BOOK REVIEWS

THE HIGH COURT OF AUSTRALIA ON CONTRACT 1950-1980 *by M P Ellinghaus* (Law Book Co 1983) pp xviii, 487.

My first reaction to this book was one of perplexity. Why would anyone *want* to produce a case-book containing "nearly all cases on contract law decided by the High Court of Australia in the three decades between 1950 and 1980"? The brief introduction is not very enlightening, confining itself to an explanation of the new technique adopted in editing the 164 cases covered (of which more later) and giving no clue as to the author's purpose in wading through the reports to discover and reproduce even the most insignificant decisions of the High Court in the specified period. The publisher's blurb on the back cover goes so far as to say that the book will be "a valuable research tool whenever there is a need to check modern High Court authority on a point of contract" and "useful to students". But students would surely find a more comprehensive case-book far more useful in studying contract — a subject which is, fortunately, not one of those where there is a lack of a good case-book which includes Australian cases and materials, thanks to Messrs Pannam and Hocker.[1]

In terms of a research tool, the book fulfils its aim admirably: it does indeed provide virtually exclusive coverage of the High Court's view on contract during the period selected. But how useful is that? There are many pre-1950 High Court decisions which have retained their importance and their authoritative status throughout the 1950-1980 period and beyond.[2] And of course recent developments[3] have already robbed the book of much of its significance as an account of contemporary High Court learning on the subject. Perhaps it can only be justified as a historical record of the Court's work in the field of contract during an era dominated by two Chief Justices, Sir Owen Dixon and Sir Garfield Barwick. However a case-book would seem unsuitable for the purpose of such a historical analysis, a fact confirmed by the complete lack of notes, observations, additional references and so on. In any event it appears there is little to be gleaned from the Court's aridly formalistic approach that would assist in a meaningful examination of its role and performance as the supreme Australian legal tribunal during those highly significant years: the field of constitutional interpretation is obviously a much more fertile source for such a study.

However, accepting at face-value the unusually limited coverage of the work, how does it shape up as a casebook? The cases are arranged not according to subject-matter but chronologically. However any difficulties which might be occasioned by those wishing to use the book for reference purposes are minimised by the inclusion of a comprehensive subject-matter index, which gives references to each case by its short

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1 *Cases and Materials on Contract* (1979).

2 Two such cases which spring to mind and yet which are nowhere referred to in this collection are *Hoyt's Pty Ltd* v *Spencer* (1919) 27 CLR 133 and *McDonald* v *Dennys Lascelles Ltd* (1933) 48 CLR 457.

3 See eg *Codelfa Construction Pty Ltd* v *State Rail Authority of New South Wales* (1982) 41 ALR 367; *Meehan* v *Jones* (1982) 42 ALR 463; *Taylor* v *Johnson* (1983) 45 ALR 265; *Legione* v *Hareley* (1983) 46 ALR 1; *Commercial Bank of Australia Ltd* v *Amadio* (1983) 46 ALR 202.

name and the particular point(s) it deals with. The distinctive feature of the presentation is the editing technique used in reducing the judgments. Rather than merely excerpting particular passages in their entirety from the judgments, the key passages are themselves abridged by the deletion of superfluous sentences. The remaining sentences are then themselves edited, with the excision of words considered unnecessary to convey the essence of the particular point being dealt with. Thus, to take a random example, the following passage, which deals with unilateral contracts, occurs in the Court's judgment in the *Australian Woollen Mills case*[4]:

> "In cases of this class it is necessary, in order that a contract may be established, that it should be made to appear that the statement or announcement which is relied on as a promise was really offered as consideration for the doing of the act, and that the act was really done in consideration of a potential promise inherent in the statement or announcement. Between the statement or announcement, which is put forward as an offer capable of acceptance by the doing of an act, and the act which is put forward as the executed consideration for the alleged promise, there must subsist, so to speak, the relation of a *quid pro quo*."

In the case-book that passage is reproduced as follows:

> "In the cases of this class it is necessary that the promise was really offered as a consideration for the act, and that the act was really done in consideration of a promise. Between the statement put forward as an offer and the act put forward as the consideration there must subsist the relation of *quid pro quo*."

