 Q.B. 380) at p.53 are surely not susceptible of being answered without some closer appreciation of the scope of jurisdictional error. As to the assertion at p.25 that the rules on standing in relation to certiorari and prohibition "are liberal", it should have been said that, while this is generally so, the courts are still liable to take a very attenuated view of *locus standi:* see *Durayappah* v. *Fernando* ([1967] A.C. 337).

In other respects the chapter contains an entirely uncontroversial collection of the more venerable and more recent decisions on the prerogative and equitable remedies. On the question of the Attorney-General's proper function in pursuing relator actions, the editors might consider for inclusion in any future edition the important decision of the South Australian Full Court in the 'Oh! Calcutta' case *(Attorney-General for S.A. ex rel. Daniels and others* v. *Huber, Sand and Wichmann Investments Pty. Ltd.* [1971-72] 2 S.A.S.R. 142). The selection of certiorari cases could also have included a reference to *R.* v. *Corporation of the Town of Glenelg* ([1968] S.A.S.R. 246).

Chapter II deals with the scope of judicial review and the doctrine of jurisdictional defect. The editors are to be commended here for their deft and discriminating selection of cases from the very wide field open to them. This is one of the chapters in which a considerable amount of rewriting has been necessitated by the decision in *Anisminic* v. *Foreign Compensation Commission* ([1969] 2 A.C. 147). The commentary and questions which follow the extract from this decision are sophisticated and thought-provoking.

Perhaps the editors might here consider for inclusion in the next edition a reference to Professor Whitmore's excellent article in relation to the fact-law distinction ((1967) 2 *F.L. Rev.* 159). Moreover, I suspect that the editors entertain the same sorts of doubts as I do as to the best place in which to set out the decision in *Coleen Properties Ltd.* v. *Minister of Housing and Local Government* ([1971] 1 W.L.R. 433). It may be a seminal decision as to the scope of jurisdictional error, or it may be a case which ought to be confined to the particular terms of the statute giving the right of review, or it may perhaps be most appropriate as an illustration of the principles of review applicable to ministerial discretionary powers (*cf.* de Smith *Judicial Review of Adminstrative Action,* 3rd ed., 261,306).

Chapter III deals with discretions and subordinate legislation. The arrangement of the materials in this chapter of course reflects the view of the original authors that "conceptual boundaries are (not) supported by the decided cases; nor do we believe that they are an aid to the understanding of the subject" (Preface to the Second Edition, 1967). I reserve for further comment this question of arrangement. However, given the avowed rejection of any need to differentiate between legislative powers on the one hand and administrative discretionary powers on the other, the content and arrangement of this chapter is almost entirely unexceptionable. It would be possible to arrange the cases

according to the more traditional classifications and find that most, if not all, the usual authorities are either set out or referred to.

Two comments are offered. First, in relation to the discussion of plurality of purpose (p. 241), my feeling is that the matter of plurality in relation to improper purposes and irrelevant considerations is rather more complex than the few lines it receives here might suggest. Indeed, the analysis comes close to being misleadingly superficial in the absence of more extensive illustrative material or more specific references than the asserted "few suggestions to be found in the cases" *(ibid.)*. Moreover, it may be doubted whether the *Westminster Corporation Case* ([1905] A.C. 426) is truly one of plurality of purpose at all. Second, the suggestions made at p. 269 with respect to the *King Gee Clothing Case* ((1945) 71 C.L.R. 184) logically would lead to different results in identical cases depending on the expert evidence tendered on the matters in issue.

Chapter IV is concerned with procedural matters: first, the problem of mandatory and directory requirements; secondly and more significantly, the operation of the rules of natural justice. The cases and materials for this chapter are particularly well chosen and provide an excellent basis for teaching, as well as a most valuable conspectus of an area of administrative law which is of very great practical significance. Any future edition should include a reference to the decision of the South Australian Full Court in *Hinton Demolitions Pty. Ltd.* v. *Lower (No. 2)* ([1971] S.A.S.R. 512) which, while not necessarily elucidating all the arcane complexities of the effect of a breach of the *audi alteram partem* rule, must at least be regarded as a significant attempt to grapple with some of the problems posed by the void/voidable distinction.

Chapter V, dealing with attempts to oust judicial review, is a brief but useful chapter on privative clauses.

Chapter VI deals with the position of the Crown. Here again, the materials have been well chosen and are linked by extensive and at times perceptive commentary. It is therefore all the more surprising that the editors should have failed to discuss the problems of interpretation posed by provisions such as s.10 of the South Australian Crown Proceedings Act 1972 which provides that the Crown shall be liable "in respect of any contract made on its behalf in the same manner and to the same extent as a private person of full age and capacity is liable in respect of his contracts." The question, of course, is the extent, if any, to which this and similar provisions abrogate the effect of the decision in *The Amphitrite* ([1921] 3 K.B. 500) and the cases dealing with the dismissal of Crown servants. At the very least this problem should have been adverted to.

