

and *New Zealand* again, inevitably, covers much of the same ground as some of the other standard texts, particularly *Jacobs' Law of Trusts*. The nature of a trust, the requisite certainties and the requirements as to form are all considered. Separate chapters deal with discretionary, charitable and resulting trusts. There is a particularly useful chapter on superannuation which includes an analysis of the legislative regulation of superannuation in both Australia and New Zealand. Constructive trusts are dealt with as one of the equitable remedies.

The authors of *Equity and Trusts in Australia and New Zealand* have set themselves a demanding task: to describe all equity and trust law, case law and statute, in both Australia and New Zealand. It is convenient to have all this in the one volume. The price of the convenience is brevity. To take one example, the vigorous debate in respect of those cases which have taken a more expansive approach to equitable set off, as compared with what *Equity and Trusts in Australia and New Zealand* calls 'classical equitable set off', is confined here to a footnote.

Still, readers wishing to research an issue in more depth are directed where to go. *Equity and Trusts in Australia and New Zealand* is a comprehensive and accessible addition to the legal literature in this area.

The companion volume is a casebook, and consequently may be of more interest to the student than the practitioner. Extracts of cases are followed by detailed questions, and points for law reform. Usefully, the organisation of parts and chapters conforms to that of the main volume. Because of this the casebook will be of particular interest to those students studying equity and trusts through the main volume.

Reviewed by Jeremy Stoljar

Media Law and Commentary Materials

By Sally Walker
LBC Information Services, 2000.

In the forward to this publication, Sally Walker notes that over a decade has past since her last book, *The Law of Journalism in Australia* (LBC) was published. The considerable size and scope of this work is a reflection of the profound changes and explosion of activity in the field of media law during this period and a comprehensive one at that.

The author states that the book, while described a compendium of 'commentary and materials', was prepared not only with students in mind but was aimed more broadly at practitioners, media organisations and journalists. To this end she has achieved her objective. While the latter may hesitate before dipping into this work given that its orientation is clearly towards a legal audience, the book is nevertheless accessible enough so that those who do not possess a background in the law

can nevertheless make use of the information contained within it. For lawyers, the book is an excellent resource for those who do not profess to be specialists in this field. It marries contemporary commentary with relevant legislation, case extracts and secondary materials in an altogether harmonious fashion thereby providing a convenient initial 'one stop shopping' facility for those who are unsure as to where to commence their researches. For both students and lecturers, the publication will undoubtedly become an invaluable teaching tool given its breadth, its depth and its clarity.

The book is structured into seven parts dealing with all of the topics that one would expect in a publication bearing the name Media Law, viz, defamation and related actions; the reporting of events in the courtroom and in the Parliament; the publication of offensive material; the protection of intellectual property, the protection of privacy and the regulation of broadcasting, print and electronic media.

The layout of the book is clear and simple, enabling ease of navigation. The index to the book, for example, is sufficiently pithy to allow a reader to find with haste the topic to which their inquiries are directed. Equally helpful are the contents pages to each part and the detailed cross-referencing to other sections of the book. The table of statutes is also extremely useful.

In short, this practical and informative casebook will greatly assist practitioners and non-practitioners alike and given the lacuna that presently exists in respect of publications of this genre in this area of the law its release is timely.

Reviewed by Rachel Pepper

Trade Mark Law in Australia

By Brian Elkington, Michael Hall and David Kell
Sydney, Butterworths, 2000

There has, for some time, been a pressing need for a textbook on Australian trade mark law which deals with the *Trade Marks Act 1995*. This book to a large extent fills that gap, and will be of considerable assistance to practitioners in the area of trade mark law.

The book takes the form of an annotated *Trade Marks Act 1995*. Usefully, it also contains the Regulations, although not annotated.

The commentary is, on the whole, accurate, informative and concise, and provides a convenient starting point for analysis. It does, however, supply far less detail than the existing texts in the area such as *Shanahan Australian Law of Trade Marks and Passing Off*, and practitioners will need to go to other sources to obtain all relevant authorities or to analyse particular problems.

Like most works in the form of annotations, the book is somewhat difficult to use as a textbook: commentary on the one topic or on closely related topics is spread

throughout the Act. The disadvantages are to a certain extent overcome by frequent cross-referencing to other paragraphs of the text. Notwithstanding this, the text repeats many sections of commentary, sometimes in identical terms and sometimes in different terms. For example, commentary on ‘deceptive similarity’ is to be found in paragraph 10.10, 44.10, 60.10 and 120.20, and the commentary in these paragraphs is provided in terms which are overlapping but different. The reader, in order to be informed of everything the authors have to say on the subject, would have to go to each of these sections, which is inconvenient. It would seem more sensible to have one (more lengthy) discussion of each topic with appropriate cross-references in other locations.

