

The arbitrators' companion

by Geoffrey Gibson
Federation Press, 2001

This book, as its title suggests, has been written principally to provide an introduction and guide to law for arbitrators. It is divided into five parts.

Part 1, headed 'The law relating to arbitration' provides a useful conspectus, both for lay arbitrators and also for lawyers seeking an introduction to the topics covered, of the various stages and particular principles relating to arbitration. As the author acknowledges, matters dealt with in this Part are themselves the subject of specialist texts which necessarily contain a far fuller discussion of the principles. As such, the book does not claim, and rightly so, to provide an authoritative or exhaustive discussion of topics such as international arbitration, applicable law, jurisdiction or stays of court proceedings in favour of arbitration, domestic or international.

Although the text does make reference to some recent Australian and English decisions on topics relating to arbitration, there are at least three recent important intermediate appellate Australian decisions, the failure to refer to which is somewhat surprising. *Francis Travel Marketing v Virgin Atlantic Airways* (1996) 39 NSWLR 160 deals, inter alia, with questions of the scope of arbitration clauses and whether, for example, a Trade Practices Act claim may be referred to international arbitration. *Hi-Fert Shipping Pty Limited v Kuikiang Maritime Carriers Inc* (No. 5) (1998) 90 FCR 1 was a decision of the Full Court of the Federal Court dealing also with questions of scope of arbitration clauses, in a manner which went somewhat against the 'one-stop shopping' trend referred to on page 25 of the text. It also considered the constitutional validity of the *International Arbitration Act 1974* (Cth) and raised doubt, obiter dictum, in arguable tension with the decision of the Court of Appeal in *Francis Travel*, as to the validity of an arbitration clause referring a Trade Practices Act claim to an international arbitration. Nor did the text refer to *Raguz v Sullivan* (2000) 50 NSWLR 236, an Olympics case concerned with the Court of Arbitration for Sport, which contains an extensive and learned discussion by Spigelman CJ and Mason P of both the

Commercial Arbitration Act 1984, the notion and significance of the seat of the arbitration (*locus arbitri*) and appeals from awards.

Part 2 of the text headed 'The practice of arbitration' provides a brief overview of the main procedural steps of an arbitration, together with a worked example or case study designed to illustrate in a practical way the time line of an arbitration from the inception of the dispute to the completion of the award. The text, however, provides very little discussion indeed, even by way of overview, of principles relating to the enforcement of awards.

Part 3 of the text is entitled 'Elements of law for arbitrators'. Again, as its title suggests, this aspect of the book is particularly directed to lay arbitrators. It provides a necessarily brief overview of the following topics: the Australian legal system, contract, discovery, equity, estoppel, evidence, interpretation, misleading and deceptive conduct, natural justice, negligence, pleadings, privilege and restitution. This, in 60 pages, may provide useful introduction to lay arbitrators. It would be alarming, however, if it was of value to practitioners. In fairness to the author, it is not directed to them. In similar vein to Part 3 is Part 4 of the book, headed 'Glossary of legal terms for arbitrators'. Again, this is likely to be a principal value to lay arbitrators rather than legal practitioners.

Part 5 of the book, headed 'Sources of law for arbitrators' contains reprints of the *Commercial Arbitration Act 1984* (NSW), the *International Arbitration Act 1974* (Cth).

Whilst the text of the book runs to 248 pages, what appeal it may have to a practitioner wishing to inform him or herself in a general and introductory way of the framework of arbitration lies in the first quarter of the text.

Reviewed by Andrew S. Bell

Lumb & Men's The Constitution of the Commonwealth of Australia (Annotated 6th ed)

By Gabriel A Moens and John Trone
Butterworths, 2001

Firstly, it must be acknowledged that this edition marks the death of one of the original authors of this text, namely, Professor Darrell Lumb. One of the seminal legal writers on Australian constitutional law and indeed whose text *The Constitutions of the Australian States* (first published in 1963) has no rival, his passing will greatly lamented amongst academic and practicing public lawyers alike.

Secondly, to be frank, it is difficult to say anything very original about this celebrated annotation. Since its initial publication in 1974, this text has unfalteringly provided practitioners and academics alike with the essential commentary and case law required to navigate one's way through the Constitution. There are, of course, weightier tomes on the market but none that have consistently presented themselves in such a concise and yet relatively comprehensive fashion.

It is of course no mere coincidence that (judging by the book's cover, aphorisms aside) the 6th edition has been published during the centenary of federation. In this regard it was somewhat disappointing to see less, rather than more, material in the 'Introduction' on subjects such as 'Relations With the United Kingdom' and the complete excising of all commentary on the *Australia Acts 1986* (UK and Cth).