As to overall impressions of this latest edition: first, the new edition retains the pre-eminent position which Brett and Hogg has deservedly occupied in the field of Australian administrative law case books. Equally, it is to my mind something of a pity that the present editors did not see fit to abandon what have always appeared to be some of the idiosyncracies of arrangement and presentation of material which charaterized the first and second editions. Mention has already been made of this matter with respect to the chapter on remedies and also with respect to the combination of materials on legislative and administrative powers in Chapter III. This latter arrangement apparently derives from the somewhat dubious assertion in the preface to the second edition that this sort of portmanteau classification "makes for easier understanding of the problems involved". In my teaching experience it certainly does

not make for easier understanding of the problems involved, but on the contrary tends to obscure rational and valid distinctions which are still made and relied upon by the courts in this area. Indeed, it might be said in defence of the present editors that they show some degree of ambivalence on the general question of classification, not only of administrative and legislative powers, but of functions generally in administrative law, and also in relation to matters of fact and law. Certainly they perceive the dilemma involved in having on the one hand a desire to abandon such no doubt bothersome distinctions as the law continues to retain, but at the same time a realisation that formally, at least, they underlie much of judicial review. Indeed, one wonders whether the present editors are truly convinced by the avowed radicalism of the original authors (see pp. 2, 147, 153, for example). The other criticism of substance which I would make is that the third edition, like its predecessors, has once again avoided including material on the administrative process. I am convinced from my own teaching experience that before students are able to grapple with the complexities of judicial review of administrative decision making, they need to have some clear understanding of the historical and evolutionary processes which brought forth the administrative mechanisms of the modern state. They need to have some appreciation of the modalities of decision making within this process and they need to consider the extent to which it is practicable or desirable to impose a juridical upon an administrative regime. To the extent that the book fails to present this perspective, it has failed to present a complete picture of administrative law.

These reservations apart, I can only repeat Professor Whitmore's accolade that "the cases and materials are well selected and provide an excellent basis for teaching administrative law at an advanced level." One hopes that it will continue to "find a place on the shelves of discerning practitioners", for, most assuredly, "it is not merely a stringing together of extracts from cases and statutes; there are very extensive notes which not only fill out the body of case-law which is not produced but also contain many acute and valuable comments on different aspects of the law" ((1968) 3 *Univ. of Tas. L.R.* 122).

In short, the editors are to be commended on their revision in a rapidly developing area of public law. They have missed very little of significance: what does not appear is very often the result of their being overtaken by events over which they had no control, e.g. the developments that have occurred in relation to the Administrative Appeals Tribunal and the Federal Ombudsman since the publication of the Kerr and Bland Committee reports.

On the printing and presentation of this edition, it has to be said that there are numerous silly printing errors, particularly in the cases reproduced, which ought not to appear (e.g. pp. 49, 67, 183). Moreover, I for one find some of the publisher's practices eccentric and on occasion almost too much to bear. Whatever the rationale behind the omission of full stops after abbreviated expressions and the like, it is doubtful whether the printer's ink saved and the editing time rescued really justify the resultant inelegancies that one finds dotted throughout the book.

On the other hand, it would be wrong to conclude on a sour note. The editors and publishers alike are to be complimented for compiling tables of cases and statutes and a general index which are both informative and accurate.

*M. C. Harris**

* Senior Lecturer in Law, the University of Adelaide

CASES AND MATERIALS ON CONTRACT, (3rd ed.), *by R. E. McGarvie, C. L. Pannam and P. J. Hocker,* Law Book Company, 1975, i-xxxvii, 1-950 pp.

A new edition in the four years since the release of the second edition of this work is perhaps some indication of the important place it has come to occupy in the list of books suitable for studying the law of contract. Developments in the subject in that time have not been of the major scale of the changes which preceded the last edition, but there have been a number of noteworthy decisions.

Recent cases extracted include *Holwell Securities Ltd.* v. *Hughes* on the posting rule, *Godecke* v. *Kirwan* on uncertainty, *Saunders* v. *Anglia Building Society* on *non est factum, Thornton* v. *Shoe Lane Parking Ltd.* on the incorporation of statements displayed or delivered, *Prenn* v. *Simmonds* on admission of evidence in aid of interpreting a contract in writing, and *Academy of Health & Fitness Pty. Ltd.* v. *Power* on misrepresentation. In addition, *Ingram* v. *Little* on mistaken identiy has been dropped in favour of *Lewis* v. *Averay,* and the advice of the Privy Council in *New Zealand Shipping Co. Ltd.* v. *A. M. Satterthwaite & Co. Ltd.,* discussing the question of a third party relying on an exemption clause as well as certain aspects of consideration, has been added in an appendix.

