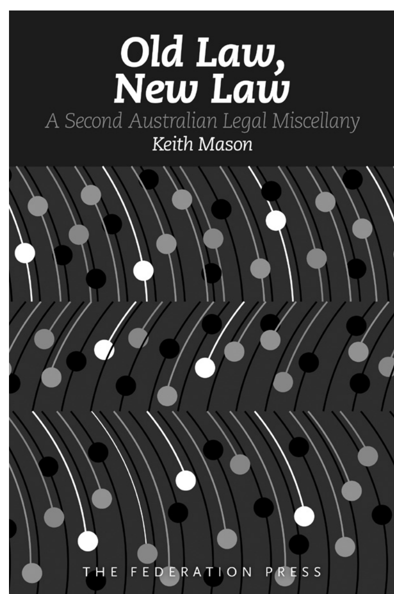
Old Law, New Law: A Second Australian Legal Miscellany

By the Hon Keith Mason AC QC | Federation Press | 2014



This kind of vast romp through more than two centuries of Australian legal and social history, its English precedents and comparative jurisprudence is done with Mason's characteristic brevity and good-humour.

Old Law, New Law: A Second Australian Legal Miscellany is a complement to Mason's earlier volume *Lawyers then and Now: An Australian Legal Miscellany* (Federation Press, 2012). It is a delightful read. With his deft combination of legal history, social commentary and ever-present appreciation of the humour in the historical record, Mason's style is part of the book's charm. So too is its integration of Australia's colonial past into key themes of Australia's (continuing) legal development. On this last point, *Old Law, New Law* fits within a welcome trend in recent legal scholarship to narrate, and recognise the importance of, the colonial and pre-Federation history of this country.[1]

Old Law, New Law is divided into five parts: 'Men and Women', 'Essentials of Life', 'Law's Ways and Means', 'Guarding Patches', and 'Public and Private Wrongs'. Unsurprisingly given the nature and content of this book, some common themes traverse these divisions.

For this reviewer, the exploration across at least three of these parts of the evolving relationship in Australia between the Executive and the courts was a particular highlight. Chapter 9 ('Appeal Courts') includes the story of the Tasmanian Executive Council in the 1870s assuming 'the non-existent powers of a court of appeal' and pardoning a person (Louisa Hunt) who had been convicted and sentenced to seven years' imprisonment for setting fire to a dwelling with intent to defraud her insurer. The attorney-general (an active member of that Executive Council) had been Louisa Hunt's defence counsel at trial. A scathing communication from the court to the governor followed, appealing (though not in terms) to principles resonating what has later become the constitutionalised separation of powers doctrine. In Chapter 13 ('The Rule of Law: Courts and the Executive') this theme receives more direct treatment, with particular focus on the Rum Rebellion of 26 January 1808, the open defiance by the Victorian Legislative Assembly in 1865 of the dictates of the Victorian Constitution Act and decisions of the Supreme Court that the imposition of a lawful tax requires the assent of both houses of parliament, and the stunning defiance by Sir Henry Parkes in 1888 of multiple decisions of the Supreme Court of New South Wales concerning the unlawful imprisonment of Chinese migrants. In Chapter 14 ('Exclusionary Conduct: Colourful Aspects of Constitutional Law') the tension between the Executive and the courts over the application of immigration laws in more modern times becomes the focus. That chapter, for example, narrates the story of the unsuccessful attempts by the Executive in 1934 (and specifically the newly appointed first law officer, Sir Robert Menzies KC) to exclude the Czech, Jewish and Communist Egon Kisch from Australian shores, and also the more recent skirmishes between the Executive and Chapter III courts over the repulsion, detention and offshore processing of boat people.

This kind of vast romp through more than two centuries of Australian legal and social history, its English precedents and comparative jurisprudence is done with Mason's characteristic brevity and good-humour. The same qualities of writing make equally enjoyable Mason's treatment of two other themes that run throughout this book, namely the pervasiveness of law and legal history to all aspects of Australian life, and the fallibility of law, practitioners, and even judges. The ribbing is (largely) gentle; the stories about practitioners – as someone else has put it – often too good not to be true. Whether picked up to be read from start to finish, or for dabbling here and there, it is a book worth acquiring.