Certainly the technique is effective in reducing the decisions to manageable proportions, but the question is, does it result in an *accurate* presentation. The point that must be borne in mind is that the book is evidently conceived to reproduce in abridged form each decision as a whole, facts and all. Unlike orthodox case-books, priority is not accorded to those passages of particular analytical significance: it is primarily the facts, the result and the elements of the reasoning crucial to the decision which are sought to be presented. My initial impression that this was so was confirmed by selecting three important decisions and comparing their accounts in the case-book with the original reports. The first case was *McRae* v *Commonwealth Disposals Commission*.[5] The exposition of the law on common mistake by Dixon and Fullagar JJ and their treatment of the earlier authorities, which take up eight pages in the report, are reproduced in one short paragraph by Mr Ellinghaus: there is in particular no reference to their explanation of the decision in *Couturier* v *Hastie*.[6] Secondly, the account of *Coulls* v *Bagot's Executor and Trustee Co Ltd*[7] severely truncates the classic exposition by Windeyer J of the rules and ramifications of privity of contract and omits entirely his detailed arguments refuting Lord Denning's suggestion that the doctrine of privity was not part of English law. Finally, there is *T C Industrial Plant Pty Ltd* v *Robert's Queensland Pty Ltd*[8] where the Court dealt with the thorny problem of whether or not damages could

4 *Australian Woollen Mills Pty Ltd* v *The Commonwealth* (1954) 92 CLR 424, 456f.
5 (1951) 84 CLR 377.
6 (1856) 5 HLC 673.
7 (1967) 119 CLR 460.
8 [1964] ALR 1083.

be recovered to protect both the plaintiff's expectation interest and his reliance interest and made a convincing critical examination of the difficult English decision, *Cullinane* v *British "Rema" Manufacturing Ltd.*[9] The discussion of the problem is completely omitted by Mr Ellinghaus.

Much can be made of the criticism that the editing pays too much attention to abridging vital passages of reasoning, and the view that space might better have been allocated to fuller reproduction of such passages at the expense of the considerable factual detail given. It might also be commented that the editorial technique, particularly insofar as there are no indications of the extent, or indeed of the existence, of the deletions, generates a deal of uncertainty, in that one cannot absolutely trust that the essence of the judgment has been accurately reproduced. However anyone using a case-book necessarily trusts themselves to some extent to the judgment of the editor; and Mr Ellighaus's method has the signal advantage that it eliminates excess verbiage whilst leaving the end-result free of disjointed phrases and endless ellipses, hence making it readable. Moreover, as to the criticism that priority is not accorded to key passages in leading cases, it can be objected that those passages and cases will be or should be familiar from other sources, and that the real purpose is to draw attention to and present the lesser-known cases as a part of a comprehensive survey of High Court authority. Nevertheless the failure to extend the period under scrutiny, at least to encompass the more important pre-1950 decisions, is somewhat disappointing. One is left with a serious doubt as to whether this book will find a place among the more useful and important volumes on the law of contract.

*A J Stewart**

REFORM THE LAW, ESSAYS ON THE RENEWAL OF THE AUSTRALIAN LEGAL SYSTEM *by Michael Kirby* (Oxford University Press 1983) pp i-xii, 1-284.

In less than a decade the catchphrase "law reform Australian style" has gained a measure of currency to describe what may, in some ways at least, be regarded as a new social phenomenon. One of the chief hallmarks of this has been a special emphasis on reaching out for community involvement in the processes of ordering legal change. In theory there may seem to be little, if anything, which is really innovatory in this. Democratic theory in countries like Australia has now paid service for a century and more to the notion that community attitudes expressed through the ballot box provide the means for setting the directions and substance of changes in the working of the legal system. In practice, however, the reality has often been quite different. The growth of powerful executive branches of Government has tended to isolate elements of law-making from close, active community scrutiny. Bureaucratic mechanisms have aided considerably in this. At times, these have even developed their own self-perpetuating norms for pursuing legal change, freed as far as possible from the influence of community and other pressures. In its turn, the legal profession often retained an air of almost abstract mysticism in its approach to updating the law. Too frequently, for example, shaded by the pretence that "lawyers' law" was essentially "value free", it would seem that it was almost an impertinence

9 [1954] 1 QB 292.

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to suggest that the community at large could have any effective concern in many law reform processes. Just as significantly, the failure of many skilled in the law to transfer this knowledge to the community in meaningful ways served also to bar effective public discussion on many legal issues. Today, however, "law reform Australian style", and notably in the fashion developed by the Australian Law Reform Commission since it came into existence in 1975, has sought to overcome these and other barriers to direct community involvement in law reform processes.

From its inception, the Commission made provision for wide-ranging discussions and public hearings to be an accepted, essential part of its activities. Side by side with this, however, there has been an acknowledgement that the community must also be accorded the means of being able to do this in an effective fashion. And a chief focal point for this has been the Commission's foundation Chairman, Justice Michael Kirby. With proselytising zeal and seemingly unbounded energy he has sought to make the subject-matters of the Commission's work the subject of meaningful public debate. But he has also ranged well beyond this to help bring the law itself into the realm of more effective public understanding and scrutiny. As he admits early in this collection of essays, he has given upwards of 100 public addresses annually around Australia on law reform and other legal topics. And this in addition to a heavy round of public hearings and many other activities relating to the Commission's programmes. Now, with *Reform the Law,* a selection of these talks and other materials has been brought together to provide a record of what some might describe as the mini-revolution he has led in the past eight years to help make the law and its reformative programmes matters of more active public knowledge and concern.

