

BOOK REVIEWS

DECLARATORY ORDERS. B P W Young. Butterworths, 1975. Pp lxiv, 205. Recommended retail price \$12.50.

Reading this book by Young brings home to one the attractiveness of the declaratory order as a form of relief, particularly in Administrative Law matters, but also in relation to other fields of law. Of Scottish origin, the declaratory order bears much of the hard-headedness and commonsense of the practical race that conceived it. Particularly where speed is the essence of relief and especially where litigation is only concerned with interpreting points of law, the declaratory order is a manifestly useful weapon in the lawyer's arsenal.

The attractiveness of this remedy has, however, apparently evaded the notice of New South Welshmen for the most part until 1965 when amendment to the laws concerning remedies made the declaratory order more readily available to litigants in that State. It would seem that the enthusiasm with which the remedy has been embraced in that jurisdiction has prompted Mr Young to undertake his assessment of the ways in which the order can be used. When passing judgment on this book it is as well to keep in mind that this was the context in which the book was written. For as the author explains in his Preface the book is presented as 'a practical guide to the scope of the declaratory action. It does not go into matters which may well delight the academic or the historian'. Mr Young's main task then appears to be to provide his fellow practitioners with a generous store of examples of the ways in which the remedy may answer the needs of litigants. It is in the multiplicity of cited instances that the book's value can be measured. It can fairly be said that the text provides a serviceable compendium into which the busy practitioner may delve to find some starting clues to aid him in solving some uncommon problem.

But having said that one cannot overlook the manifold shortcomings of the enterprise. In the first place Mr Young appears to have been beguiled by the heady atmosphere that has come with the early experiences of his fellow practitioners in their rush to embrace the remedy. Hence we find scattered throughout his text many current decisions of NSW judges involving use of the declaratory order, some

of which are admittedly of considerable interest. But in other instances, particularly where unreported recent cases are mentioned, a more discriminating approach might have led to a reduction in instances of limited and probably passing significance.

Again, it is well to remember that at the outset the author in the main is concerned to give a 'list of examples'; he makes no claim to be writing a definitive text on the subject. Accordingly it would be improper to criticise the book on the basis that it is largely descriptive rather than analytic in its approach. For the most part the text does not advance one's understanding of the judicial approach to the declaratory order to any great degree. Rather one is presented with a headnote approach to cases. This is usually sufficient to indicate the nature of a particular action, even though it may leave one in frustration on many occasions because it does not disclose the reasoning on which particular decisions are founded. It is not particularly informative, for example, to be told (para 1004) that 'In *Cormack v Cope* (1974) 3 ALR 419, some of the Justices of the High Court of Australia indicated that they did not agree with all that was said in the *Rediffusion* case'. The lack of analysis becomes apparent when one looks to the actual reasoning of the Justices in *Cormack's* case and discovers in a judgment such as that of Stephen J the *Rediffusion* case may have been misinterpreted anyway. But whilst one could tax Mr Young with an over-simplified approach it may be a little unfair to do so since he has made no pretence of indulging in any deep probe of even recent important decisions such as *Cormack's* case.

Accepting that the strength of the book lies in the fact that it brings together many disparate instances of the way in which declarations may provide redress, the book will be welcomed by practitioners who are initially puzzled when they first encounter the more uncommon kind of legal problems. To mention a few matters of contemporary interest, those interested in environmental challenges such as the recent Black Mountain litigation in Canberra, will be assisted by the cases listed in Chapter 5—and particularly para 507—which relate to the question of standing of private plaintiffs. In Western Australia recently legal action was taken in an attempt to have the internal rules of the National Country Party in this State subjected to judicial scrutiny. A practitioner called upon to advise whether such disputes are justiciable would be interested in para 402 which indicates that the courts are not inclined to interfere in such conflicts unless a proprietary right is involved. Similarly with respect to such matters as the litigation recently before the Supreme Court of NSW in relation to the

combining of various churches into the Uniting Churches of Australia, a practitioner advising on such disputes would find a useful starting point in paras 1011-1012. Finally with regard to the current University dispute about photocopying, one needs to keep in mind that the decision of Hutley JA in *Moorehouse v University of New South Wales* (1974) 3 ALR 1 (which was the latest decision available to the author at the date of publication) has now been affected by the High Court's judgment in the appeal on that case.

