"decision to which this Act applies" in section 3 of the Administrative Decisions (Judicial Review) Act 1977 (Cth) so that the considerable benefits created by that Act and, in particular, the right of a person to obtain reasons for a decision under section 13, would then apply to administrative decisions made by the Governor-General in Council. The present exclusion of such decisions was framed at a time when it was assumed that the limitations which governed the exercise of administrative powers did not apply to the exercise of such powers when they were vested in the Crown's representative.

11 [1977] Q.B. 643, 705.

12 Note 8 *supra*, 184.

13 Note 3 *supra*, 83-4. The asserted non-justiciable legal duty of the Governor-General to dismiss Ministers who cannot secure supply from both Houses of Parliament, on the other hand, seems to involve a further and different use of the term not adverted to in the text above. It seems to assume the existence of some "legal" duties the performance of which is not enforced by a court of law.

14 *Official Record of Debates of the Australian Constitutional Convention* (Adelaide, 1983) 243 and 294-5. The relevant proposed conventions were Practices 20-27 and 31.

15 The proposal discussed by Dr Winterton subsequently became known as the Constitution Alteration (Fixed Term Parliaments) Bill 1982 (No. 441) and it underwent some changes before being passed by the Senate on 17 November 1982. For a further analysis of the objections raised against the proposal before it was passed by the Senate, see the analysis by Senator Evans: *Parliamentary Debates (Senate)* 348-354 (19 August 1982) and 2015-17 (28 October 1982) especially in relation to the operation of the proposal if the Senate retained its power to withhold supply. Standing Committee D of the Australian Constitutional Convention published as a separate document all the papers relating to the proposal including the parliamentary debates in the Senate, the relevant bills and the entries in the Journals of the Senate (February 1983). The present federal Labor Government was committed to the introduction of a fixed term proposal following its election in March 1983 but it was unable to obtain the support of the Australian Constitutional Convention at the meeting held in Adelaide in April of the same year: see *Official Record of Debates of the Australian Constitutional Covention* (Adelaide 1983) 150-52 and 179. Notwithstanding the failure to obtain that support the same Government later introduced in the Senate the *Constitutional Alteration (Fixed Term Parliaments) Bill* 413, 421-5 (12 May 1983). That measure was substantially the same as the 1982 Bill passed by the Senate but the Government subsequently decided to postpone debate on the measure and later succeeded in having the Bill withdrawn apparently because it was felt that it had not attracted the degree of cross party support which was necessary to ensure its success at a referendum: see *Attorney-General's Press Releases* dated 24 May and 22 August, 1983 respectively and also *Parliamentary Debates (Senate)* at 00.824, 827, 832-833 (21 September 1983).

16 Although not quite germane to the problem it is interesting to note that in *Wrathall* v. *Fleming* [1945] Tas. S.R. 61 it was held that the exercise of a statutory power vested in the Governor alone was valid even though the Governor had acted on the advice of the Executive Council. The relevant provisions expressly defined a reference to the Governor to mean a reference to him alone and not the Governor acting with the advice of the Executive Council. The case involves the reverse of the problem raised by Dr Winterton.

17 Note 3 *supra*.

18 Quoted in M. Harris and J. Crawford, "The Powers and Authorities Vested in Him" (1969) 3 *Adelaide Law Review* 303, 311. See also L. Zines, *The High Court and the Constitution* (1981) 202,203-204 and D. O'Brien, *The Powers of the Governor-General to Dissolve the Houses of Parliament* (unpublished A.N.U. LL.M. thesis, 1982) 66-75.

19 See also the discussion by D. O'Brien, *id.*, 47-65.

20 *E.g.*, note 158 at page 214 and note 203 at page 237.

The Torrens System in Australia, by D.J. WHALAN, LL.M.(N.Z.),Ph.D.(Otago), M.I.Env.Sc., Barrister and Solicitor of the High Court of New Zealand and of the Supreme Court of the Australian Capital Territory, Professor of Law, Austraian National University. (The Law Book Company Limited, Sydney, 1982), pp.i-lxvii, 1-410 with Table of Statutes, Table of Cases and Index. Cloth recommended retail price $32.50 (ISBN 0 455 20357 1). Paperback recommended retail price $22.50 (ISBN 0 455 20358 X).

Easements and Restrictive Covenants in Australia, by ADRIAN BRADBROOK, M.A.(Cantab), LL.M. (Osgoode Hall), Ph.D.(Melb.), Reader in Law, University of Melbourne and MARCIA A. NEAVE, LL.B.(Hons)(Melb.), Senior Lecturer in Law, University of Melbourne. (Butterworths Pty. Limited, Sydney, 1981), pp.i-xiv), 1-422 with Table of Cases, Table of Statutes and Index. Recommended retail price $48.00 (ISBN 0 409 30048 9).