Primarily, this collection is directed to the community. But it also serves as a model for the way in which those who are legally trained can become effective communicators to the public at large on legal topics without being patronising or eschewing high level thinking in presenting such material. In a fashion which follows in the mould of those like Felix Frankfurter, who have had the great facility of making the law intelligible to a wide audience, Michael Kirby shows a capacity to engage the attention of his readers, take them to the heart of legal issues and expose the problems which deserve their attention. He moves easily and readably from discussions on the role of law reform in contemporary Australian society, the operations of agencies working in this field, and their difficulties, through to an examination of individual topics which have raised his concern or have been the subject of his Commission's formal activities. So, general topics such as "Community legal education" and "New laws for New Australians?" stand side by side with analyses of "Procedural reform and class actions" and "The computer, the individual and the law". In the process, there is, too, a well measured refusal to descend to polemics. While Michael Kirby can stand firmly and understandably so, for example, in asserting that "the law should reflect and serve the country as it *is,* not as it *was",* he does not seek, at the same time, to dictate the final shape that legal developments should take in working towards such aims. Rather, as he shows in several of his essays, his primary task seems to be to provide a means to enable the public to determine for itself how it may move in supporting the re-ordering and renewal of the Australian legal system. In this, he also demonstrates a blend of radicalism and conservatism about the law. This is a mixture in which the strengths of past practice and traditions should

not be put aside in a doctrinaire fashion, but where the law is wanting, whatever its antecedents, it should not be permitted to stand in the way of adaptation or renewal to meet the needs of contemporary society. If there are touches of ambivalence in this at times, even a possible tendency to lean a little towards renovation rather than major renewal in some circumstances, it may be that in his turn Michael Kirby often reflects the character and tenor of Australian society in its approach to legal questions. And it could well be that this can provide at least one clue as to why he has succeeded in bringing the Australian community more closely into a relationship with the working of law reform. This may also help to explain why complex, controversial law reform issues which have been the subject of his Commission's references have sometimes achieved levels of acceptance which have often eluded those who have followed older, more traditional ways in seeking to pursue legal change.

But with all this, agencies such as his own, as Michael Kirby points out in one of his earlier essays here on "filling the institutional vacuum", can face serious difficulties in achieving the effective consideration of their recommendations. The Australian Law Reform Commission from the outset took one significant step in overcoming a traditional barrier to the swift consideration of law reform proposals by ensuring that its reports were accompanied by drafts of proposed legislation. There remain, however, such factors as governmental indifference, cluttered parliamentary agendas and bureaucratic inertia, as Michael Kirby relates, which may still impede, perhaps even prevent, law reform proposals from being translated into law. Difficulties like this in the path of law reform are not easily resolved. At times there have even been muffled suggestions that because of these and other factors law reform proposals might perhaps be allowed to pass into law, much like subordinate legislation, in the absence of parliamentary disapproval. Suggestions along these and similar lines, however, point to dangers which should be eschewed in the working of institutionalised law reform. Law reform, whatever its affinity with community aspirations, should not be regarded as a substitute for the working of the accepted methods of statute making through parliamentary processes; albeit, with better procedures than at present for the parliamentary examination and discussion of law reform proposals. To suggest otherwise could, in the long run, tend to make institutionalised law reform as self-perpetuating in its intent and as myopic in its attitude to legal change as some of the older methods which have been challenged so effectively by "law reform Australian style". Rather, by bringing the law and the need for its change more effectively into the public demesne, as Michael Kirby has essayed in this book, institutionalised law reform can play its part and hopefully an important one, in stimulating and convincing parliamentarians and bureaucrats that law reform proposals cannot lightly be ignored when they are backed with significant public understanding and at times, through this, elements of community demand for legal change.

*Alex C Castles**

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A MODERN INTRODUCTION TO INTERNATIONAL LAW 4th edn, *by Michael Akehurst* (George Allen & Unwin 1982) pp i-vi, 1-304.

Akehurst, now well established and in its fourth edition, is among the best, arguably the best, of the introductions to international law in the English language. It is accurately and clearly written, and for the most part fluent and interesting. There are spots of humour (the splendid story about the gorilla: p 65), and flashes of iconoclasm (the equally splendid footnote on comity: p 50 n 1). The book is not obviously "learned" and is correspondingly easy to read. It addresses the questions and problems which confront the interested layman and the undergraduate beginner, but in a way that suggests (if it does not detail) the hidden complexities of the subject. A number of chapters, eg on the United Nations (ch 13), on statehood and government (chs 5 and 17, which, though separated, should be read together) and on international and civil wars (chs 15 and 16)) are detailed and provocative, and fully adequate to the demands of any undergraduate international law course. In short, Akehurst can be thoroughly recommended. I ask students to read it, cover to cover, at the beginning of their course, to get an overall idea of the subject. It is in this way extremely effective.

