Lawyers, Social Workers and Families, Stephanie Charlesworth, J.N. Turner and Lynne Foreman

Federation Press, 1990
Recommended Retail Price $35.00

"Lawyers, Social Workers and Families" is a very good reference treatise for lawyers and social workers as well as those Bar Readers who need to hone their skills in critical legal analysis, social science and socio-legal interactions; it would be a valuable addition to the Reading Syllabus. The authors are dual professionals in law and social case work.

Unfortunately their academic, condensed, almost lecture-room narrative makes the book less suitable for the non-professional social welfare workers, including police, to whom it is also directed. Its broad scope brings into focus for social workers legal ingredients which must be recognised and dealt with in case work, often with assistance of lawyers.

There are a number of unsubstantiated generalised statements and comments, also some legal views with which this reviewer respectfully disagrees. Whilst the fields of general and family law (marriage and de facto), single relationships, adoption, fostering, legitimacy, surrogacy, artificial conception, child welfare and family law mediation are examined in depth, as legal "content" (sic) and social work "process" (sic), only the legal "content", not the "process" with two minor exceptions, is explained in lay terms, leaving the general reader in the dark as to the "mystique" (sic) of social behavioural science. This detracts from its value to lawyers who must come to terms with the social welfare ramifications of their work in family areas.

Your reviewer similarly disagrees, amongst other things for example, with some aspects of the treatment of "separation" in family law, of precedent, legal/social worker professional privilege, and the status of non-court approved family law/mediation agreements (at least where mediation is contractually "open").

These matters are readily capable of reconsideration in a second edition because this important work on socio-legal relationships, law and procedures is intrinsically meritorious and includes research material and commentary of great importance tucked away in footnotes.

Areas of potential and actual liability of social workers, other "interveners" in the "process", and lawyers, for negligence both to clients and third parties, the rights and obligations of married, adopting, natural, fostering and unmarried parents/spouses, children, parents of foetuses/embryos (including surrogates) also rights of embryos/foetuses themselves are analysed by reference to United States, Canadian, Australian-British and European case law, though the treatment of maintenance and child support needs clarifying.

Disturbing examples are given from actual case-work material where harm and injustice occurs because of professionals' incompetence. Also because of poor communication between lawyers, social workers and courts, amongst themselves and in tandem. The adversary system in family disputes is critically considered throughout the book.

The best chapter (Ch.7) deals exhaustively with family law mediation as legal "content" and a social work "process" and gives a step by step description of the dynamics of an actual procedure. It is clear that that mediation, like litigation, needs close attention from the point of view of cost effectiveness and other micro-economic factors. The debt ridden Australian economy cannot afford wastage of legal/social welfare resources.

Although its condensed style and batches of footnotes make for some tediousness and misunderstanding in the reading, the book deserves close attention and examination. ❑

Patrick O'Sullivan

The Law Relating to Banker and Customer in Australia by G.A. Weaver and C.R. Craigie

The Law Book Company Limited; 2nd edition, 1990
Recommended Retail Price $475 and continuing subscription)

The publisher's decision to issue the second edition of this work in loose leaf form is to be commended. The initial cost of the work is substantial: by way of comparison, it will cost the Australian purchaser about twice as much as the current (10th) edition of *Paget*. One hopes that the publisher and the authors will avail themselves of the flexibility afforded by this mode of publication to extend the lifetime of the work and its value to purchasers.

It has to be said that the second edition of this work suffers from a number of defects. This may, to an extent, reflect a desire to cater for a wide audience: as the authors say in their preface to the second edition:

> "This service is designed for use by bank officers as well as by their legal advisors and other practising lawyers. For this reason an attempt has been made to include some general legal concepts, particularly in Chapter 4."

One feature which the second edition shares with the first, and which was, at least in this reviewer's opinion, a defect in the first, is its citation of cases from reports other than the authorised reports. The authors apparently recognise the problem: in the preface they say:

> "Whilst the cases written up in the text are not always taken from an authorised report, we have attempted to deal with this by giving a number of references in the table of cases..."

Two things may be said of this. Firstly, it is far from convenient for the reader, having found a reference in the body of the text, to have to go to the table of cases to find a reference to the authorised report. Second, the table of cases does not always fulfil the authors' apparent intention. In a work of this nature, one would expect that, where possible, a reference to, or quotation from, a case, would be supported by a citation of the authorised report of that case.