Technically, the book is open to a number of objections. There are many flaws in the text varying from the puzzling to the irritating. There is not room in this review to recount the bulk of such blemishes but a few examples should be mentioned.

In the first place there are occasions when the sequence of paragraphs is somewhat curious. The first part of Chapter 8 (dealing with discretion to refuse relief) serves as one illustration. Commencing with a section on discretion generally, the author then jumps for some peculiar reason to discretionary principles in South Africa, reverts to an examination of equitable principles, again sidetracks to Dominion decisions, turns next to alternative civil tribunals with jurisdiction, following this with a descent to 'specific cases' which the author then finds necessary to amplify by some 'further examples'. The sequence is disjointed to say the least.

In like manner there are some startling injections of subject matter in parts of the text where they appear to be out of place. Just as one example it is strange in Chapter 12, which concerns review of *judicial* decisions, to find a digression in para 1205 on the subject of *private* tribunals.

On other occasions the author puts forward a *non sequitur* such as that found in para 1102 where he says: 'An individual *may obtain* a declaration where he has sufficient interest in the matter, that an authority is bound to act in a certain way. *So* in *Oddenino v Metropolitan Water Board* (1914) 2 Ch 734, the plaintiff *unsuccessfully* sought a declaration that the defendant was duty bound to supply him with water at a certain rate.' (emphasis supplied.)

Inconsistency of approach is also apparent in relation to the author's treatment of case citations. Throughout the text the author usually includes case citations in the body of his writing. Yet for no apparent reason, he launches into an extensive and singular footnote at the bottom of page 106. Again in para 1002 there is an extensive list of cases cited in connection with particular Acts of Parliament; yet this appears to be virtually the only time this device is used in the whole

book. Whilst there is nothing intrinsically wrong with this, such sudden revelations add to the unevenness of the text. Such irritating features are not assisted when one encounters a number of mis-spellings. In para 108 for example it is strange to read that: 'The declaratory procedure was *sorely challenged*' (soon?). Similarly it is apparent that a matter in *res*, and not *raised*, *judicata* in para 114. Such slips do not compliment either the author or his publishers.

In the end result, one may conclude that the book's principal merit is as a legal roadmap, the main utility of which consists of sign-posting the multifarious aspects of declaratory orders. But even leaving aside the flawed character of its presentation, the book falls far short of a penetrating analysis of such a promising and increasingly relevant remedy. Perhaps the fault is one of overambition. Undeniably, the author has covered a vast amount of territory, but at a cost of failing to provide deeper insights and explanations of the way in which the remedy works.

P W J

REVENUE LAW IN AUSTRALIA. By Charles A Sweeney & J H Telfer. Butterworths, 1975. Pp 500. Recommended retail price \$15.00.

It is always easy for a reviewer, who is in the luxurious position of not having to do the work entailed, to sit back and say that if he were the author of a particular text he would have included more material of a certain kind, or, conversely would have deleted certain matters. One's overall impression after having read a book is therefore the most reliable guide to the book's value or success, rather than trying to evaluate it by enumerating various pluses or minuses. Having said that, my general impression of *Revenue Law in Australia* is a strong positive impression that this is a book which not only fills a gap in the need for a basic collection of tax law materials, but that it is also successful as a source of refreshment for the practitioner who wishes to cast his mind over certain areas of revenue law. Revenue literature is well served with texts which contain references to many authorities. It is rather rare however to be able to have actual judgments of the courts available for immediate reference.

As much as the reviewer might wish to leave his assessment there, it is nevertheless incumbent upon him to indicate some of the virtues and the vices which, at least to him, appeared to be present in this text.