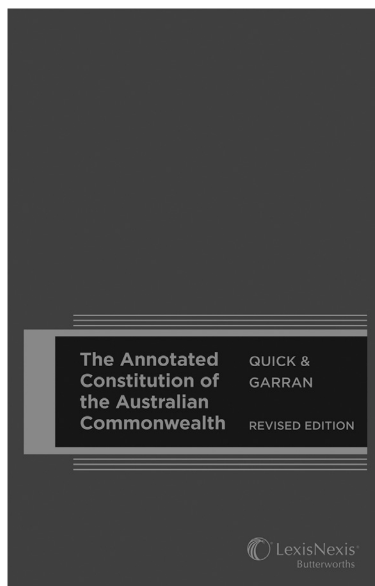
Review by Fiona Roughley

Endnotes

1. See, for example: Mason, *Lawyers then and Now – An Australian Legal Miscellany* (Federation Press, 2012); various chapters in Gleeson, Watson and Higgins (eds), *Historical Foundations of Australian Law* (Federation Press, 2013), Appleby, Keyzer and Williams (eds), *Public Sentinels: A Comparative Study of Australian Solicitors-General* (Ashgate Publishing, 2014) – see in particular the chapters by Mason and Hanlon.

The Annotated Constitution of the Australian Commonwealth (Revised Edition)

John Quick and Robert Garran | LexisNexis Butterworths | 2014



The original edition of this text was published over a century ago yet remains widely consulted and cited in constitutional law cases. It has now been published in a revised edition for the first time in some years. The text of the original work remains unaltered, but changes to the book's layout have been made and some useful additional features included.

Readers familiar with the work will be aware that it is divided into several parts. The first provides an invaluable historical introduction to the Constitution, covering ancient colonies, modern colonisation, colonial government in Australia, and the federal movement in Australia. Then follows a list of members of federal conventions and conferences, followed by the text of the Constitution as originally enacted. The bulk of the work consists of the original commentaries on each section of the Constitution, including references to the corresponding sections of other federal constitutions.

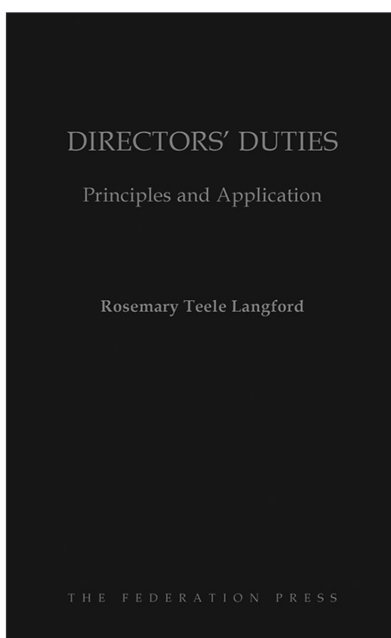
Features of the revised edition include the inclusion of a table of over 160 High Court decisions in which the 1901 edition has been cited, the text of the 2003 compilation of the Constitution showing all amendments in bold and ruled-through text, a new detailed index in addition to the original 1901 index, and the inclusion of the original 1901 edition page numbers in the margin of the commentaries for ease of cross-referencing to the original work.

This work remains a valuable addition to the library of any practitioner of constitutional law or enthusiast of Australian federation history.

Reviewed by Victoria Brigden

Directors' Duties: Principles and Applications

By Rosemary Teele Langford | Federation Press | 2014



The limited liability company has long been lauded as one of the law's most important inventions. It allows commercial people to take commercial risks – and bring rewards – that would be otherwise passed up. Over the years, there has been a growing focus on corporations being good citizens. This focus has brought with it an increasing array of obligations which are foist upon those who control companies: directors.

Directors are now subject to common law, equitable and statutory duties. These are augmented by guidelines such as the ASX's Corporate Government Principles and Recommendations and those promulgated by the OECD. Directors' personal liability has been clarified and expanded in several areas (including, effectively, guaranteeing certain of the company's taxation liabilities). Some argue that the volume of corporate regulation and the creeping personal liability of directors discourages qualified people from becoming directors and inhibits risk-taking.