Those who are familiar with the writings of Professor Douglas Whalan on the Torrens systems of Australia and New Zealand will not be surprised that he has now produced an excellent volume covering all aspects of the Torrens system in Australia. The book explores the history and development of the Torrens system as well as its present operation in Australia. It examines the way initial registration of land is effected (Part III), the Register and its contents, the process and the effect of dealing with Torrens system land as well as the protection of interests both before and after registration.

Dealing as it does with all eight Australian jurisdictions, the book encompasses a wealth of information and provides many informative comparisons. Inevitably this comprehensiveness raises some problems. At times the litany of statutory provisions can be distracting, obstructing the development of ideas and impeding the flow of the language. Unavoidably (at least in a work of one volume) some explanations lack the detail that Professor Whalan could surely have supplied. For instance, in Chapter 23, which deals with the nature and extent of indefeasibility, the exception (common to all jurisdictions) in favour of short-term leases, is given only scant treatment. The New South Wales exception is given barely eight lines of text. There is no explanation of the provision in section 42(1)(d)of the Real Property Act 1900 (N.S.W.) that a short-term lease constitutes an exception to the indefeasibility of title of the registered proprietor only if before he became registered as proprietor he had "notice against which he is not protected". That this is a reference to section 43A of the same Act is not explained either in the above mentioned chapters or in the discussion of section 43A on pages 275-278.

Professor Whalan's great strength in this book is his overall view and solid understanding of the Torrens system, and in particular its interaction with the system of conveyancing which it replaced. For example, in Chapter 13 the potential conflict between section 26(1) of the Conveyancing Act 1919 (N.S.W.) and section 100(1) of the Real Property Act 1900 (N.S.W.) is considered. Professor Whalan suggests that the problem is illusory and that there is no inconsistency between the two sections. Without the benefit of reference to the decision of Hutley J.A. in *Hircock* v. *Windsor Homes (Development No.3) Pty. Limited*[1] he comes essentially to the same conclusion, which is that persons who are registered as joint proprietors of Torrens title land have by virtue of section 100(1) the same rights as if they were joint tenants at common law. That is, as Professor Whalan says

> if the Register discloses that two or more persons are registered as joint proprietors without more, then (a stranger) can deal as if they are joint tenants. For example, if one dies, then the third party will be entitled to assume that the survivor is entitled to the whole of the interest by the operation of jus accrescendi. However, as far as the relationship between two or more registered

> proprietors is concerned, s.26...interpolate(s) a set of rules by which their relationship is to be governed. Under this the old equitable rule favouring tenancy in common and not the common law one favouring joint tenancy applies unless the case is within the exceptional cases in s.26...or evidence shows that the intention was otherwise (p.105).

One of the most interesting parts of the book is Chapter 3, where the interaction between the Torrens system and the general law is discussed. In only a few pages Professor Whalan outlines the difficulties in that interaction and, although he concludes that some of them can only be overcome by legislation, he suggests how the courts might develop a coherent and consistent approach to this relationship. Legislation of course has its own problems, for in all jurisdictions except perhaps Tasmania, there are some doubts concerning the relationship between the Torrens statutes and the general property statutes. Professor Whalan's solution, which would do much to resolve such doubts, is that the provisions which apply to Torrens title land and those which do not should be set out in two schedules to the general conveyancing or property statutes.

The problem of the relation between Torrens Statutes and the general law is nowhere more pressing than with unregistered interests. Although the courts had some initial hesitation, they early rejected the view that rights acquired pursuant to a contract for the sale of Torrens title land are merely personal and accepted such interests even prior to registration as proprietary. However, as Professor Whalan points out, the problem of the unregistered interest of a volunteer is far from resolved. After a brief outline of the controversy as to the effect of voluntary instruments prior to registration, he summarises the principles which may be extracted from the decided cases (pages 284-286). Thus it would seem that the donee has a right enforceable against the donor only if he acquires and retains control of an intact and registrable instrument. However, the judgment of Sir Owen Dixon in *Brunker* v. *Perpetual Trustee Co. (Limited)*[2] raises doubts whether the donee's interest is proprietary or merely personal. Professor Whalan suggests that the situation could be clarified by the enactment of legislation which, like section 200 of the Property Law Act 1974 (Qld), provides that the principles of *Milroy* v. *Lord*[3] as interpreted by Griffith C.J. in *Anning* v. *Anning*[4] should be applied. Thus a voluntary assisgnment of property would be deemed to be complete and a proprietary interest would have passed to the donee as soon as the donor has done everything that it is necessary for him to do to transfer the property regardless of what else has to be done by others.