There are some curious omissions. No reference appears to the Privy Council case of *Barton* v. *Armstrong,* on appeal from the Supreme Court of New South Wales, in which a plea of duress succeeded. The decision of the Supreme Court of South Australia *Ellul & Ellul* v. *Oakes* is a striking example of an oral statement made some time before the actual agreement being held to constitute a term of the contract; the case is mentioned only in a brief reference to *dicta* in the judgement relating to the tort of negligent misstatement. In a footnote to the extract from *Beswick* v. *Beswick* the possibility is mentioned of a court using its power to stay proceedings brought in breach of a third party benefit contract; the case of *Snelling* v. *John G. Snelling Ltd.* in which this precise argument was given detailed consideration appears to have been overlooked. The vague judgements of the House of Lords in *Esso Petroleum Co. Ltd.* v. *Harper's Garage (Stourport) Ltd.* are extracted as the authoritative pronouncements on requirement contracts; the much more incisive assessment made of such contracts in both the Supreme Court of South Australia and High Court judgements in *Amoco Australia Pty. Ltd.* v. *Rocca Bros. Motor Engineering Co. Pty. Ltd.* is nowhere mentioned.

There have also been recent statutory amendments to the law. The provisions of the English Misrepresentation Act 1967 extracted in the last edition have been replaced by parts of the South Australian Misrepresentation Act 1971-1972. Some legislative reforms seem, however, to have been overlooked. The changes made by the English Law Reform (Enforcement of Contracts) Act 1954 to the operation of the Statute of Frauds are noted without any reference to the statutes in Western Australia (Law Reform (Statute of Frauds) Act 1962), and Queensland (Statute of Frauds Act 1972), adopting some of those changes. The chapter on privity makes no mention of the Property Law Act 1969-1971 (W.A.) entitling a third party in certain circumstances to sue on a contract made for his benefit.

The organization of the material remains basically unchanged. The authors have continued the practice of preceding each chapter with a short preface giving a helpful summary of the law covered by the succeeding cases; some of

these, including the one on "the legal operation of the contract" and a new one on "the agreement", are particularly instructive.

There are some changes. A new glossary of terms used in the law of contract is included. The stated object is to eliminate the confusion which has resulted from the use of terms such as "rescission" and "condition", and while this aim is to be commended, one wonders whether the definitions adopted are entirely satisfactory. The description of the terms of a contract as being either essential promissory terms or inessential promissory terms is a clumsy substitute for the condition/warranty dichotomy. Moreover the traditional description is not confined, as seems to be suggested, to the sale of goods legislation; it appears consistently throughout the case law. The term "rescission" is reserved for rescission *ab initio,* and distinguished from discharge for breach. As important as it is to make this crucial distinction clear, it would have been more helpful to have added the cautionary advice that nonetheless discharge for breach is very often called rescission in the cases. Other changes appear in the section on offer and acceptance which has undergone some expansion. Mention might also be made of the dropping of any reference in the chapter on remedies to the equitable remedies. While any detailed treatment of these remedies is neither possible nor appropriate in a work of this kind, the mention of only two remedies in this chapter, damages and money due, seems misleading.

It is regrettable that no attempt appears to have been made to rectify the spelling errors which detracted from earlier editions. Particularly glaring is the recurrent misspelling of case names, sometimes in large type headings. Some cases are even variously misspelt in different references.

These criticisms relate mainly to matters of detail. The positive features of an intelligible organization of material, a concentration on Australian case law, and helpful ancillary notes, which characterize this book, will maintain its place as a valuable teaching instrument for Australian law students and handy reference work for practitioners which previous editions established.

R. J. Bullen*

PROPERTY LAW CASES AND MATERIALS, (2nd ed.), *by R. Sackville and M. A. Neave,* Butterworths, 1975, i-lxi, 1-981 pp.

It is an indication of the widespread success of this casebook that the authors have published a second edition only four years after the first edition appeared. The second edition has been updated to June 1974 and provides an exceedingly useful set of materials for both students and teachers. It is of note that this edition has remedied the deficiences of the earlier edition (see Jackson (1972) 8 *M.U.L.R. 728).* In particular the chapters on remedies, the rule against perpetuities, and on mortgages are all valuable additions. As far as the general organisation of the casebook is concerned, it has been improved by transferring the chapter on fixtures, which had been awkwardly attached to a discussion of the concept of property, to the section dealing with the original acquisition of proprietary interests. The major omission in the first edition of a lack of a table of statutes has also been remedied.