The premise

In this book, Rosemary Teele Langford particularly explores the development of directors' fiduciary duties and the intersection of those duties with the statutory duties imposed by Part 2D.1 of the *Corporations Act 2001*.

Ms Langford's book is argumentative in that it seeks to rationalise the law concerning directors' fiduciary duties. The High Court case of *Breen v Williams*

Directors' Duties: Principles and Applications (Federation Press, 2014)

(1996) 186 CLR 71 marked a shift in Australian fiduciary theory. The court's insistence in the proscriptive (as opposed to prescriptive) nature of fiduciary duties has narrowed the scope of such duties considerably. Indeed, as Ms Langford demonstrates, academics and judges since *Breen* have often treated fiduciary duties as being limited to the 'no conflicts' and 'no profits' rules.

Ms Langford argues strongly against the limitation of fiduciary duties to being solely proscriptive. She states, with considerable force, that the director's duty to act bona fide in the interests of the company is the fundamental fiduciary duty from which other duties spring. This prescriptive (i.e. positive) duty seems to be excluded by *Breen* (which the High Court has followed since). Yet, the argument is so inherently attractive that it has found favour in intermediate appellate courts since (and in apparent disregard of) *Breen*.

The structure

Directors' Duties is structured in such a way as to bring the reader along as the argument builds momentum. After an introduction, the book sets out the history and jurisprudence of directors' fiduciary duties. It then outlines the jurisprudential shift since *Breen*. The following chapters examine particular fiduciary duties by which, Ms Langford argues, directors are bound. It must be acknowledged that certain of these duties are prescriptive in nature and therefore might be somewhat controversial. The book then devotes a chapter to the nature and characterisation of directors' duty of care, skill and diligence. The penultimate chapter is devoted to remedies. In particular, the author engages in a useful discussion of the differences between the remedies which flow from a breach of directors' statutory duties and the much broader array of remedies which a court of equity has at its discretion. The final chapter evaluates the Australian trend of jurisprudence against other jurisdictions, particularly the United Kingdom.

Conclusion

Directors' Duties is a monograph, rather than a textbook. It is clearly the result of a deep study of cases and academic writings on the subject. It is of great assistance in gaining an understanding of the modern evolution of fiduciary duties in general and those that relate to directors in particular.

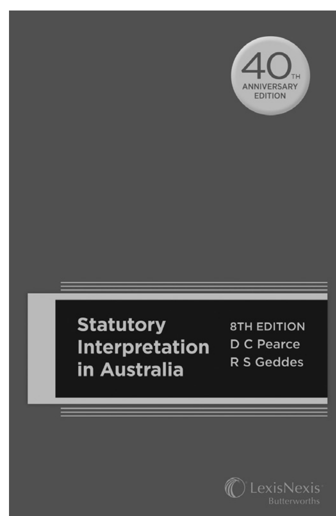
As persuasive as the book is, the reader must bear its argumentative nature in mind. The author is arguing for a more uniform, cohesive and rational treatment of directors' duties – particularly their fiduciary duties. This means that 'dipping in' to the book and reading only a section may paint a misleading picture of the law in the reader's mind.

Practitioners will find the author's discussion of fiduciary duties particularly useful as the remedial differences between a statutory and fiduciary breach may have significant consequences for their clients.

Reviewed by Nicolas Kirby

Statutory Interpretation in Australia (8th Edition)

By Dennis Pearce AO and Robert Geddes | LexisNexis Butterworths | 2014



It has been 40 years since the publication of the first edition of this book. Sir Garfield Barwick wrote the foreword to the first edition. Chief Justice Robert French wrote the foreword to this edition, the eighth. The present chief justice writes of the book's enduring utility to judges, practitioners, teachers and students alike. Its status as the definitive word on the approach to its subject is reflected in the sheer number of cases that reference it: according to Westlaw, more than a 1600 references in the period 3 October 1975 to 16 March 2015.

