

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

was not an excise duty. Dawson, Toohey and McHugh JJ drew a distinction between ‘a price paid for the right to appropriate a public natural resource and a tax upon the activity of appropriating it’.⁵ The distinction is far from persuasive. Yet in an introductory text, the lack of persuasiveness must sadly pass without comment.

The tests for inconsistency between Commonwealth and State laws.

The three authors have not neatly segmented their tasks, and some overlaps do occur.

For example, there is a discussion in chapter 3 of the paramountcy of Commonwealth law authored by Keven Booker, and Chapter 13, which is authored by Arthur Glass, contains a more detailed analysis of section 109 and the doctrines of inconsistency as they have developed in Australian constitutional history.

The basic tests for inconsistency are neatly set out in chapter 3, and they are simply and clearly explained. Difficult concepts such as the effect of repeal of a Commonwealth law in reviving the enforceability of a State law that had previously been overridden are presented pithily. Yet it is only at the end of chapter 13 that the proactive use of section 109 to expand Commonwealth power is explored at all, and with no reference back to the role of the *Engineer’s* case⁶ as underpinning such an expansion. So, while each issue is described and analysed with clarity, there is a gap in the integration of the various chapters.

Appropriations and the AAP Case.

*The AAP Case*⁷ is discussed by Keven Booker in chapter 6 and by Robert Watt in chapter 7. The two discussions do not appear to be well integrated. Keven Booker concludes: ‘Perhaps the diversity of reasoning in the AAP case indicates that constitutional problems about appropriations are not readily susceptible to effective judicial review.’ Robert Watt dissects the six judgements, and like his colleague refers to the more recent case of *Davis v. Commonwealth*⁸ to suggest that the High Court has now provided a much clearer idea in relation to the difficult issues that concern the appropriations power. The two chapters are consistent with each other, but again there appears to be a lack of integration between the two authors.

Conclusion

Overall this is a very useful contribution to the analysis of Australian Constitutional law. It makes it accessible to an audience that wants to know without having to delve into the analytical depths required for thorough jurisprudential consideration of the cases.

Each chapter stands alone, and the quality of the authors’ thinking and writing is immediately apparent. However, the lack of integration across the three authors is a blemish that one can only hope the next edition will resolve.

Reviewed by David D. Knoll

- 1 (1951) 83 CLR 1, 258.
- 2 *New South Wales v. Commonwealth* (1990) 169 CLR 482,90 ALR 355
- 3 For a careful critique of such judicial euphemism see: J.Stone, *Precedent and Law* (1985) esp. at 53-54.
- 4 (1989) 168 CLR 314; 88 ALR 38
- 5 (1989) 168 CLR at 337
- 6 *Amalgamated Society of Engineers v. Adelaide Steamship Ltd* (1920) 28 CLR 129
- 7 *Victoria v Commonwealth & Hayden* (1975) 134 CLR 338
- 8 (1988) 166 CLR 79; 82 ALR 633

Equity and Trusts in Australia and New Zealand, 2nd Ed.

By G E Dal Pont and D R C Chalmers
LBC Information Services, 2000.

Equity and Trusts, Commentary and Materials, 2nd Ed,

G E Dal Pont, D R C Chalmers and J K Maxton LBC
Information Services, 2000

When Meagher, Gummow and Lehane’s *Equity Doctrines and Remedies* was first published, in 1975, the *Australian Law Journal* said that it ‘fills a gap in Australian legal literature, and does so with distinction. For the first time, we have a comprehensive Australian text-book on equity, incorporating all the relevant Australian case law, and referring also to the pertinent statutory provisions.’ In the succeeding twenty five years a series of further books on equity have appeared. The first edition of *Equity and Trusts in Australia and New Zealand* arrived in 1996; this, the second edition, just four years later.

Inevitably, *Equity and Trusts in Australia and New Zealand* covers much of the same ground as *Meagher Gummow & Lehane*, at least in so far as it deals with equitable doctrines and remedies.

The history and maxims of equity are dealt with concisely, in a brief opening chapter. The following chapters deal with equitable interests in property, relationships of trust and unconscionable conduct. Part V is headed ‘Unfair Outcomes’, and deals with part performance, relief against forfeiture and penalty clauses, subrogation, contribution and marshalling, and deceased estates. The main equitable defences and remedies are examined in the concluding chapters.

As noted in the preface, there have been many developments in the area since the first edition in 1996. The chapter on unconscionability, for example, sets out the developments in respect of the rule in *Yerkey v Jones*, with a detailed discussion of *NAB v Garcia*. Statutory initiatives including the *Consumer Credit Code* are considered. When it comes to injunctions there is a separate chapter dealing with Mareva and Anton Pillar orders, with a useful analysis of *Cardile v LED Builders Pty Ltd*.

In respect of trust law *Equity and Trusts in Australia*