However, the sixth edition is a fully revised edition referencing most of the recent developments in constitutional law since 1995. For example, there is now a discussion of proportionality in light of decision in *Leask v Commonwealth* (1996) 187 CLR 579. Chapter I has undergone significant revision, incorporating many of the cases concerning representative democracy and responsible government, including implied freedoms. For example, *McGinty v Western Australia* (1996) 186 CLR 140, *Kruger v Commonwealth* (1997) 190 CLR 1 and *Lange v Australian*

Broadcasting Corporation (1997) 189 CLR 520. Equally, there is mention in Chapter I of the plethora of new decisions concerning the Commonwealth legislative powers contained in s51 of the Constitution. Cases such as *Victoria v Commonwealth* (1996) 187 CLR 416 (on the legislative implementation of treaties) and *Kartinyeri v Commonwealth* (1998) 195 CLR 337 (on the races power).

Chapter III contains a pithy discussion of the recent rush of decisions concerning the judicial power of the Commonwealth. As one would expect, reference is made to the important decisions of *Kable v Director of Public Prosecutions* (NSW) (1996) 189 CLR 51 and *Re Wakim; Ex parte McNally* (1999) 198 CLR 511.

Likewise, Chapter IV on finance and trade outlines the changes effected to s90 in light of the decision in *Ha v New South Wales* (1997) 189 CLR 465, whilst Chapter V's discussion on 'The States' has been expanded in line with the developments to the Cigamic doctrine as a result of *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410.

The structure of the text is clear and in addition to the standard table of cases, the annotation has a useful table of statutes and an extremely useful table of constitutional provisions for quick access and reference.

The only criticism, and it is not perhaps the fault of the authors', is that curiously the currency of the content of the text is as at 1 January 2000. Thus nearly two years later and the book is already a little out of date. For example, omitted is any reference to *R v Hughes* (2000) 171 ALR in the chapter on judicial power.

This complaint aside, the annotation is nevertheless commendable. It will prove to be an invaluable acquisition for those who only occasionally have recourse to constitutional law in their practice and an essential complement to the constitutional libraries of those who are more conversant with this field of law.

Reviewed by Rachel Pepper.

Architects, engineers and the law (3rd edition)

By J R Cooke
The Federation Press 2001

I am not sure what to make of this book. In many ways it is good, but ultimately it may be too complicated to be useful.

When I commenced to read the book I was negative toward it, thinking it would be no more than a non-lawyers book, perhaps to be used as a text in some introductory course to the law for non-lawyers. But the book is much more than that. In the first place there are the remarkable qualifications of the author, Dr Cooke, who holds bachelors degrees in architecture and law, a masters degree in building science and a doctorate in architecture. Dr Cooke is described as a chartered architect, a solicitor and an arbitrator. The scope of the book is ambitious: it commences with an introduction to the legal system, and then proceeds to touch upon a remarkably diverse group of subjects - contract, tort, trade practices, agency and employment, damages, limitation periods, defamation, copyright and the professional conduct of engineers and architects. There is an extensive section on matters relating to particular building contracts as well as planning and environmental issues. There are even specific sections on, for example, waiver, quasi-contract and equitable estoppel.

I think the book tries to do too much: it is very detailed which is obviously the product of an enormous amount of research. The author constantly refers to decisions of courts and tribunals, not just in Australia, but cases decided in the UK, Canada and America. In fact, this probably constitutes the downfall of the book, which ultimately fails to identify principles, preferring to refer to all sorts of decisions from all around the world. In this context it is irresistible to mention that Dr Cooke cites, as authority for the proposition that foreseeability alone is inadequate to establish the existence of a duty of care in tort, the case of *Crochet v Hospital Service District No 1 476 So 2d 516 (1985)* - a decision of the Court of Appeal of Louisiana.

By trying to do too much, some fundamental things get lost. For example, although the book (which was published in

June 2001) has a section on contributory negligence, *Astley v Austrust Ltd* does not get a mention. And although issues of the availability of pure economic loss are discussed, *Perre v Apand Pty Ltd* is missed altogether. While the *Trade Practices Act 1974* (Cth) must have a significant impact on the liability of architects and engineers, the whole matter is covered in less than three pages.

For the general lawyer I would hesitate before recommending Dr Cooke's book, but it is not possible to simply dismiss it, as it does constitute, at least for a person interested in construction law, an invaluable list of decisions with a construction-bent. This is especially so in the second half of the book, much of which deals with specialist matters relating to particular building contracts - the interpretation of particular clauses and so forth.

Reviewed by Geoffrey Watson