It is in this context as well as in the discussion of section 43A of the Real Property Act 1900 (N.S.W.) that one regrets that Professor Whalan did not include a discussion of the circumstances in which an instrument may be described as "registrable". In particular, some guidance as to the necessity of having possession of, or access to, the certificate of title would have been helpful. It is clear that possession of a properly executed transfer and the relevant certificate of title gives one a registrable dealing.[5] It is also clear that, subject to the registrar's power to register a dealing, notwithstanding any error or ommission and to correct patent errors (relevant statutory provisions are set out at page 148), a properly executed transfer is essential for the dealing to be registrable. It is not clear, however, whether

the certificate of title is, or should be, similarly essential. Although as a matter of practice the certificate of title is required to be lodged with a dealing that is to be registered, there is power in all jurisdictions to dispense with the production of the certificate of title (page 82). The issue raises important questions concerning the status of the certificate of title and its place with the Torrens system. In discussing *J & H Just (Holdings) Pty. Limited* v. *Bank of New South Wales*[6] Professor Whalan comments that the case gives "an importance to the duplicate certificate of title that the Torrens system probably never intended... The decision downgrades the importance of a prospective dealer with land finding a clear Register; he must also find the duplicate certificate of title" (page 246). It would have been interesting to have been able to read professor Whalan's expansion on this rather tantalising reference to the status of the certificate of title. The matter is important in all jurisdictions, but particularly in New South Wales, where the concept of a registrable dealing is central to an appreciation of the protection afforded by section 43A.

In summary, this volume provides a broad, general survey of the Torrens system in all states, and a fruitful comparison of the various jurisdictions. It is particularly valuable for those who would understand the way in which the Torrens system interacts with the general law of property. Its deficiency is its failure to explore a number of interesting issues and complexities.

The other work to be considered here is Bradbrook and Neave's volume, *Easements and Restrictive Covenants in Australia.* This admirable book provides a much needed expositon of two difficult and very technical areas, again with reference to all Australian jurisdictions. The authors have each assumed responsibility for part of the book; Dr. Bradbrook for easements and Ms. Neave for restrictive covenants.

An outstanding feature of both parts of this book is the clarity of its argument and organisation. The nature and development of the law are explained with almost deceptive simplicity, yet the treatment is both comprehensive and profound. The authors admit in their preface that where a doctrine is regarded as well settled, they have referred only to representative decisions, although in more doubtful areas they have attempted to produce a detailed analysis of the case law, emphasising Australian rather than English authorities. As Sir Ninian Stephen suggests in his foreword, the book is not only a statement of the present Australian law but "it is also a study in the adaptation of complex bodies of law to the needs of a new community in a new environment and is an exercise in comparative law."

An instance of these features is the exemplary discussion in chapter 16 of both the common law and statutes concerning covenants in restraint of trade. The detailed analysis of the High Court decision in *Quadramain Pty. Limited* v. *Sevastapol Investments Pty. Limited*[7] brings out clearly the implications of the majority and minority views, particularly the difficulties inherent in those of the then Chief Justice, Sir Garfield Barwick.

Similarly, the explanation of equitable estoppel and equity of acquiescence in Chapter 2 and the discussion of equitable remedies in Chapter 18 provide an illuminating account of these difficult concepts. As noted in paragraph 204, much of the confusion has arisen because the courts themselves have confused the notions

of estoppel and acquiescence. The discussion which follows shows the extent to which these concepts are independent and also the way in which they overlap. As such, the account should be valuable to anyone generally interested in the development of equitable doctrines, irrespective of any interest in the rather specialised study of easements and covenants.

In a book which as a whole is notable for its clarity, the discussion in Chapter 17 of restrictive convenants and the Torrens system deserves particular mention. Part 5 of the Chapter, dealing with schemes of development and express assignment in New South Wales, manages to render even that notoriously difficult area comprehensible. It achieves this by a careful consideration of the relevant decisions in chronological order and a brief summary of the conclusions which can be drawn from them.

It is to be regretted that the authors did not devote rather more space to prediction or perhaps speculation as to the future development of those avenues of law with which the book is concerned. For instance, although there is, in part 3 of Chapter 1, consideration of the recognition of novel easements, a discussion of the possibility of extending the law to protect the access of solar heating devices to sunlight would have been valuable. This is an expanding area of interest as the use of such devices becomes more widespread. Of course, such problems should eventually be dealt with by statute, but in the meantime suggestions as to the best interim measures would have been welcome.