But it is not *the* textbook for a full-year international law course, not at least for a student aiming at a reasonably comprehensive understanding of the major topics. This is a pity, for it could so easily be. It is short (the text is only 288 pages): increasing it by a third in length would to a much greater degree increase its depth and coverage of chosen topics. For example, both codification and act of state have hardly more than a page (pp 33-34, 51-52 respectively); air space and outer space (ch 19) only 3 pages. Human rights is dealt with in the heterogeneous context of chapter 6 ("International Organisations, Individuals and Companies") under the guise of a study of derivative forms of legal personality. Surely, in a "modern introduction", human rights merits its own chapter. (The gist of human rights has little to do with legal personality anyway.) The treatment of international responsibility occurs (again somewhat derivatively) in a chapter entitled "Treatment of Aliens", which also includes a brief account of preliminary objections to international claims. The accounts of sovereign immunity and state succession are almost too brief to be helpful; state succession for example does not *have* to be included in an introductory text, and the space could well be spent on other topics, giving them the rather more detailed treatment from which chapters such as that on the United Nations benefit. And in an introductory text, the guides to further reading at the end of the chapter (so often followed by half or three-quarters of a blank page) could easily be made more comprehensive and helpful.

Akehurst's attempt to set the subject in perspective, in the first two chapters on the nature, history and role of international law, is particularly welcome. Much bigger books on the subject have avoided these difficult, important topics. So it may seem curmudgeonly to complain of occasional over-simplication (it is not the whole story to say that Vattel exercised "a strong and pernicious influence" for 200 years (p 15), or to over-simplify natural law thinking to this extent (pp 13-14). The important thing is that the attempt is made. A concluding chapter, reverting to the issues, would be equally desirable. In my experience, it is

much more illuminating for students to think about the nature of international law when they know something about it.

In short, the book is a splendid piece of compression, managing somehow (and with minor exceptions) to avoid over-simplification. It is a pity that it needs to do so.

*James Crawford**

AUSTRALIA'S CONSTITUTION: TIME FOR CHANGE? *by John MacMillan, Gareth Evans and Haddon Storey* (George Allen & Unwin and 1983) pp i-ix, 1-422.
POLITICS OF LAW REFORM *by Stan Ross* (Pelican 1982) pp 1-295.

There has long been discussion — almost since the time of Federation, and, increasingly, since 1975 — of the alteration of some of the basic aspects of Australia's Constitution. The events of 1975 brought questions of constitutional alteration into a popular, though politically and emotionally heated, focus, removing the question from an essentially legalistic, academic or narrowly political perspective. The High Court's recent decision in the Dams Case (*Commonwealth* v *Tasmania* (1983) 57 ALJR 450) provides another dimension, seized upon by politicians, citizens and the press, to emphasize the question of changing the Constitution.

Australia's Constitution: Time for Change? was planned when constitutional development in Australia seemed at a standstill. Since then, there have been three major developments which need to be taken into account when reading the book and considering the question generally: the joint decision of the Commonwealth and States to end residual legal ties with the United Kingdom; the elevation of a federal Labor Government; and the decision of the High Court in the Dams Case.

Law reform is also a matter which is in the public eye, with the high profile adopted by the Australian Law Reform Commission and its chairman, Mr Justice Kirby. The function and direction of law reform in Australia, its definition and in particular the underlying factors which direct and influence it, are matters which ought to be of utmost concern to lawyers and, indeed, all citizens. However, the developments mentioned above are also relevant to the consideration of Stan Ross' book, *Politics of Law Reform. Australia's Constitution* is concerned with the specific issues of constitutional alteration and the effect that this would have on governmental structures and powers, while *Politics of Law Reform* is concerned with the broader issues of law reform generally and concentrates on the institution and persons able to influence legal developments in Australia, Ross' emphasis on "significant" or "social" law reform indicates that new governmental policies may be of considerable concern to him, while his chapters "The Judiciary" and "The High Court and the Constitution" detail their influence and importance: alterations in the scope, nature or operation of these bodies are clearly matters of significance.

The intentions of the authors of both these books are stated clearly. In *Australia's Constitution* the preface declares the purpose of the book to

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be "to stimulate a serious national debate on the desirability and possibility of changing the Australian Constitution". An absence of political barrow pushing is also insisted upon and, indeed, the differing political allegiances of the authors bear this out. The book does not argue for specific changes, either in general or in particular; rather, it is concerned to raise questions and issues relating to particularly contentious areas within the Constitution where change might be regarded as politic or desirable.