---

* Lecturer in Law, The University of Adelaide

A casebook relies very heavily on the depth of its commentary for its value, and in this case the penetrating questions (both legal and social) posed by the authors provide an excellent means for setting readers on a course of inquiry or as a basis for discussion. It is difficult to deal adequately with the differences in the law between the states without the casebook reaching mammoth proportions. Nevertheless, since the Real Property Act (S.A.) causes the authors some apparent difficulties (e.g. in the treatment of the indefeasibility provisioins), and since the discussion of the protection of interests by means of caveats is somewhat curtailed some comments on these areas may be a useful supplement to the work. The authors' comment on the indefeasibility provisions of the South Australian Act is that: "in South Australia the application of the principle of immediate indefeasibility is very much more doubtful by reason of the South Australian s.69(2)" (p. 393). It is submitted that although this section may well compel the application of deferred indefeasibility with respect to the cases specified within the section, the presence of this section does not make application of the principle of immediate indefeasibility to the Real Property Act (S.A.) 1886-1972 any less clear. *Breskvar* v. *Wall* ((1971) 46 A.L.J.R. 68) would have been decided the same way in South Australia, even though the same could not be said for *Fraser* v. *Walker* ([1967] 1 All E.R. 649) which would fall within the specified exceptions of deferred indefeasibility set out in s.69(2).

If anything, immediate indefeasibility can be more easily inferred from the lay-out of s.69 than it can be from similar sections in other states: e.g. The Transfer of Land Act 1958 (Vic.) ss.42, 43; Real Property Act 1900-1973 (N.S.W.) ss.42, 43. Originally the Real Property Act (S.A.) 1861 ss.33, 40 were virtually identical to the present s.69 equivalents in other states. However, the Royal Commission into Intestacy, Real Property and Testamentary Causes Acts of 1873 considered that these sections did not convey what was believed to be the intention of the 1861 Act (i.e. immediate indefeasibility for a *bona fide* purchaser for value who became the registered proprietor): *Report,* p.vi; see also Mr. Gawler's Memorandum, Appendix ix, fo. xiv. They suggested amendments which they considered would make the Act more consistent with the intention of its framers. (Draft Bill to Amend The Real Property Act (1861), Clauses 33A, 40, 114: *Report,* Appendix xv, fo. xxv.) These amendments were eventually enacted as s.69 of the Real Property Act 1886.

The structure of s.69 consists of—

(1) immediate indefeasibility as a basic principle;
(2) deferred indefeasibility in the exceptions specified, with a provision in favour of a bona fide purchaser for value who is registered: i.e., s.69(1), (2), (3), (7);
(3) complete exceptions to indefeasibility in the rest of the subsections in s.69, (See also the deferred indefeasibility exceptions in RPA 571, s.449, and *R. M. Hosking Properties Ltd.* v. *Barnes* [1975] S.A.S.R. 100 at 106-7, referred to by Sackville & Neave, 2nd edition at 396.)

It would be difficult to imply any overriding basic theory of deferred indefeasibility from these provisions, and even more difficult to do so from Cl. 33A, 40, and s.114 of the 1873 Draft Bill of the Real Property Act.

It has been said that s.69(2) seems to compel the application of deferred indefeasibility for the situation specified therein. The matter may not be entirely clear, but the arguments against this interpretation of the rather convoluted phraseology of s.69(2) appear weak. For example, it might be said

that the language of the section leaves open the possibility that, in the situation where A is the registered proprietor of land under the Act, and B, a forger, forges a transfer to C, a *bona fide* purchaser for value who proceeds to register the transfer, C takes an indefeasible title immediately. This would be because s.69(2) requires an actual physical delivery of the duplicate certificate of title to be made before a certificate can be said to have been obtained. Hence the forged notification of a memorandum on the original certificate would not amount to the certificate being obtained by forgery. However such a radical interpretation ignores the fact that the Act implies that the word certificate means 'original certificate'. Also it is hard to justify an interpretation of the section which results in protecting a person who gains his title through someone who has stolen the duplicate certificate, and yet does not protect a person who receives his title from someone who obtained a duplicate certificate by means of forgery. Alternatively it might be said that the forgery contemplated in s.69(1) means fraud of the new registered proprietor. However as forgery would be considered fraudulent this situation is completely covered b s.69(1). Hence it appears that both arguments are unsupportable. Given that s.69(2) provides for deferred indefeasibility in certain situations, then unless one is prepared to sacrifice the logical inferences to be drawn from the setting out of s.69 and the intention of the drafters of this section as evidenced by the 1873 Commission, one can say that there is really no doubt about the application of immediate indefeasibility in South Australia.

There is also little discussion in the casebook of what amounts to a caveatable interest. This comes as a surprise, as the effect of failure to caveat by the holder of a prior equitable interest in relation to the question of priorities of competing equitable interests is dealt with in considerable detail. Only in a footnote (p.363 n.217) are we referred to the textbooks and the controversial case of *Miller* v. *The Minister of Mines* ([1963] A.C. 484) on the question of what is a sufficient estate or interest to support a caveat. Although the list of caveatable interests as found in Kerr, *Australian Land Titles (Torrens System)*, and Jessup's *Land Titles Office Forms and Practice* is generally referred to by practitioners, *Miller* v. *The Minister of Mines* may be said to have limited this list. The statement by the Privy Council that . . .