Indeed, there are other areas in which the reader could be given a little more guidance. For instance, reference is made in paragraph 108 to the "seemingly contradictory cases" *Wright* v. *Macadam*[8] and *Copeland* v. *Greenhalf*.[9] The issue in both is whether it is possible to have an easement where the grantee of the right is given exclusive use of the servient tenement. This raises a problem similar to that which sometimes arises in distinguishing between a lease and a licence. That is, there is ambiguity in the term "exclusive possession", which may refer to either the legal right of exclusive possession or the fact of sole occupation. In addition, as Dr Bradbrook points out in paragraph 107, "some forms of user inevitably involve the exclusion of the servient owner for short periods" and thus the question becomes one of degree. If there is a "significant restriction" on the possessory rights of the servient owner, the court will not recognise the right as an easement. In view of this eminently sensible conclusion it would have been helpful to have made quite clear that this issue of "significant restriction" explains the apparent contradiction between the two cases.

The earlier case of *Wright* v. *Macadam* was concerned mainly with the question whether a merely permissive (and therefore precarious) right could pass on a conveyance of the property by virtue of section 62 of the Law of Property Act 1925. This statute provided that every conveyance (the definition of which included a lease) "shall be deemed to include... all liberties, privileges, easements, rights and advantages... demised, occupied or enjoyed with..." the land conveyed. The court held that the permissive nature of the right was no bar to the operation of the statute so long as the right was of a type that was known to law. It was clearly held that the right of a tenant to use a shed belonging to the landlord "for the purpose of storing such coal as might be required for the domestic purposes of the flat .....

is a right or easement which the law will clearly recognise".[10] It would seem that the agreement did not envisage that the tenant would have sole use of the shed and therefore the question of exclusive possession was not an issue in the case. In other words there was no suggestion that there was an unreasonable restriction of the servient owner's possessory rights. The decision was only concerned with whether the statute had operated to include this right in the lease.

In *Copeland* v. *Greenhalf*, however, the issue of exclusive possession was squarely raised and carefully considered. Although the defendant initially claimed a lost grant he did not pursue this defence and the matter was dealt with solely as a claim under the Prescription Act 1832. The case concerned the right to store vehicles on a neighbour's land and in Upjohn J's view it amounted to "a claim to possession of the servient tenement, if necessary to the exclusion of the owner; or at any rate to a joint user, and no authority has been cited to me which would justify the conclusion that a right of this wide and undefined nature can be the proper subject matter of an easement".[11] Therefore the defendant could not succeed, as the right claimed was not known to the law and upholding the right claimed by the defendant would have imposed an unreasonable restriction on the plaintiff's use of her land. Similarly in *Grigsby* v. *Melville*,[12] Brightman J. dismissed the defendant's claim to an easement of storage in a cellar under the plaintiff's drawing room. It is clear that the claim was regarded as a totally unreasonable restriction of the plaintiff's enjoyment of her property. Brightman J. was clear that it would take "cogent authority or persuasive argument" to convince him that the conveyance should be so interpreted, even if such a right was possible at law. "A purchaser" he said "does not expect to find the vendor continuing to live mole-like beneath his drawing room floor".[13] But, as he said later in his judgment, "to some extent a problem of this sort may be one of degree".[14] This view is consistent with Dr Bradbrook's earlier conclusion that unreasonable restrictions will not be recognised as easements. This being so, the proposition that a decision of a superior court would completely resolve the problem seems optimistic. Only a series of decisions could indicate which restrictions courts are likely to regard as reasonable and which as unreasonable. A more definitive solution may be neither possible nor desirable.

These, however, are minor criticisms. The book's scholarly strength and clarity are enhanced by a comprehensive index and a table of statutes. It is a most welcome contribution to legal scholarship for students, scholars and practitioners alike.

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FOOTNOTES

1 (1979) 1 N.S.W.L.R. 501.
2 (1937) 57 C.L.R. 555.
3 (1862) 4 De G.F. and J. 264; 45 E.R. 1185.
4 (1904) 4 C.L.R. 1049.
5 See *Brunker* v. *Perpetual Trustee Co. (Limited)*, note 2 *supra*, 587, *per* Latham C.J., 603, *per* Dixon J.; *Scoones* v. *Galvin* [1934] N.Z.L.R. 1004.

6 (1971) 125 C.L.R. 546.
7 (1976) 133 C.L.R. 390.
8 (1949) 2 K.B. 744.
9 (1952) Ch 488.
10 Note 8 *supra*, 752.
11 Note 9 *supra*, 498.
12 (1972) 1 W.L.R. 1355.
13 *Id.*, 1360.
14 *Id.*, 1364.