Such an absence of proselytisation is not a hall-mark of *Politics of Law Reform;* nor is it intended to be. The introduction to that book states unequivocally that a large part of the function of law reform ought to be "the restructuring of our society by the use of law . . . [including] the development of a fairer system of justice and government and achieving a far more equitable distribution of our wealth". Ross' intention therefore is to reveal the social and political forces, often hidden or overlooked, which exercise influences on attempts to effect what he calls "significant" or "social" law reform, and to indicate means by which these influences can be either circumvented, controlled or manipulated.

Central to the discussion in *Australia's Constitution* is the question of the extremely restrictive amendment procedures of s128, which suggest that any broadly based proposals for amendment may be doomed from the outset. The referendum record speaks for itself of both the effect of the stringent requirements of s128, and of the practical unrealism of this stringency: of 36 referendum proposals, only 8 have been successful, and of the 28 which have failed, 4 were lost despite receiving a vote in favour from more than 50% of the electorate. One of these was the 1977 simultaneous elections proposal, which was lost despite 62.22% of the vote being in favour.

The referendum record is often cited also to illustrate another proposition: the innate and consistent conservatism of the Australian electorate. MacMillan, Evans and Storey take it rather to indicate the general lack of awareness on the part of the electorate of constitutional matters and their significance. The redressing of this ignorance (perpetuated by politicians, lawyers and the media for their own ends, and by the failure of our education systems to address such a vital matter) is adopted as a principal and most laudable aim of this book. It is clear that only by making information about the Constitution available to citizens on a non-partisan basis that there can be any possibility of successfully proposing any effective constitutional review. On this point there is complete agreement from Ross. His book is indeed also concerned with this very matter, albeit on a broader basis.

Areas for constitutional change are identified in three main contexts: (1) the notion of federalism itself; (2) the institutions of national government (the connections with Britain, the question of republicanism, the role of the Governor-General, the executive and the Senate, as well as the federal Parliament and the function of the High Court); and (3) "rights and freedoms" under the Constitution, concentrating on s92 and proposals for a Bill of Rights. In general, the discussion of each area is straightforward and informative: the current interpretation of the relevant constitutional provision or convention is explained, and the followed by an analysis of the problems, legal, political and practical, which exist or are created in the area, and usually proposals for redressing these

difficulties are suggested. Conflicting and alternative views are canvassed, and conclusions are not drawn in a dogmatic manner. Such an approach makes it possible to present discussion of highly contentious and divisive matters, such as the role of the Governor-General, and the British connection, in a manner which avoids the emotional and political rhetoric often associated with them.

The three major developments mentioned at the beginning, which must be borne in mind while reading this book, are all concerned with possible constitutional development in Australia. Removing the colonial vestiges which attach to the States means the removal of a principal popular emotive basis for constitutional reform. The British connection – excluding matters relating to the establishment of a republican system – is the major galvanizing issue in the movements for reform, and with this issue effectively, at least in its limited sense, defused there is a possibility that, without its principal rallying point, both action and motivation may peter out.

The other two matters, the election of a federal Labor Government, and the recent High Court decision, may also be linked. The federal Government has proposed a number of matters for referendum in the future, but, more significantly, it is probable that the present Government is likely to show more legislative adventurousness than its more conservative predecessor.

Further, it is more than probable that proposed federal legislation will not only strain the limits of some Commonwealth powers as they are presently perceived, but will also attract the hostility of some States or persons affected by such legislation. Consequently the role of the High Court in determining the validity of this legislation and in defining the limits of Commonwealth powers under the Constitution is likely to be emphasized.

This is a matter with which Ross is particularly concerned. He emphasizes the almost unavoidably conservative attitudes, political and social, of the High Court both as a body and, in general, as individual judges. The High Court's role in constitutional development in particular and legal development in general is not emphasized in *Australia's Constitution,* but Ross rightly sees it as a highly significant and powerful factor in inhibiting such development. The decision in the Dams Case may on a superficial level seem to contradict his assertion, but the limitations on the High Court's role, which he points out, remain: the constraints of precedent and the essentially passive role of the Court in that it cannot choose either the matters with which it is to deal nor the terms on which issues are presented, are the principal formal and overt constraints, but Ross is also concerned with less obvious social and political limitations on the Court. As he points out, there is little Australian work on this area, which is perhaps one of the most important and interesting aspects of the operation of the High Court.

Ross employs three case studies which aptly illustrate the underlying factors which often dominate law reform and law reform proposals in Australia. He also examines the role of the bureaucracy and of politicians, and looks at the limitations which are imposed on them as well as those which they create for themselves in seeking or implementing "significant" law reform.