The first edition was published at a time of great legislative output in Australia. The Whitlam government was notorious for the volume of legislation that it passed. Such seminal instruments as the *Trade Practices Act 1974* (Cth), the *Family Law Act 1975* (Cth), the *Racial Discrimination Act 1975* (Cth) came into force at about this time. The need for a resource to tie together the various principles of statutory interpretation, both legislative and common law, was clear: as the authors note in the preface to this edition, Australian lawyers were forced to have recourse to the leading

Statutory Interpretation in Australia (8th Edition) (LexisNexis Butterworths, 2014)

English texts before the first edition was published. Since then, Pearce and Geddes has built a reputation as an indispensable resource for the approach of Australian courts to the interpretation of legislation.

The structure of the eighth edition does not differ markedly from that of the seventh edition. That is unsurprising as the previous edition contained a number of more substantial textual changes. The book continues to be arranged in such a way as to enable the reader to readily identify, by numbered paragraph, a particular principle of construction, in a particular context, while still allowing for a more comprehensive review of the principles governing various aspects of statutory interpretation. This makes the book easy to reference and to read.

Chapter 1 identifies introductory principles with a particular focus on how courts embark upon the task of statutory interpretation. Some explanation of the basis, structure and style of legislative drafting is also discussed here, as an introduction to the overview of drafting conventions and expressions in Chapter 12.

Chapter 2 lays down the basic common law and statutory principles of legislative interpretation, including the application of the purposive approach set down in s 15AA of the *Acts Interpretation Act 1901* (Cth).

Changes have been made in Chapter 2 to reflect recent developments in the common law principles applicable to reading words into legislation, in particular the High Court's recent decision in *Taylor v Owners – Strata Plan No 11564* [2014] HCA 9 and the intermediate appellate decisions preceding it. The authors beautifully distil the principles elucidated in these and previous cases to identify a general approach to the issue of construction

Taken together, the book constitutes an essential overview of the manner in which legislation is to be construed and with it, and important account of the scope and limitations on state power.

of words used in legislation that do not conform with the apparent legislative intent.

Chapter 3 deals with extrinsic aids to interpretation, again by reference to the common law principles and by the application of s 15AB of the Acts Interpretation Act and its state analogues.

Chapter 4 deals with the various interpretative maxims applicable to statutory interpretation, and provides a guide to the structure and framework of Acts.

Chapter 5 deals with the assumptions that constitute the principle of legality. The authors also introduce into this edition an extremely useful tool to aid the application of the principle of legality in various situations: a table has been included at the end of Chapter 5 identifying the various principles, rights and privileges that trigger the presumption that parliament will not be taken to have intended to abrogate fundamental rights and privileges without clear words expressing such an intention, together with references to those parts of the book that discuss each right or privilege in greater detail.

Chapter 6 provides an overview of the various interpretative principles contained in the Commonwealth and state Interpretation Acts, and a detailed account of how the provisions of the Interpretation Acts have been applied by the courts.

Chapter 7 deals with the approach to amendment and repeal of Acts by other Acts, and Chapter 8 deals with interpretation of consolidating, reprinted or codifying Acts.

Chapter 9 deals with special rules concerning the interpretation of remedial, penal and fiscal legislative provisions.

Chapter 10 deals with the retrospective operation of legislation and includes an overview of general principles of retrospectivity as well as the retrospective operation of particular classes of Act.

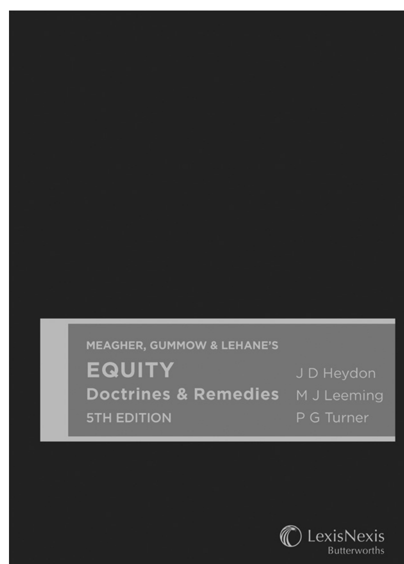
Finally, Chapter 11 deals with the principles concerning legislation conferring obligations and discretions on people and office holders. The chapter provides a guide to the interpretation of statutory duties and powers as well as the consequences of non-compliance with obligatory provisions.