> "The caveat procedure is an interim procedure designed to freeze the position until an opportunity has been given to a person claiming a right under an unregistered instrument to regularise the position by registering the instrument" (at 497)

has been interpreted as limiting caveatable interests to those which arose where the caveator is entitled to have a registrable instrument created and then registered: see Robinson "Caveatable Interests—Their Nature and Priority" (1970) 44 A.L.J. 351. Although part of the wording of s.191 of the South Australian Act does seem to be covered by s.137(a) of the New Zealand Land Transfer Act (1958), it is not altogether clear that such a narrow interpretation of *Miller's* case would be adopted in South Australia. Under s.191 a person can caveat whether he claims "under an agreement or under an unregistered instrument or otherwise howsoever". The width of the words "or otherwise howsoever" would seem to suggest that unregisterable instruments could be caveated, and it would be difficult to imply that claims under an agreement would be likewise limited, or why would the words "an agreement" precede the words "an unregistered instrument". In view of the similarity of the New Zealand Act in allowing claims "by virtue of any unregistered agreement or other instrument . . . or otherwise hosoever" (s.137(a)) to be registered it

is hard to see why the Privy Council ascribed such a limited purpose to the caveating system. A distinction can be made with the narrow phraseology of the New South Wales and Victorian Acts which allow any person who claims "under an unregistered dealing or by devolution of law or otherwise" to caveat: Real Property Act (N.S.W.) 1900 s.72, and see also the Transfer of Land Act (Vic) 1958 allowing claims under any "unregistered instrument or dealing" etc.

Secondly, the South Australian Act may be distinguished from the New Zealand Act in that lodgement of a caveat may prevent registration of any dealing with such land or may allow registration of such dealing provided it is expressed subject to the claim of the caveator: S.A., s.191; N.Z., s.141. The South Australian Act is unique in this respect and the provision would tend to suggest that the purpose of the caveat procedure is not merely to freeze the Register until the interest claimed in the caveat has been registered.

Thirdly, in *Blacks* v. *Rix* ([1962] S.A.S.R. 161) the plaintiffs claimed declarations that they were entitled to enforce, as against the purchasers of encumbered land, the restrictive covenants contained in the encumbrance, and that they were entitled to protect such rights by a caveat forbidding any dealing with the said land unless such dealing be expressed to be subject to the rights or interests of such plaintiffs.

Since the defendants acquired title on the faith of the covenants, the plaintiffs were entitled to enforce the restrictive covenants under s.249 of the Act, which allows "all contracts and other rights arising from unregistered transactions to be enforced against such proprietors in respect of their estate and interest therein, in the same manner as such contracts or rights may be enforced against proprietors in respect of land not under the provisions of the Act". Restrictive covenants cannot be registered under the Act, but Napier C.J. nonetheless held that, since they were enforceable under s.249, they could be caveated. Similarly, if it were decided that options to renew a lease were not registrable, it would still be arguable that they might be caveated: see *Mercantile Credits* v. *Shell,* Hogarth J. (as yet unreported), S.A. Supreme Court, April 1975.

It would seem then that *Miller* v. *The Minister of Mines* represents an unduly restrictive interpretation of the purpose of a system of caveating. On this point it has not yet been followed in South Australia, where the recent case of *Galvasteel Pty. Ltd.* v. *Monterey Building Pty. Ltd.* ((1975) 10 S.A.S.R. 177) is representative of the line taken. In that case Walters J. approved the view expressed by Griffith C.J. in *Butler* v. *Fairclough,* that the scheme of caveating is to enable "such rights to be temporarily protected in anticipation of legal proceedings" ((1917) 23 C.L.R. 78 at 91. See also *Achatz* v. *De Reurem* [1971] S.A.S.R. 240.)

It is submitted that this is the more realistic view of the purpose of the caveat procedure and it enables a far wider range of interests to be capable of supporting a caveat. It is not surprising that Walters J. *(loc. cit.* at 180) also approved the traditional classification of caveatable interests as found in *Woodberry* v. *Gilbert* ((1907) 3 Tas. L.R. 7 at 9. See also Kerr *loc. cit.* at 472). Because of the difficulties created by *Miller's* case, *Woodberry* v. *Gilbert* is usually either ignored or limited to the mining lease aspects of the decision.