For those who like to go back to tors, the book offers a black letter approach to law in that it lets the Judges speak for themselves through many well chosen extracts. The case materials cover a wide range which for the most part are well chosen and apt. In one instance, the *Esquire Nominees* case, the authors succeed in simplifying the complicated factual situation by aid of a diagram, a device which law texts are perhaps too reluctant to use. Whilst a proper emphasis is placed on judicial explanation of particular provisions the text nevertheless retains a practical emphasis which is evident in Chapter 5 in dealing with the collection and assessment of income tax. It is sometimes suggested that too much emphasis is placed on theories of liability whilst the machinery of collection is neglected. The authors have not failed in this respect.

Besides case law the authors include a wealth of statutory materials from the various tax Acts. This can be advantageous in relation to some of the more obscure provisions which are sometimes overlooked. For instance, of local interest is the inclusion of S.73 and 75 of the West Australian Stamp Act in the section on Gift Duties. It is sometimes overlooked that S.75 includes what is in effect a disguised form of gift duty.

But if anything it is the inclusion of such a wealth of statutory provisions that is the most questionable part of the book. At the outset, it seems fair to remark that the book would have been well served by the addition of an index of statutory provisions. Again the many pages of statutory materials could have been helped by more commentary. Such commentary as there is is to the point and easily digested. But nevertheless it seems fair to say that introductory remarks to various extracts from Acts would have contributed to a better understanding of the significance of those provisions. As it is, to be confronted with page after page of various sections is something rather overwhelming, though probably if they were broken up by the interpolation of relevant comments the authors would have drawn down upon themselves the criticism that their text is disjointed. Such is the dilemma of authors.

Of course there is a certain risk anyway in including legislative provisions. It is perhaps inevitable that these will be altered over time. This could be particularly so at the present moment when tax laws are being subject to close scrutiny and there is much talk of the virtues of such changes as rebates and indexation in income tax law, on the one hand, and the abolition or modification of death duties on the other.

By way of minor quibble, a constitutional lawyer might have included S.90 of the Constitution on page 1 relating to the Constitutional provisions affecting the Commonwealth and States. Again the reviewer thought that the authors were inclined to dwell too long on some minor points, such as the examination of those cases dealing with the question of where income is derived. Though a fascinating area, it is arguable whether fewer cases might have sufficed. In this regard one can appreciate the authors' dilemma in dealing with a case such as *Esquires Nominees* insofar as the relevance of that case has largely been superseded by subsequent statutory amendment.

Having said all this, however, the basic point remains that *Revenue Law in Australia* is a timely production which will aid in the teaching of taxation laws.

P W J

BANKER AND CUSTOMER IN AUSTRALIA. By G A Weaver and C R Craigie. The Law Book Company Ltd, 1975. Pp xxxiii, 817. Recommended retail price \$32.

This is an extremely useful book for anyone concerned with commercial law. There have been many developments in banking since the last work bearing this title appeared in 1947 and the authors of this edition have added a substantial amount of new material and rewritten large portions. The result is a very thorough and wide-ranging reference which is remarkable in that the material is presented in such a way that it should be accessible to students, commercial men and legal practitioners.

As the authors state in the preface, they have followed the pattern of earlier editions by including some outline material on basic legal concepts and a central core of material which is intended to be useful to the legal profession. The book commences with an introduction to the Australian Banking System and then deals with the banker-customer relationship, cheques and bills of exchange, securities for advances and letters of credit. In passing, the authors find time to mention everything from gold clauses to Euro-dollars. Almost inevitably, therefore, because the scope of the book is so wide there are passages where the exposition of the law is a little thin on the ground and in certain areas (eg assignments of choses in action) the reader would be well advised to turn elsewhere. However, to be fair, the authors are only too aware of this trap and signpost further references

where they are required. Their style is both helpful and practically orientated indicating the current practice as well as the law.

Some comparison with the leading authority in this field, *Paget's Law of Banking* is unavoidable. No doubt *Paget* will continue to be referred to frequently on matters of principle. The advantage which *Banker and Customer in Australia* has is that, of course, it is a specifically Australian work and deals with the many Australian cases and particularly, so far as comparison with *Paget* is concerned, with those on the constitutional basis of banking law. There have been many cases since 1947 but the authors have been thorough both in including the relevant ones and analysing the difficult ones.