Taken together, the book constitutes an essential overview of the manner in which legislation is to be construed and with it, an important account of the scope and limitations on state power. In his foreword, Chief Justice French speaks of the involvement of statutory interpretation in every aspect of the law, public and private. Construction is essential to determining the validity of legislation, the scope of executive power, and the application of legislation to all areas of public life. This book assumes, in comparatively few pages, the enormous task of guiding the user through the tools necessary to engage in the task of construction, and the authorities that are necessary to approach that task.

Reviewed by Catherine Gleeson

Meagher, Gummow & Lehane's Equity: Doctrines and Remedies (5th Edition)

By J D Heydon, M J Leeming and P G Turner | LexisNexis Butterworths | 2014



The late Professor Emeritus Harold AJ Ford AM, writing for the *Sydney Law Review* in 1976, concluded his review of the first edition of *Meagher, Gummow & Lehane's Equity: Doctrines & Remedies* by stating that it was 'a very welcome accretion to Australian legal literature and is more likely to be a possession for all time than many other works'.[1]

Much like Thucydides, whose self-confessed intention in writing his *History of the Peloponnesian War* Professor Ford was referring to, Meagher, Gummow and Lehane were never writing to 'win the applause of the moment.' To the contrary, and as was made abundantly clear by the vigorous criticism levelled at certain judges guilty of committing the 'fusion fallacy' or at forms of relief which the authors considered to be lacking in proper jurisdictional basis, the authors had far loftier goals in mind. Clearly, the work was intended to be not only an exposition of the general doctrines and remedies of equity but also an attempt to steer and shape equity jurisprudence, not least through its forceful critique of judicial reasoning deemed by the authors to exhibit a 'disregard for historical continuity' or a misunderstanding of the Judicature legislation.

However, and as acknowledged by the authors of the recently released fifth edition, the position forty years on from when the first edition was written is quite different. The authors (J D Heydon, M J Leeming, and P G Turner) refrain from commenting on the extent to which the previous editions of *Meagher, Gummow and Lehane* have been responsible for what they regard as a recent and discernible change in judicial reasoning and academic writing. However there is an implicit recognition by the authors of this edition, evident in the change of tone, noticeable particularly in Chapter 2 ('The Judicature System'), as well as in the abbreviation of that chapter, that the battle is over, at least insofar as it relates to the changes effected by the Judicature legislation, and that the authors of *Meagher, Gummow and Lehane*, past and present, have emerged triumphant.

Gone then from this edition, is some of the (self-confessed) 'colourful' and 'pungent' criticism found in earlier editions. Also left behind is the extensive critique of Mareva injunctions in what can only be read as a begrudging concession that the authors' doctrinal objections to this form of relief found in earlier editions have fallen on deaf ears. New to this edition is Chapter 23 on equitable compensation, which plugs what was a conspicuous gap in previous editions.

Certain chapters have been restructured and rewritten. Chapter 10 ('Contribution') is a representative example. The table of contents at the beginning of the chapter (tables of contents for each chapter being one of this edition's welcome innovations) provides a map to the chapter's structure and a shortcut to the reader who already knows the particular aspect of the doctrine of contribution with which he or she is interested. The presentation of the text is clearer, the language is more concise, the sentences pithier. A more extensive use of sub-headings (yet another innovation of this edition which is carried across the entire work) makes the chapter more easily navigable. The positive effect of removing citations from the body of the text and into the footnotes (as they have been throughout this edition) cannot be overstated. The overall result is a chapter that must surely be of greater utility to a busy practitioner seeking quickly to determine whether to assert an equitable right of contribution on behalf of his or her client. Yet, as with the other rewritten and restructured chapters, the coverage of the doctrine remains comprehensive and its presentation is true to the overall style and tone of the work.