Both of these areas of indefeasibility and caveatable interests show the difficulties arising from the differences in the relevant State Acts. These differences do form a basis for distinguishing cases decided in other jurisdictions. Thus, for example, because of s.191(2) of the Act it would be open to the

South Australian courts to follow *Osmonski* v. *Rose* ([1974] V.R. 523) rather than *Just Holdings* v. *Bank of New South Wales* ((1971) 45 A.L.J.R. 625 *per* Barwick C.J. at 627. See also (1975) 5 *Adelaide L.R.* 208). Then again, the fact that in South Australia it is possible to caveat conditionally, forbidding any dealing with the land unless such dealings are expressed to be subject to the claim of the caveator, may be reason enough for the courts to favour *Just Holdings,* since registration of a caveat does not itself prevent dealings with the land and failure to caveat should not necessarily result in a loss of priority. Another, perhaps less fortunate, instance was the use of s.119 of the S.A. Act by Sangster J. in *Mercantile Credits* v. *Shell (supra)* as a basis for distinguishing *dicta in Travinto* v. *Vlattas* ((1973) 47 A.L.J.R. 279). The different results which may be produced show clearly the necessity of distinguishing between the Acts in each State, and the difficulties confronting Sackville and Neave in covering this area adequately.

Mary Fisher*

THE LAW OF MINORS IN RELATION TO CONTRACTS AND PROPERTY, AN ANALYSIS OF THE MINORS (PROPERTY AND CONTRACTS) ACT 1970 (N.S.W.), *by David J. Harland,* Butterworths, 1974, i-xxxviii, 1-238 pp.

Like South Australia, Western Australia and Tasmania, New South Wales has reduced the age of majority from 21 to 18 years. The Minors (Property and Contracts) Act 1970 (N.S.W.) which freed persons "aged eighteen years or upwards" from any "disability of infancy" (s.8) came into force on 1st July, 1971. Unlike the "reduction" Acts in the other states, this statute, enacted in accordance with recommendations made by the Law Reform Commission of N.S.W. *(Report on infancy in relation to Contracts and Property* (1969) L.R.C. 6), has not only lowered the age of majority, but also established a virtual code covering the area of infants' capacity in the fields of contract and property. S.17 excludes the principles of the common law in this field: "civil acts" in these fields are now binding upon infants (or rather "minors" to use the terminology adopted by the Act) only by virtue of the provisions of the Act, and no longer by virtue of any principles of common law or equity.

Professor Harland's book provides the first comprehensive analysis of the new provisions. It will be many years before there is a significant body of case law concerned with the interpretation of the Act. In the absence of such authoritative guidance, the author has had to rely upon the words of the Act, his knowledge of the problems of infancy (the dedication to his children testifies to his first-hand experience), the canons of statutory interpretation, the report of the Law Reform Commission upon which the Act is based and the complex common law background (to the limited extent to which it is still demonstrably relevant in New South Wales). The book is the result of judicious and imaginative use of these materials.

After a brief review of "reduction" statutes in other jurisdictions (at 1-6) and a useful summary of the principles of the common law (at 7-26), the author turns to some of the new concepts introduced by the Act, the most interesting and important of these being the "civil act". New South Wales

* Tutor in Law, The University of Adelaide

is probably the first common law jurisdiction to have introduced this essentially civilian notion, which is termed *"acte juridique"* in French and *"Rechtsgeschäft"* in German law and which Windscheid has defined as "a manisfestation of a private individual's will directed to the origin, termination or alteration of rights" (Lobinger "Juristic acts in the civil law" (1949) 24 *Tulane L.R.* 178). S.6 of the Act defines "civil act" by giving a series of specific instances in s.6(1) a-l) (e.g. contract, election, disposition of property, discharge, exercise of power, assent, release of a cause of action) and following these, in s.6(1) (m), with the dragnet definition: ". . . an act relating to contractual or proprietary rights or obligations or to any chose in action". It seems arguable that the "civil act" as employed by the Act has given a new dimension to the jurisprudence of New South Wales, or even to Australian jurisprudence. However, Professor Harland prefers the perhaps more sober dualist view which insists on keeping new statutory concepts strictly confined to the field occupied by the particular statute. Within these limits he applauds the new concept as useful (at 29) and devotes only a little space (at 28-32) to its analysis, regarding the definition as "largely self-explanatory" (at 30).

Probably the most important single principle contained in the Act is enunciated in s.19 which renders a civil act binding upon a minor who is a party to it if the act is for the minor's benefit at the time of his participation. At common law a contract is binding upon a minor only if it is, on the whole, for his benefit *(Nash* v. *Inman* [1908] 2 K.B. 1 at 12, *per* Buckley L. J.), and if it is related to his person in the sense that it is a contract for necessaries (*Bojczuk* v. *Gregorcewicz* [1961] S.A.S.R. 128). S.19 of the Act has modified this common law principle in two major ways: the second requirement with all its technical complexities has been abolished and the remainder, in the form of a newly formulated "benefit" test, has been unequivocally extended from contracts (the main field of application for the common law principle) to all civil acts. (For an attempt made at common law to adapt the principles of infants' liability to a civil act other than a contract, see *Farmer & Co. Ltd.* v. *Griffiths* (1940) 63 C.L.R. 603.)