A further problem is that the extent of cross-referencing is not uniform throughout the text: some paragraphs dealing with part of a topic are not cross-referenced to other paragraphs dealing with the balance (for example, paragraph 120.30 does not refer to paragraph 44.15, which contains more detail).

The text draws useful comparisons with provisions of the 1955 Act. However, it largely omits to identify the extent to which the new Act codifies the existing authorities, which is a matter of importance when considering the extent to which the existing authorities assist in construing the new Act. Simply by way of example, no mention is made in the commentary to s120 of the significance of the addition of the words ‘uses as a trade mark’. Likewise, s60 is stated, in paragraph 60.05, to effect a substantial expansion of the circumstances in which an application can be opposed, which is a doubtful proposition and one which is likely to promote confusion in interpreting the previous authorities.

While the brevity of the commentary is in most respects an advantage, in some cases the text is too brief and omits significant matters. Some of these omissions are discussed in the following paragraphs, again merely by way of example.

The commentary on ‘fair notional use’ in paragraph 60.15 fails to identify the important distinction, drawn for example in *Smith Hayden & Co Limited’s Application* (1946) 63 RPC 97, between the test in s60 (involving a comparison between the ‘normal and fair’ manner of use of the mark applied for and the prior use and reputation of the opponent’s mark) and the test in s44 (involving a comparison between the normal and fair manner of use of the mark applied for, and the normal and fair manner of use of the opponent’s registered mark). Nor, in this context, is there a reference to the decision of Lindgren J in *Garden Overseas Pte Limited v The Garden Co Limited* (1994) 29 IPR 485.

The treatment of the issue of ‘deceptive similarity’ in general is somewhat too brief and inconclusive. For example:

The text fails to refer at all to the important cases of *Australian Woollen Mills Limited v E.S. Walton & Co Limited* (1937) 58 CLR 641 and *Sym Choon & Co Limited v Gordon Choons Nuts Limited* (1949) 80 CLR 65 at 78, or the cases of *Polo Textile Industries Pty Limited*

v Domestic Textile Corporation Pty Limited (1993) 42 FCR 227 and *Marc A. Hammond Pty Limited v Papa Carmine Pty Limited* (1976) 2 NSWLR 124.

The commentary on the decision of the Full Court of the Federal Court in *Registrar of Trade Marks v Woolworths Limited* (1999) 45 IPR 411 (paragraph 44.10) is confusing, in that it cites the relevant test from *Southern Cross Refrigerating Co* and then suggests that the Full Court rejected a direct application of this test to a question of registrability. The Full Court did no such thing: it applied the very test set out, and merely observed that it was to be applied in light of the change of onus which results from s33 of the 1995 Act.

The text does not refer in any detail to the importance of aural comparison. Nor does it deal certain other factors considered in recent authority, such as the human tendency to recall the particular rather than the general (*Sports Cafe Limited v Registrar of Trade Marks* (1998) 42 IPR 552, how the mark might be used informally and the Australian tendency to shorten expressions (*Sports Cafe*), whether one of the words has ‘aural prominence’ (*Woolworths Limited v Registrar of Trade Marks* (1998) 42 IPR 615, and whether the word is ‘familiar to Australians’ (*Woolworths Limited* at first instance and on appeal).

The issue of whether a mark is, or is required to be, used in Australia is dealt with sparingly. The important case of *WD & HO Wills (Aust) Limited v Rothmans Limited* (1956) 94 CLR 182, (1956) 1B IPR 511 is cited only as support for the short proposition: ‘It must be trade in Australia’. No mention at all is made of the case of *The Seven Up Company v O. T. Limited* (1947) 75 CLR 203.

Section 43 of the Act, and in particular the extent to which deceptively similar marks can remain on the register, is discussed in very brief terms. It may be that the authors were deliberately restrained in that regard, anticipating the decision of the High Court in *Campomar Sociedad Limitada v Nike International Limited* (2000) 74 ALJR 573.

While no text, particularly a text in the form of annotated legislation, can deal with all relevant authorities, the omissions referred to above are peculiar, particularly in light of some of the material which is included. For example, a lengthy passage from the decision of the hearing officer in *Re Aussat Pty Limited* (1993) 27 IPR 309 is reproduced twice, in paragraphs 44.15 and 120.20, and paragraph 120.40 quotes at length from a South African decision.

Notwithstanding these minor criticisms, the text is a very useful reference source and practitioners in the area would be well advised to obtain a copy.

Reviewed by Cameron Moore