Other chapters have been wholly rewritten and reorganised, such as Chapter 17 ('Estoppel in Equity'). In this edition, the authors have taken the opportunity to analyse the status of the 'single overarching doctrine' suggested by Mason CJ and the 'general doctrine' of estoppel by conduct advanced by Dean J in *Commonwealth v Verwayen* (1990) 170 CLR 394. The conclusion advanced by the authors, based on this new analysis, is that no single overarching doctrine of estoppel by conduct exists in Australia and that the attempts to simplify the law in this area have failed.

The authors have undertaken a similar stock-take in Chapter 42 ('Confidential Information'). It is noted in this chapter that much of the doctrinal uncertainty apparent in the case law on confidential information has been clarified and resolved, such that the fundamental questions in relation to confidential information identified in previous

Meagher, Gummow & Lehane's Equity: Doctrines and Remedies (5th Edition) (LexisNexis Butterworths, 2015)

This fifth edition has not disappointed. The change in tone is refreshing and welcome, as are the authors' conspicuous (and successful) efforts to modernise the work's style and presentation.

editions of the work are now able to be answered. The chapter explores what has been established and what remains to be developed.

Twelve years have passed since the publication of the last edition. As the authors have observed in their preface, during that time there has been delivered a considerable number of judicial decisions, as well as extensive commentary published, dealing with many areas addressed in this work. In particular, the authors note development in the areas of fiduciary relationships, assignments, estoppel, penalties, equitable compensation, rectification and confidential information. Accordingly, a new edition of *Meagher, Gummow and Lehane* was much needed. This fifth edition has not disappointed. The change in tone is refreshing and welcome, as are the authors' conspicuous (and successful) efforts to modernise the work's style and presentation. The updating of the text with recent judicial decisions and commentary is characteristically thorough and it is apparent that considerable thought has been given to how these developments affect the authors' commentary and conclusions found in previous editions; where necessary material has been reworked or excised to reflect these developments.

As prophesied by Professor Ford, *Meagher, Gummow and Lehane* is a possession for all time. And thanks to the commitment and erudition of its current authors, it has been allowed to evolve gracefully and judiciously.

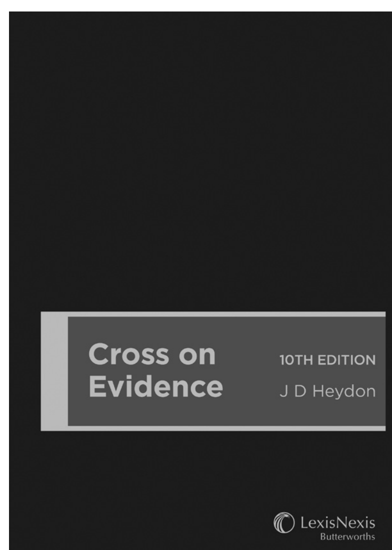
Reviewed by Juliet Curtin

Endnotes

1. Ford, H A J, 'Meagher, Gummow, Lehane, Equity: Doctrines and Remedies', (1976) 7(3) *Sydney Law Review,* 474.

Cross on Evidence (10th Edition)

J D Heydon | LexisNexis Butterworths | 2014



Given the law of evidence is an integral part of the process of litigation it is no surprise that it is the subject of continued attention by the courts and accordingly undergoes rapid and constant development relative to other areas of law, save perhaps for the law of civil practice and procedure. Consider, to name just some of the recent developments in the case law, the High Court's decisions on opinion evidence (*Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 374; and *Lithgow City Council v Jackson* (2011) 281 ALR 223); spousal incrimination privilege (*Australian Crime Commission v Stoddard* (2011) 282 CLR 620) the rule in *Jones v Dunkel* (*ASIC v Hellicar* (2012) 286 ALR 501); legal and evidential burdens of proof (*Strong v Woolworth Ltd* (2012) 285 ALR 420); the use of extrinsic evidence in contractual construction (*Western Export Services Inc v Jireh International Pty Ltd* (2011) 86 ALJR 1). These and other developments were captured in the ninth Australian edition (2012) of *Cross on Evidence*.