Authorities concerned with the first branch of the common law test are still indirectly relevant, as the author demonstrates in his substantial chapter on s.19 (at 73-100). *Nash* v. *Inman,* for example, holds that a minor who is already amply supplied with a particular commodity is not liable on a contract to buy more of the same—in the language of the Act, "his participation" in this civil act is not "for his benefit" (at 85).

Professor Harland also gives detailed attention to the legal standing of "dispositions of property" (at 101-116). This special type of "civil act" is itself elaborately defined in s.6(1) (see Harland at 37-44). As he rightly observes (at 209), the relevant provisions are likely to prove more controversial than the basic principle of s.19 which he regards as fair and appropriate (at 206). A disposition of property is a civil act and is therefore binding according to s.19 if it is for the minor's benefit. Should it fail that basic test, it may still be binding upon the minor if it constitutes a gift which it is reasonable for the minor to make (s.21), if the minor made it in pursuance of a duty (s.22), or if it satisfies the test laid down in s.20.

S.20(1) renders binding dispositions of property by the minor if the agreed consideration is not manifestly inadequate and if the minor has received at least some part of the consideration. Professor Harland illustrates the operation of this harsh principle by giving the following example (at 103):

> ". . . if a minor transfers goods on payment of 10% of the total purchase price and gives credit terms for the balance of the purchase price then, assuming that title has passed to the purchaser, the disposition of property will be presumptively binding on him even though he never in fact receives any further payment. The practical result is that in the event of the purchaser being in financial difficulties the minor would be unable to repudiate the transfer of title and his rights against the purchaser would be purely *in personam.*"

Should this be correct, then s.20 probably deserves more severe strictures than those contained in the author's rather brief critical appraisal of the approach of the Act to dispositions of property (at 209 *et seq.*). The basic idea that minors should be protected from the consequences of their own inexperience seems to have been overlooked altogether. It is surely typically youthful inexperience which would lead minors to extend the kind of easy credit involved in Professor Harland's example. It is difficult to see why the absence of "manifest inadequacy" in the agreed (and practically often worthless) consideration should have been made the touchstone of validity. Moreover, to attribute this significance to the agreed consideration is doubly inappropriate when it is remembered that the agreed consideration is often not even the consideration which will ultimately be payable under the Act. As the author informs us (at 148 *et seq.),* the mere fact that a disposition of property becomes binding according to s.20 does not mean that the underlying contract is also rendered binding. If that contract is not for the minor's benefit it is neither binding on him (ss.17, 19), nor upon the other party (s.39). What the adult party in Professor Harland's example will have to pay is "just compensation" (s.37(4)), not the agreed consideration. The courts may find ways of avoiding or mitigating the more unfortunate features of s.20. One could, for example, judge the adequacy of the consideration by taking into account not only the amount payable according to the contract but also the minor's real prospects of actually receiving the money, in particular the purchaser's financial standing.

It is one of the most unfortunate aspects of the common law principles relating to minors' contracts that they expose adult parties to such contracts to uncertainty about their rights and duties for long periods, often until the minor comes of age. The Act, in an obvious reaction to this apparent unconcern of the common law for legal certainty, sets the adult party to a civil act free whenever the minor is not bound (s.39), and provides not one but a whole range of methods by which the validity of a minor's civil act can be placed beyond doubt. All of these methods are subjected to careful scrutiny by the author. Dispositions of property by the minor or to him can be rendered binding by being certified in advance by a solicitor (at 107-108). Civil acts of all descriptions will bind the minor if the requisite legal capacity has been bestowed upon him by court order (at 117-120). Where a civil act is not initially binding, it may become so later not only by virtue of an affirmation by the minor himself after he comes of age (at 122-125), but also by virtue of affirmation by court order (at 121-122), or simply by lapse of time after the minor comes of age (at 125).

Professor Harland gives an extensive account of the problems involved in repudiation of civil acts not binding on minors, and of the way in which the Act has dealt with claims for restitution and compensation which can be brought to resolve consequential problems flowing from invalidity. There are chapters on the management of minors' property (at 151-172), on minors and succession (at 173-183), torts (at 184-196) and on jurisdiction and procedure

(at 197-204). The book concludes with a critical appraisal (at 205-213) in which the author, despite some criticism of particular provisions, credits the Act as a whole with constituting "an imaginative and workable approach towards the problems arising in respect of contracts and other civil acts entered into by minors" (at 212). Even the most critical student of the Act must concede that the solutions it offers are more realistically proportioned to the needs of minors than are the principles of the common law.

This book is obviously "a must" for legal practitioners in New South Wales. It is also of great comparative interest in other common law jurisdictions. The Act is much more than just another reforming statute. It constitutes an interesting Australian attempt at codifying, as well as reforming, a small portion of the common law. If the common law is to be codified in this country, then it seems sensible to do so by means of statutes no wider in scope than the Minors (Property and Contracts) Act, 1970 (N.S.W.), the merits and demerits of which can be carefully assessed by experts, and, more importantly, exposed to public scrutiny. Australian lawyers should be grateful to Professor Harland for his thoughtful analysis of the provisions of this new and interesting piece of legislation.