Although any discussion of law reform in an Australian context naturally directs attention to government law reform bodies, and in

particular the ALRC, he does not concentrate on them, being concerned rather with the underlying forces which direct their establishment, their staffing and the fate of their proposals. With respect to the ALRC, there would seem to be many other specific questions to which Ross could have directed his attention: but the existence of these questions is certainly implicit in the general text of his book.

These two books complement each other well. *Australia's Constitution* poses specific and basic problems and suggests means of remedying them: *Politics of Law Reform,* on a broader canvas, seeks to illustrate both why many of these problems – aside from the terms of the Constitution – exist, and the difficulty of providing remedies. Ross concludes with a plan for putting into operation means to "significant" reform: part of that plan is a rather more radical form of the educative and informative program at the heart of *Australia's Constitution.* Both are books which could, and ought to be influential in informing citizens of the significance and role of both the Constitution as such, and of the underlying influences on legal development in Australia. Such information could do much to reduce the apathy and wariness perceived by the authors to persist in the Australian citizenry as a whole towards legal and constitutional development.

*K P McEvoy**

CASES AND MATERIALS ON REVIEW OF ADMINISTRATIVE ACTION 2nd edn, *by S D Hotop* (Law Book Co 1983) pp xxxiii, 1-1219.

Mr Hotop's book is very much of the "portable library" category of case-book. Extracts from cases and statutes take up most of the 1219 pages of this work. Although it has been fashionable in academic circles to sneer at this type of book, the reviewer disgrees with this sort of opinion. For those persons who are unable or reluctant to visit a Law Library (particularly at weekends or during vacations) the existence of a book such as Hotop represents a positive bonus. For there is no doubt that, within the genre, he has produced an exceptionally good book. It is, with one small cavil, absolutely comprehensive and up-to-date. The case-extracts are lengthy and contain not only the vital parts of the judgments but also the facts of cases and the detailed statutory provisions on which the judgments are based. The latter is particularly important in Administrative Law in that almost every judgment needs to be read *secundum subiectam materiam.* The book also contains the text, with cases thereon, of the Administrative Decisions (Judicial Review) Act, the Victorian Administrative Law Act, the Commonwealth Ombudsman Act and the Administrative Appeals Tribunal Act. The one small cavil is that there is nothing in the book about the action in tort as an Administrative Law remedy. *Hedley Byrne* and *Anns* may come to play an important part in the rectification of public wrongs. Admittedly no case has yet tested the strength of Lord Wilberforce's observations in *Anns* concerning the tortious action of an abuse of discretionary power. However, one recalls that *Donoghue* v *Stevenson* was for quite some years regarded as a decision whose significance lay mainly in relation to liability for dangerous chattels.

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Occasionally in the small print between extracts, Hotop produces questions for the reader, no doubt as a concession to the views of those who think that the case-book should be a "learning-tool". I doubt the value of these questions; they are not penetrating and are such as could be asked by any tutor. They do not bear comparison with the sort of questions in Weir's *Case-book on Tort,* which could certainly not have been asked by any tutor, and which perhaps many tutors could not answer. On the other hand, Hotop's own contributions, again in small print between extracts, are valuable, since they are both sound and relevant. One could have wished for more of Hotop, though no doubt the publishers would not have wanted to add to the length of an already long book. This case-book has no serious competitor in the Australian market, nor even in the United Kingdom, Bailey, Cross and Garner, *Cases and Materials on Administrative Law* (1977) being a different type of case-book.

*David Baker**

CRAWFORD'S PROOF IN CRIMINAL CASES 4th edn, *ed by R Barley,* (Law Book Co 1982) pp i-xxii, 1-279.

Memorandum to: Senior Partner

From: Junior Person

Re: Library Purchase

Sir,

Since, as you are no doubt aware, the most junior person in the firm has the responsibility for the management of the library of the firm, and since the book in question involves the expenditure of $22.50 in these hard times, I take the liberty of asking your advice.

This book outlines and provides a commentary on selected provisions of the NSW Crimes Act, Prisons Act, Poisons Act, the Commonwealth Customs Act and the bigamy section of the Marriage Act, and odd common law offences. The Crimes Act section involves 252 of 279 pages. The editorial commentary is set out in headnote form and is designed for those who know little of the criminal law; thus providing a simple reference to the principles of the cases decided on the provision in question without the disadvantage of reference to the reasoning employed by the courts involved, nor any indication of the relationship between the concepts and the provisions concerned.

