

Book Reviews

Understanding Company Law (9th Edition)

By Phillip Lipton and Abe Herzberg.
LBC Information Services, Sydney NSW 2000

Understanding Company Law is a practical and clearly expressed exposition of company law in Australia. As the jacket copy indicates, it is not an attempt to comprehensively review and critique the *Corporations Law*. Rather, it focuses on the life cycle of the typical company, beginning with registration, moving through matters such as the constitution, structure and control, and finishing with receivership, voluntary administration and liquidation. By adopting that structure, the authors have provided an easy to follow means of understanding the regulation of companies in Australia.

Students studying Company Law as part of an Economics, Commerce or Business degree will find *Understanding Company Law* particularly useful. The authors have clearly attempted to avoid unnecessary jargon and provide basic definitions wherever possible. In most instances they have succeeded in that regard, so that, for instance, a reader with little knowledge of the share market and its workings will be able to make sense of the treatment of share capital in Chapter 8. The case extracts in *Understanding Company Law* have been kept to a minimum and only short, easy to follow extracts have been used.

Understanding Company Law will also make a useful text for law students, though it will clearly have to be supplemented with other more comprehensive texts and by reading relevant decisions of the State and Federal Courts. Practitioners will also benefit from *Understanding Company Law*, though its limited case law references dictate that it should not be relied upon without wider reading, particularly given the easy availability of unreported judgments through electronic databases.

Stylistically, *Understanding Company Law* uses a readily understandable system of headings and sub-headings, as well as shading for any cases, legislation or Law Reform Commission reports extracted. One significant deficiency is that the extracted judgments do not include page references, so that it is quite difficult to use them as the starting point for further reading. Of less importance, but still a matter of some irritation, is the scattering of more than a few typographical errors through *Understanding Company Law*.

The significant changes made to the Corporations Law by the *Corporate Law Economic Reform Program Act 1999* (Cth) (CLERP) are dealt with in some detail in *Understanding Company Law*, particularly in relation to directors' duties (see Chapter 13), statutory derivative

actions (see Chapter 17) and takeovers (see Chapter 18). However, in some instances, the authors seem to have preferred brevity to thorough explanation. For example, while mention is made of the fact that the 'business judgment rule' now contained in section 180(2) has been imported from American company law, scant detail of how the concept is applied in American case law is provided. The lack of such detail is not so much a ground for criticism as another indication that *Understanding Company Law* needs to be viewed as a primary source of information about the relevant law, rather than a complete statement of it.

In summary, *Understanding Company Law* is an easy to use and up to date guide to company law in Australia. Its clarity of expression and logical layout ensure that it will prove valuable to the student and practitioner alike as a primary reference point.

Reviewed by Jason Downing

Butterworths Australian Competition Law

Sydney, Butterworths, 2000

Competition law is suddenly sexy. At least publishers seem to think so, if the plethora of competition law titles now on offer is any indication. *Butterworths Australian Competition Law* is a collective work, bringing together a range of trade practices practitioners and academics, all well known in trade practices circles. The book is an examination of those parts of the *Trade Practices Act 1974* ('the TPA') which deal with competition principles – that is primarily Part IV of the TPA.

An introductory chapter, 'The Legislative Basis of the Act,' introduces the reader to the legislative history of competition regulation in Australia, from the *Australian Industries Preservation Act 1906* (Cth) through to the report of the Hilmer Committee and the Competition Policy reforms which followed that report.

The second chapter contains an extremely useful overview of the economic principles that underpin any analysis of competition law. The economic novice and the seasoned practitioner alike can benefit from the clear review of the various concepts, such as 'competition' and 'market', which operate within the context of the Australian legislation. There is an excellent analysis of market definition and delineation as well as detailed discussion of the various concepts of competition. The footnotes suggest further reading of both economic texts and articles as well as relevant case law.