The reviewer would recommend this book to practitioners in this area as one which would provide the solution to a good many problems or if not the solution, then at least the place where it might be found. Students on the other hand might find rather too much in the book to use it other than as a selective reference.

J A C

ASPECTS OF THE CORPORATIONS AND SECURITIES INDUSTRY BILL 1974.
By W E Patterson QC and H H Ednie. Butterworths, 1975. Pp 96.
Recommended retail price \$3.50.

Among the more contentious pieces of legislation that came before the Commonwealth Parliament during the Whitlam era was the Corporations and Securities Industry Bill 1974.

If it had passed Parliament (it was held up in the Senate) it would have not only had many commercial implications; it would also have had a considerable impact on lawyers. The election of the Fraser government might have been taken as the demise of the proposals for Federal intrusion into the area of corporate control. But recent ministerial pronouncements suggest that at least on some modest scale, the Commonwealth Parliament may soon have a modified version of the Labor proposals before it. For these reasons, it is appropriate that Patterson and Ednie should have produced a commentary on the 1974 Bill. The fact that all the features of that Bill may not be incorporated in any new laws does not detract from the need for informed comment about the novel propositions being promoted for company law reform.

Aspects of the Corporations and Securities Industry Bill 1974 is really a clause by clause report of the provisions of the Bill; the object

being to indicate the origin of various provisions and to highlight the relationship of individual provisions with other provisions in the legislation and elsewhere. Consequently, for the greater part, Patterson and Ednie are not concerned to go into any depths of analysis. This does not detract however from the usefulness of the book as a short introduction for those interested in the contemporary debate surrounding the legislation.

At various points in their commentary the authors mention and in some instances draw upon, the major sources and materials upon which the new company law legislation was to be based. In this regard considerable reliance is placed on the report of the Senate Select Committee on Securities and Exchange (usually referred to as the Rae Committee). This of course is entirely appropriate as it was the Rae Report which highlighted the need for new company legislation. In like manner when dealing with reports by directors and officers concerning interests and securities (p 19), the authors refer to the *Securities Exchange Act* 1934 of the US Congress which has provided a basic model for the provisions concerning that matter. Where appropriate (as at pp 50, 62-3) the authors also draw upon the Report of the Eggleston Committee (though that is often thought now to be somewhat dated). Further (for example at pp 50 and 60) useful material is also taken from the Explanatory Memorandum issued by the Attorney-General in relation to the Bill. In places (such as p 48) useful comparisons, or rather contrasts, are indicated between the provisions of the Bill and State legislation.

Beyond such cross-references, the authors do not indulge to any great degree in matters of conflicting legal interpretation. One exception to this is, however, the discussion at p 45 of the conflicting views concerning *Percival v Wright* [1902] 2 Ch 421 concerning the duty of directors in relation to their share transactions. The authors also spend some considerable time dwelling on the rather amusing facts of *Balogh v Crown Court at St. Albans* (1974) 3 All ER 283. In itself that case hardly justifies the two full pages devoted to it in regard to contempt proceedings that might arise in relation to the proposed Federal Commission but it is at least refreshing to find such a humorous digression in an otherwise serious text, where they allude to the 'uncouth insult' made in that case.

In relation to the important question whether the new Federal legislation was intended to extinguish existing State provisions the authors at p 5, merely report the statemen in the Explanatory Memorandum to the effect that the new provisions were intended to super-

sede existing State and Territory provisions. Since the date of writing, officers of the Attorney-General's Department in giving evidence to the Senate Select Committee appointed to consider the provisions of the Bill, have indicated that the Commonwealth Act certainly was meant to cover the field. It will be interesting to observe whether any renewed initiatives of the new Government will adhere to that intention.

Although many new views have been expressed concerning the legislation since the time when the authors wrote their book, their essay is still a useful guide to the specific provisions proposed. In their text the authors do not commit themselves to any entrenched position on the policy of the legislation but it is interesting to note that in their summary at the beginning of their book they do indicate their agreement in the need for a single administrative agency to oversight and administer the companies and securities industry in Australia.

P W J