H. K. Lucke*

GUIDE TO THE FAMILY LAW ACT 1975, *by P. E. Nygh,* Butterworths, 1975, 162 pp.

MARRIAGE, DIVORCE AND THE FAMILY : NEW RULES FOR AUSTRALIANS, C. C. H. Australia Ltd., Citizens Law Series I, Sydney, 1975, 148 pp.

The appearance of two books on the recent Family Law Act is welcomed by all those in need of guidance on the operation of the new legislation. These two books, the first to be published, differ totally in aim and approach, and so in no way reduplicate each other. The factors common to them are brevity and low cost—factors which cannot fail to increase their appeal to the student.

Professor Nygh's book is undoubtedly more of a "lawyers' book". The aims of the work are set out in the Preface. "This book does not seek to praise or to bury the Act, but to explain, and where necessary, to interpret it". Given these declared aims, it would be unfair to criticize the work for lack of general discussion on the social context, aims and implications of the Act, although this must inevitably strike the reader. Comment on the trend of family law reform and changing philosophies of matrimonial law is confined to a few pages in the introductory chapter. However, the book does not aim to provide social discussion; it is, essentially, an explanation of the legislation. As such, the author says, "it may be of some use to practitioners, judges, law teachers, students and others interested in family matters . . .".

The book has two particular merits. In the first place, it takes care to provide throughout accurate comparisons of the old law and the new. In the second place, it provides an excellent explanation and exposition of the detailed provisions of the Act. In this context, it provides a thorough and precise analysis of the meaning of the Act's numerous sections, and explains their practical implications. Many examples could be taken; a typical one is the discussion on pp.54-60 of the meaning of the phrase "the parties separated

---

* Professor of Law, The University of Adelaide

and thereafter lived separately and apart for a continuous period of not less than one year", which now forms the sole ground of divorce in Australia.

Within the area covered by the book, certain sections are particularly valuable. The treatment of the scope and constitutional validity of the Act is both clear and succinct. The inclusion in the book of some explanation of the institutions involved in the working of the new legislation (for example, the new Family Court and the new Family Law Council and Institute of Family Law Studies), together with the explanation of the jurisdiction of the various courts, give the reader an accurate picture of the operation of the Act. Of particular value is the section on financial provisions under the Act. Here, detailed analysis of the statutory provisions is combined with discussion of their social implications, and the eradication of fault notions from this area emerges clearly.

Subject always to the proviso that Professor Nygh's aim is to provide a basic explanation of the Act, what criticisms can be made of the book? The exclusion of social discussion cannot fail to strike the reader in Chapter 5, which deals with divorce. Here, no attempt is made to discuss the changing rationale of divorce, and the "legalistic" nature of the book acts to its detriment. Some comparison with the English legislation's concept of "irretrievable breakdown" would perhaps have been of value here. Another fault might be seen in Chapter 10, which deals with injunctions, but fails to bring out clearly their relation to the absence in the new divorce law of an "behaviour ground". Chapter 9, which deals with overseas orders, suffers from the absence of comment on the desirabilities and drawbacks of liberal rules of recognition.

C.C.H.'s new book differs fundamentally from that of Professor Nygh in its aim and form. It is directed as much towards the ordinary citizen as towards those with legal experience, and forms part of the publishers' Citizens' Law Series. In what it sets out to do it is highly successful. It is set out as a series of questions and answers covering the whole scope of the new legislation. This format makes it highly readable, whilst at the same time conveying to lawyer and layman alike much valuable information on the practical application of the Act. The questions and answers are particularly successful in explaining the detailed workings of the Act. Some typical examples are: "Does forgiving what was done to me prevent me applying for a divorce?"; "What can't we do together if we are separated?"; "Does a parent who has committed adultery lose custody?". Moreover, the books succeed in putting over to the reader much of the social implications of the new legislation, and conveys in a forceful manner the eradication of the "fault principle" from matrimonial law. Certain of the questions and answers are directed specifically towards the ordinary person: for example, "Can my friends come to court?" and "What do I wear in court?". These will provide reassuring guidance to those uneasy about undertaking proceedings. Inevitably, the form of the C.C.H. book makes it far more readable than that of Professor Nygh; the latter, on account of its aims, is undoubtedly a "legalistic" work, and, as such, is not the most gripping reading.

Neither of these new works aims to provide a full-scale discussion of the new legislation in its social context. Neither claims to analyze in depth the changing attitudes towards the function of divorce law, nor to undertake any assessment of the impact of the new law on day-to-day life. There can be no doubt that there is room—and indeed need—for a new book with such aims. We wait for its appearance.

R. J. Bailey*

* Lecturer in Law, The University of Adelaide