A detailed look at the various sections of Part IV

follows. Each is dealt with in a separate chapter – ‘Misuse of Market Power’, ‘Exclusive Dealing’, ‘Resale Price Maintenance’, and ‘Mergers’. Each chapter includes a short introduction and a useful analysis of the key phrases of each section, with references to illustrative examples in the case law. The structure of each chapter follows the structure of the relevant section of Part IV. Interestingly, there are also analyses of economic concepts which enhance the accepted concepts of market. An example is the consideration of ‘Aftermarkets’ and ‘Network Externalities’, in the ‘Misuse of Market Power’ chapter. There is also included an examination of the essential facility doctrine which is interesting and useful, particularly in the context of increasingly common matters involving Part IIIA and the telecommunications access regime set out in Parts XIB and XIC and which draw on analogous considerations.

Then follows a short chapter on ‘Access to Services’, which deals with the developing law of Part IIIA and national access regimes. Unfortunately, the decision of the Australian Competition Tribunal in *Re: Review of Declaration by the Freight Handling Services at Sydney International Airport* (2000) ATPR 41-754 was delivered after publication and so has not been considered – we’ll have to wait for the revised edition.

The final chapters deal with ‘Authorisations and Notifications’ and ‘Enforcement Penalties and Remedies’. The section on penalties was written before the announcement of increased penalties and a broader range of sanctions.

This book does not replace existing texts. It does, however, complement them, and is a useful addition to the bookshelves of anyone interested in competition law.

Reviewed by Michelle Painter

Federal Constitutional Law: An Introduction

*By Keven Booker, Arthur Glass and Robert Watt
Sydney, Butterworths (2ed. 1998)*

This book promises to provide a concise and informed introduction to the principal issues of federal constitutional law. It largely fulfils the promise, although the chapters are inadequately integrated. There is a sense of lack of cohesion across the three authors, although individually each chapter is of high-quality both descriptively and analytically.

Structure of the Book

One of the more difficult challenges for any text on constitutional law is the organisation of chapters.

The book adopts a historical introduction, the first three chapters dealing with the early cases, the emergence from the pre-federation colonial structure and basic issues of federation. Legislative power is illustrated initially by reference to the corporations and external affairs powers

and then by reference to revenue and appropriations.

The book then moves on to address executive and judicial powers before returning to the restraints in sections 90 and 92.

The now controversial issue of implied rights follows along with what can only be described as a rather inconclusive essay on constitutional interpretation in chapter 12. Chapter 13 deals with section 109, chapter 14 with states and territories, chapter 15 outlines the role of judicial review and chapter 16 is an appraisal of the special character of the constitution. This last chapter could well have been placed at the beginning of the book, but that perhaps is a counsel of perfection.

The table of contents is sufficiently detailed that the work can be used as a reference text as well as serve as an introductory discourse.

The role of the High Court in characterising the exercise of power.

There is a clever mix of review of High Court decisions and appropriate hypotheticals. For example, in illustrating the breadth of the trade and commerce power Keven Booker gives consideration to the regulation by the Commonwealth of intrastate sales of red socks. Such a law could be characterised as a law about intrastate trade or as a law about red socks. Neither characterisation would explain why the law is invalid. *The Constitution* does not prohibit laws about red socks, and a law about intrastate trade could be validated under a head of power other than placitum 51(i).

One has to reach across to chapter 10 to connect back to the classic reference in the *Communist Party* case to laws about lighthouses.¹ The point of course made in that case was that it is a judicial matter to characterise a Commonwealth law. Just because the Legislature says that a law is a law in relation to lighthouses does not make it so.

Yet the High Court’s interpretive practice does not always provide intellectual satisfaction. The discussion of the *Incorporation Case*² in chapter five rightly points out the categories of illusory reference in the majority view that the word ‘formed’ in placitum 51(xx) must be read in the past tense thus preventing the Commonwealth from legislating for the incorporation of trading and financial corporations. The majority opinion says that it adopted a ‘plain meaning’ approach to construction of the Constitution. This merely disguised the leeways of choice facing the Justices in drawing the map for legislative power over business affairs.³ Keven Booker identifies the difficulty with the majority view, preferring Deane J’s dissent.

The characterisation problem in the context of licensing schemes.

The problems stemming from *Harper v. Minister for Sea Fisheries*⁴ are classic problems of the proper characterisation of a licensing scheme whose validity is challenged under the Constitution. In that case the scheme licensed the taking of abalone in Tasmanian waters. There was a quota and a license fee, but the fee varied with the size of the quota. The High Court found that such a fee