We seem to have purchased the previous editions routinely. I am unaware of the reason for this, though it may be that some partners feel the need for a ready reference in case their corporate clients are suddenly picked up for some offence of dishonesty, and indeed, in the present climate that sad eventuality is becoming more likely; but I cannot see why this book should have been chosen for that purpose. But the pull of tradition is strong — the preface points out that since the production of Watson and Purnell's *Criminal Law in New South Wales,* it was thought that a further edition of Crawford would not be required, but that was overridden by constant demand.

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Nevertheless, I cannot see that this book fulfils any purpose in the South Australian practitioner's library. It has an almost exclusively NSW focus. The Crimes Act of that State has significant differences with the law in SA. An obvious example is the defence of diminished responsibility, available there, but not here. The commentary on their Poisons Act could not and should not (in the context of the aims of the book) treat the deficiencies of the Narcotic and Psychotropic Drugs Act (SA). Statutory differences of various degrees of subtlety abound. For example, commentary on s117 of the Crimes Act states that, with respect to the crime of larceny, an intention to return property is no defence, referring to s118. If that were to be taken as a statement of the common law, as in force in SA, it would simply be inadequate.

For the purposes of the NSW practitioner, or those who would wish for the handy reference to NSW criminal law, the editors have taken considerable pains to seek out cases reported in unusual places, and cases which are unreported. On the other hand, the NSW focus means that, on the odd occasion on which a South Australian case is cited, it is cited wrongly; (*The Queen* v *Wells* [1981] SASR 63).

Overall, however, one must assess the book by the quality of its commentary. Accepting that we need the NSW content, the following defects are revealed:

(1) The commentary on p 12 seems to state that the accused who pleads "drunkenness" can do so only in a case of "specific intent". The High Court has said that this is not so.

(2) It is said on p 94 that the requirement of asportation required that the goods were taken by or delivered into the possession of the accused for some period, however short. This is misleading in that case-law considered as a whole showed that any movement of the article which involved the movement of the goods in question from one point in space to another would do. *Any movement* would do.

(3) There is no attempt to clarify in the headnote sense the meaning of recklessness: in particular, the reader will find reference on p 8 to the odd concept of reckless negligence.

(4) It is stated on p 119 that the intention to steal must coincide with the taking of the article stolen, citing *Ashwell* (1885) 16 QBD 190, inter alia. This is a very doubtful proposition from a number of points of view. The ancient decision in *Riley* [1853] Dears CC 149 and the cases in which it has been applied would point to a modification of this statement at best. *Ashwell* is of extremely doubtful authority, if not overruled, in SA.

(5) Larceny by mistake is dealt with on p 120 by simple reference to another text. This is of little help to the reader.

(6) For some undisclosed reason, the section dealing with the Customs Act "drug offences" does not deal at all with the provisions of s235 of the Act, nor the provisions dealing with the forfeiture of property. The only possible reason is that the editors have decided that these are matters of sentence and hence not within the ambit of the book. While understandable in the context of traditional classifications, this decision ignores the reality of the operation of the Act. That judgment is, in my view, not well considered.

(7) The description of the elements of the statutory offence of robbery or stealing from the person (s94, Crimes Act) manages on the one hand to state that there must be all the elements of simple larceny, and on the other hand to produce a list of the elements of the offence without mention of the intention to steal.

(8) There is at least one nonsense sentence; thus on p 54:

> ". . . if the prosecution establish that he knew it was an explosive substance the jury may easily infer knowledge on the part of the prisoner that the substance was an explosive substance."

(9) The Criminal Law Journal is cited in different forms of abbreviation eg pp 9, 10, 9, 16 and 18.

With respect to the ingredients of the offence under s33 of the NSW Crimes Act, differences appear between the account on p 30 and that on p 31, with respect to the same offence. On p 83, it is submitted that the offence under s82 dealing with the administration of a drug by a woman to herself to procure a miscarriage does not require proof that the accused/victim administered a substance capable of producing the prohibited result. There is ancient authority for that conclusion, but the editor acknowledges as an afterthought that the decision of the House of Lords in *Haughton* v *Smith* [1973] 3 All ER 1109 may dictate a different result. However, when dealing with the offence of procuring drugs with intent to procure a miscarriage under s84, the commentary states that the efficacy of the drug is immaterial, also referring to *Haughton* v *Smith.* This may be right, but is puzzling on the surface.

It may be that our practice requires information about the form of indictment in NSW for such offences as placing wood on a railway, obstructing a clergyman, assault on persons preserving a wreck, secreting cattle and injuring agricultural machinery. This catalogue of offences is more an indictment of the content of the Crimes Act than any use to the South Australian practitioner. I cannot see how any of this improves on our standing order for Howard's *Criminal Law,* which provides fuller, better, and more specific answers to the likely questions of basic reference than this text can hope for. Despite undoubted merits in Crawford from the NSW point of view, I do not think its value to a SA practitioner is sufficient to justify the acquisition of the book.

