Book reviews

Editor: Angelina Gomez

THE BYERS LECTURES 2000-2012

The Byers Lectures 2000-2012, by Nye Perram and Rachel Pepper (eds), Federation Press, NSW, 2012, 314 pages + xxii tables: ISBN 9781862878518. Hardcover $125.

Sir Maurice Byers (1917-1999) was one of the leading barristers in New South Wales in the latter part of the 20th century. He was Commonwealth Solicitor General for many years. He was unlucky not to become a member of the High Court. He would and should have been appointed, but it would seem that political expediency meant that the post he should have had went to another.

The Byers Lectures were commenced in 2000 as a commemoration of Sir Maurice's distinguished career. The lecturers over the 12-year period have all been distinguished jurists. They include High Court Justices Brennan, McHugh, Gummow, Heydon, Gageler, and Spigelman CJ and Mason P from the New South Wales Supreme Court as well as Lord Phillips, Dame Sian Elias and eminent academics and counsel.

The present work is a collection of all 12 lectures (the 2003-2004 lecture covered two years). Each lecture is introduced by the editors (one a Federal Court judge, the other a judge of the New South Wales Land and Environment Court) with a two-page commentary, which does not always endorse the thrust of the paper being commented upon.

The final 26 pages of the book reproduce the text of three significant speeches made by Sir Maurice to the New South Wales Bar as well as the eulogy at his funeral delivered by Sir Anthony Mason and Tom Hughes QC's obituary printed in *The Australian*.

Acting Justice Peter W Young

FAULT LINES IN EQUITY

Fault Lines in Equity, by Jamie Glister and Pauline Ridge (eds), Hart Publishing, Oxford, 2012, 267 pages + 32 pages of tables: ISBN 9781849462198. Hardcover £71.

This is a handy book of essays in the general field of what New South Wales lawyers know as "Equity". For a seasoned campaigner in the field such as myself, one of the interests in the essays is how the next generation of lawyers is approaching the problems to which my generation had to find acceptable solutions for the community.

The majority of the contributors to the book are relatively junior academics teaching in the field of equity. However, there are exceptions, as Edelman J of the Western Australian Supreme Court and Mark Leeming SC have made substantial contributions and there are contributions from professors at Oxford.

What seems to have disturbed the editors is the way in which the currently prevailing views in New South Wales and the High Court about restitution and other significant topics differs so markedly from the law as laid down in England and New Zealand. The book has the tendency to say that the colonial lawyers should really respect more the scholarship of their betters in the old country and not try to think for Australia. (This is my reading of the overall content and my words.)

The book concludes with a chapter by two New Zealand solicitors entitled, "Thoughts on Equity in New Zealand and New South Wales", which reckons that New South Wales equity lawyers seem to consider that the only hope for New Zealand equity would have been if New Zealand had never been severed from New South Wales.

Although the book does tend away from the current mainstream thought in New South Wales, it is to be commended for the attitude taken to authority. Many books produced nowadays by legal academics tend to concentrate on curial decisions which support their views even if they derive from

the District Court of Ulan Bator, and distinguish those local authorities which do not support their arguments as of no value. That is not the case with the present volume. The authors almost invariably cite the ruling Australian authorities with respect.

Putting aside my prejudices for a while, it must be said that the various essays do contain very useful contributions to the thinking on key issues in equity. Subjects well covered include unjust enrichment, subrogation, assignment of future property, equitable compensation and constructive trusts.

As a co-author of the leading Australian book on mortgages (*Fisher & Lightwood*) for which I am with others preparing a new edition, I was particularly interested in Fiona Burns' essay, "Clogs on the Equity of Redemption: A Story of Changing Equitable Intervention". This provides a good coverage of the rise, development and more latterly, the deflation of this significant doctrine.

This book contains useful material on a number of problems that frequently occur before a court of equity and is a valuable addition to the library of practitioners in the field.

Acting Justice Peter W Young

INTERPRETATION AND USE OF LEGAL SOURCES – THE LAWS OF AUSTRALIA

Interpretation and Use of Legal Sources – The Laws of Australia, by Perry Herzfeld, Thomas Prince and Stephen Tully, Thomson Reuters, Sydney, 2013, 764 pages + cvii tables: ISBN 9780455230979. Softcover $139.95.

This work deals with the principles applying to the construction of the Commonwealth, State and Territory Constitutions; statutes; and subordinate legislation (including rules of court). It also covers the construction of international law in its application by Australian courts. It analyses the construction of private documents, with particular reference to contracts, deeds, wills and trusts. And it deals with the interpretation of judicial statements by examining the rules of precedent, the interpretation of orders and practice directions, and the operation of res judicature and issue estoppel.

The ambit of the work is thus wide – probably uniquely wide. That is its first striking feature.

Another striking feature is the skill with which the authors have managed to state the law in propositional style despite its occasionally controversial character. The work reproduces in book form Subtitles 25.1-25.4 of *The Laws of Australia*. The style of that work places a particular proposition at the start of each paragraph, and devotes the balance of that paragraph to justifications for its existence and illustrations of it. This technique assists the inexpert reader by offering firm footholds up the mountain. The technique also diminishes the tendency of other expositional techniques to meander indecisively from one consideration to another and back again, each being seemingly inconsistent and irreconcilable.