Another feature which the second edition shares with the first is in its style. On many topics the treatment of principle is discursive rather than concise. The authors do not always attempt to frame a statement of principle, and to support that

statement by reference to authority. Rather, they tend to proceed by extensive quotations from authority, with, sometimes but not always, an attempt to draw together in some coherent statement the point of those quotations. To give but one example: the authors' treatment of the circumstances in which guarantees may be avoided (paragraph 23.200 *et seq*) proceeds by way of an extensive compilation of authorities - some, it must be said, of varying relevance - and citation of extracts from some of those authorities. There is no real attempt to set out clearly and concisely the underlying principles or to show how they relate to each other and to the legal features of the relationship of principal and surety. There is no real attempt to reconcile apparent differences in the authorities to which reference is made. To say of a case that "there can be no certainty that (its) decision would be repeated in any future case..." (as the authors say in paragraph 23.220 of *Westminster Bank Ltd v Cond* (1940) 46 Com Cas 60) leads one to speculate on why, in the first case, it was necessary to make reference to that case. Unfortunately, the method by which the authors have developed the topic in relation to which that case was cited - non-disclosure by a creditor of unusual circumstances within its sole knowledge - does not easily allow even the diligent reader to answer such a question.

It is difficult to see what reason, other than historical, there can be for the method of exposition which the authors have adopted. A clue may be provided by the preface to the first edition where the authors trace the development of the predecessors to that edition. However, the limited and didactic purposes for which those predecessors were produced should not continue, beyond the grave, to rule the form of the second edition.

Although it is necessary to make some reference to defects in the work, it should not be thought that the authors have failed in their task. The work has many strengths - strengths which it shares with the first edition. Among those strengths are the enormous scope of the work, and its extensive and authoritative references to banking practice. A glance at the table of contents illustrates the former point: the work not only covers a wide range of topics which have relevance to the relationship between a bank and its customer, but also the constitutional and legal setting in which in Australia that relationship operates. The latter point can be appreciated only by reading the entire work: but to take one example only, refer to Chapter 24 - agreements for loans and bill line facilities. The authors' backgrounds and experience vouch the authenticity of their comments on banking practice.

It is not possible, within the scope of a review, to attempt to analyse and comment upon each of the major segments of the work. However, in very broad summary, it may be said that the comments which have been made about the virtues and vices of the work as a whole apply equally to those individual segments. The work is strong where the law is well established, but less strong where the law is undergoing development; strong where it deals with matters at the heart of banking law but less strong on matters more peripheral. See, for example, the treatment of the duties and protections of the paying bank and the collecting bank in Part 4. The treatment of "ratification, adoption and estoppel" (paragraphs 13.540 to 13.660) and the treatment of the bank's defence "based on the customer's duty of care" (paragraphs 13.690 to 13.740) are really no more than case digests.

Even allowing for the authors' methodology, there are some noteworthy omissions. In the treatment of s.95 of the *Cheques and Payment Orders Act 1986* (paragraph 15.490 *et seq*), no reference is made to the important decision of Giles J in *Hunter BNZ Finance Ltd v C.G. Maloney Pty Ltd* (1988) 18 NSWLR, in which his Honour dealt, inter alia, with the elements of s.88D of the *Bills of Exchange Act 1909*, (the statutory predecessor of s.95) and with the nature and extent of the enquiry required of a bank which sought to rely upon the protection offered by that section. Of particular interest in that case was the consideration given by his Honour to the position of a bank which did not make proper enquiry, in circumstances where it might reasonably be concluded that, had proper enquiries been made, the true position would not have been revealed. It is difficult to escape the conclusion that the authors' treatment of that question (paragraphs 15.1050 to 15.1090) would have been aided by a consideration of the views of Giles J. Again, the treatment of recovery of money paid under mistake (paragraphs 14.310 to 14.340), whilst recognising the central importance of *Australia and New Zealand Banking Group Ltd v Westpac Banking Corporation* (1988) 164 CLR 662, and recognising apparently, the significance of *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221, does not appear to take account of the significant divergence between the law on this topic as it has developed in England and in Australia. As a result, the text is littered with references to English authorities, many of which are out of date even in England and most of which have little relevance to the present position in Australia. The debate, which occupied judges in England in the early part of this century, over the views of Lord Mansfield in *Moses v MacFerlan* (1760) 2 Burr 1005, may have been interesting at the time and to its participants, but its present relevance must be open to question. Again, the authors' treatment of contracts subject to finance (paragraph 19.520) makes no reference to the decision of the High Court in *Meehan v Jones* (1982) 147 CLR 571 - surely the leading case on this subject.

Similar comments might be made about particular parts of some other sections of the work. However, the flaws thus indicated are, almost necessarily, products of the scope of the work and the breadth of the audience which it is intended to serve. To concentrate on such matters is to do the work, and its authors, less than justice. For it has to be said that the work is an indispensable part of the library of anyone professing serious interest in the areas of law which it covers. If it does not contain the answer, it will surely set the enquirer on the correct path to the answer and it will certainly not lead him to an incorrect answer. Lawyers' libraries are littered with books which aim higher, but fall lower. ❑ Robert McDougall QC

Law an Ass - Never!

***FISHERY** - Net placed in tidal waters - Whether "fixed engine"*

Gray v. Blamey [1991] 1 WLR 4