*Matthew Goode**

RECKLESSNESS AND CONSPIRACY : A RESPONSE TO COMMENTS IN A REVIEW, Goode "The Law of Criminal Conspiracy, *by P Gillies"* (1982) 8 Adel LR 210.

In the September 1982 issue of the Adelaide Law Review Mr M R Goode reviewed my book, *The Law of Criminal Conspiracy* (Law Book Co, 1981). Mr Goode is himself the author of a monograph on the same topic, viz, *Criminal Conspiracy in Canada* (Carswell, 1975). In his review he protests about a number of things. I believe that his review illustrates a commonplace: different people may, quite properly, have different ideas as to both the purposes for which a book on a given subject may be written, and the specific form that it should take. I do not accept his

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numerous criticisms; but at this time, I will content myself with responding to his comments in respect of my treatment of the concept of recklessness in the context of conspiratorial mens rea. This issue is an important one.

I am accused of adopting an inconsistent approach towards recklessness as a basis for conspiratorial mens rea – at p 18, it is said, I say that it will not supply mens rea, and at pp 82-84, 100-102 and 105 I say that it will.[1]

There is in fact no such inconsistency. May I refer to the distinction which I make at p 16, between what I call the *primary* and *secondary* elements of conspiratorial mens rea. I have identified the primary element as consisting in the intention to agree upon the physical act constituting the criminal or other unlawful object of the crime, and the secondary element of mens rea as being concerned with the degree of knowledge the conspirators must have as to the precise nature of this contemplated act, which knowledge will generally be concerned with the circumstances surrounding the prospective commission of this act and from which its criminal or other unlawful nature may be inferred. At p 16 I indicate that (1) the remainder of Chapter 2 (pp 16-44) will be concerned mainly with the primary element, and (2) the secondary element of mens rea required of each category of common law conspiracy will be dealt with in later chapters (ie, those dealing with the specific heads of conspiracy). These chapters include pp 82-4, 100-102 and 105.

To put things briefly, the primary element is concerned with the process of forming an agreement, but is unconcerned with the guilty knowledge which must by and large be established in the mind of each conspirator in respect of the specific acts resolved to be done.

Let me return to the allegation of inconsistency. It is said that at p 18 I assert that recklessness does not suffice for conspiracy (ie, conspiratorial mens rea). From the above discussion, it will be apparent that I am referring to the primary component of conspiratorial mens rea at this point. I am unable to locate at this, or at any of the surrounding pages, a specific assertion that "recklessness" will not supply conspiratorial mens rea, but I would accept that this is the implication of my comment at p 18 that each conspirator must possess the purpose that the overt act or acts of the conspiracy be performed. In other words, the process of coming to an agreement is a deliberate one – agreements are not entered into recklessly. Doubtless to hold that an agreement may be entered into recklessly would help to rationalise problems encountered in the context of multiple-object conspiracies,[2] though that is a line of speculation which I have never been tempted to follow. I find the notion of the reckless formation of an agreement odd, a contradiction in terms. I am unaware that the courts have, at least in the reported decisions, endorsed any such analysis. I would not dismiss the possibility, however, that recklessness, in the sense of risk-producing conduct, might not usually be applied in the context of multiple-object conspiracies. I wait to have this application demonstrated.

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1 (1982) 8 Adel LR at 210ff.

2 Ibid at 214, and see also the review by Lanham, "The Law of Criminal Conspiracy" (1981) 5 Crim LJ 312-313.

By way of contrast, I allow at pp 82-84 (dealing with conspiracy for a crime of recklessness, or one of negligence), and again, at pp 100-102 and 105 (dealing with conspiracy to defraud where the overt act consists in dishonest conduct exposing a person to a risk of economic loss), that recklessness may, or will, supply conspiratorial mens rea. But it should be apparent at this stage that I am referring not to the process of forming an agreement, but to the secondary element of conspiratorial mens rea.

Where is the inconsistency? It seems to me to be both logical and consistent to say that while the agreement to perform the substantive harm or act causing this harm to eventuate must be deliberately arrived at (or, to put things another way, the parties must indeed be proven to have resolved upon its commission), there is of course no reason why this substantive conduct cannot consist in recklessness, ie, in conduct which produces a risk of harm. The courts have clearly accepted that this is so in the context of conspiracy to defraud (pp 100 etc), and it is arguable that persons may conspire to commit a crime of recklessness, such as manslaughter, by agreeing to drive a car in such a manner and in such circumstances that should the death of a person result, the driver would be guilty, say, of manslaughter (see pp 84-85 where, however, it is recognised that in practice there would seem to be little scope for a conspiracy charge in a situation of this type).

P Gillies