A third notable feature, which is related to the second, is that the work reveals the law to be clearer than is sometimes thought. The authors depart – not completely, but to a very substantial degree – from the technique of stating a large number of "canons of construction" which, on analysis, either are too vague to be useful or reveal a tendency to conflict. The authors were able to distil standard approaches among the modern judiciary. Those approaches are often misleadingly clothed in the guise of expressions like "aim", "intention" and "purpose". But they demonstrate that approaches supposedly discovered only by the superior enlightenment of modern judges have actually existed for a long time. An example is O'Connor J's supremely lucid but insufficiently pondered account of constitutional and statutory construction in *Tasmania v Commonwealth* (1904) 1 CLR 329 at 358-360. He presented that account, correctly, as entirely traditional and orthodox. Every word of it remains in substance an accurate account today. Most acceptable approaches to the common law rules for the construction of the Constitution and of statutes reflect it and correspond with it, even if the linguistic expression of the tests may differ. Take the application to a troublesome provision of the modern mantra based on "text", "context", "implications from context", "implications from structure" and "purpose". What is the "text"? The words in which the provision to be construed is expressed. What is the "context"? In part, the words in which the whole statute is expressed; in part, the mischief to

which the words apply; in part, the general legal environment (and the words in which it is expressed) in which the words to be construed are to operate coherently. What are the "implications from context"? Those things which are to be inferred from the types of language and mischief just referred to. What are the "implications from structure"? Those which are to be inferred from the language in which the provisions making up the structure are expressed. What is the "purpose"? That function which, against that background, it can be seen that the words to be construed are to serve.

What O'Connor J said about the common law rules of statutory construction has been to a limited extent overtaken by modern legislative provisions widening the courts' access to travaux préparatoires. But that is so only to a limited extent. The material receivable under that type of legislation was to some degree already receivable as part of a search for the mischief dealt with. Modern advocates of that type of legislation have thus falsely exaggerated its originality. To the extent that it was original, those advocates have exaggerated its utility. For how often does the searcher not find that materials which may or may not be usable in an inquiry into mischief are useless in every other way? An obscure statutory provision is usually matched by an obscure second reading speech, an obscure explanatory memorandum, and sometimes an obscure law reform commission report. The obscurity usually starts in the law reform commission report and is translated into the statutory provision. The statutory provision is then simply copied by the persons responsible for it when the explanatory memorandum is composed and the second reading speech drafted. Difficulties in statutory construction often arise because the problem created by the application of the statute to the circumstances confronting the parties in dispute was not foreseen, often understandably, by those responsible for preparing the legislation.

The authors' decision to include a section on the construction of judicial statements was unusual but wise. For the doctrine of stare decisis is both misunderstood and under-applied by intermediate courts of appeal. The fealty to their own decisions which they demand of trial judges having to decide points of law is not something they reciprocate in relation to other appellate authority in their own decisions on points of law. Nor is it widely understood that working out *what* a court said is a vital first step, which is distinct from inquiring into whether what it said was *binding*. A court cannot be taken to say anything by silence or by implication on a point if that point was never in issue between the parties, never agued by them, and not considered by the court – a proposition which was pithily and trenchantly expressed by Lord Halsbury, and which is as true now as it was in his day. Indeed, to deal with a different matter, it is not widely understood that even express statements by a court on a point lack authority if they are made in the circumstances described in the previous sentence.

There are, of course, quite a number of disputed points about construction. The authors do not see their role as being to charge into the thick of the fights about those points. They see their function as being to identify the existence of the fights and align the competing authorities. One example is the extent to which a single theory of interpretation can solve all problems of interpretation. Another is the use of surrounding circumstances in contractual construction. Another is the use of extrinsic materials in statutory construction. But the authors do treat with an air of scepticism – courteous, faint but unmistakable – some of the causes which have been agitated. One is the theory – a sort of Renanian plébiscite de tous les jours – that the legitimacy of the Constitution rests on the "maintenance (by acquiescence) of its provisions by the people" (*Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 171). Another is the theory that the validity of a law supposedly supported by one of the purposive legislative powers in the Constitution depends on whether it is "capable of being reasonably considered to be appropriate and adapted" to that purpose. Another is the theory that the validity of regulations made under a statute depend on the same test. So far as that lumpish and vague test is applied to the Constitution, does it not defer unduly to the legislature at the expense of the Constitution – a deference, of course, which is detectable in many modern constitutional decisions? And so far as that test applies to the validity of regulations, does it not defer unduly to the executive, which makes regulations, at the expense of the legislature, which conferred only a limited authority to make them? Is not the real question not whether something is *capable* of being adapted, but whether it actually *is*?

Although much that is now seen as modern has in fact existed for a long time, this work may be described as being "modern" in the sense that it concentrates on later binding pronouncements of Australian courts in preference to quite old authorities or non-Australian authorities.

This is a work not only of very wide range, but of very precise scholarship. It reflects deep thought. There are very few, if any, significant instances where what the authors say is not supported by the authority they cite. In some fields, the work rises beyond a guide to constructional principles. Thus what it says on constitutional interpretation has the status, to some degree, of a work on substantive constitutional law.

The 21st century has not lasted very long. But it can safely be said that this work is one of a small handful of outstandingly able books on Australian law produced so far this century. It is one of the few books of which it can be said, without hyperbole, that it really does need to be on every lawyer's shelves.

J D Heydon AC