Since then there have been yet more developments in the case law to clarify the law in respect of the uniform evidence legislation and the common law, judicial notice, discretionary exclusion of evidence where the prejudicial effect of which evidence outweighs its probative value; tendency and coincidence evidence, privilege, illegally obtained evidence, expert evidence and the use of extrinsic evidence in contractual construction. These new developments have been captured in the latest edition of *Cross on Evidence*.

As with earlier editions, the target audience of the book includes practitioners, both bench and bar, law students (and academics who teach them and research in the area). This diversity of audience results in there

Cross on Evidence (10th Edition) (LexisNexis Butterworths, 2014)

Cross on Evidence is an indispensable tool for practitioners. Its place on the shelf of every practitioner who routinely engages with the laws of evidence is assured.

being not only a clear statement of principle and extensive citation of authority to assist the practitioner, but also an explanation of the principles underling the various rules of evidence to assist the student. This dual emphasis for the two differing audiences is, at least from the practitioner's perspective, complementary; an understanding of the principles underpinning the rules of evidence being invaluable for their application.

This new edition, in addition to including analysis of the latest developments in case law, also contains two changes in *form* to assist its audience.

First, the table of contents is now significantly more detailed than in previous editions allowing a reader, especially the practitioner, to locate more easily and readily the relevant parts of the book in answer to their particular evidentiary question. This detailed table of contents is a not insignificant change to aiding the readability and usefulness of the book as a resource for practitioners. The book is of course an essential resource for all practitioners with respect to its substantive content. This change serves to further assist the reader in navigating and locating the relevant material in the comprehensive, and therefore necessarily voluminous material, contained in the book. In this respect the changes to the detail of the table of contents now echoes the detailed and helpful index to the book, which has been, to date, another feature of the book's form assisting readers navigate through the material contained within it.

Secondly, there has been a significant reduction in the number of footnotes, which has in turn significantly reduced the size of the book, certainly from the earlier ninth, and now tenth edition. The footnotes that remain are, as always, detailed and comprehensive and remain essential reading together with the body of the text.

The speed with which developments to the case law occur – or at least the speed with which controversies in the case law arise which may or may not be resolved – and the practicalities of preparing a manuscript for production means that there will be an inevitable lag in capturing either new controversies or new case law that may arise. For example, the tenth Australian edition deals with the developments in the law in respect of the use of extrinsic evidence in contractual construction (*Western Export Services Inc v Jireh International Pty Ltd ('Jireh')* (2011) 86 ALJR 1), however, there is no reference to *Electricity Generation Corporation v Woodside Energy Ltd ('Woodside')* [2014] HCA 7; 306 ALR 25; 88 ALJR 447, the High Court's most recent decision on that topic. Nor is there any reference to the decision in *Mainteck Services Pty Ltd v Stein Heurtey SA* [2014] NSWCA 184 in which the Court of Appeal (Leeming JA, with whom Ward JA and Emmett JA agreed) expressed the view (at [71]) that *Woodside* (at [35]) was inconsistent with *Jireh,* which decision has now been subsequently followed in *Stratton Finance Pty Limited v Webb* [2014] FCAFC 110 at [40] (per Allsop CJ, Siopis & Flick JJ). The treatment of that controversy awaits the eleventh edition.

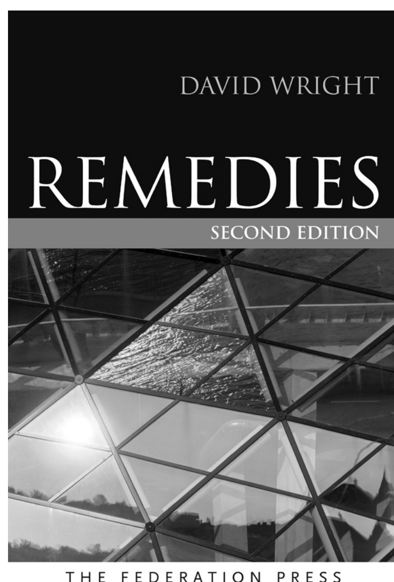
It is therefore inevitable that *Cross on Evidence* will continue to be updated at regular intervals. For those who like to tab and mark up their copies of key texts, this will prove to be frustrating. It is a small price to pay for an updated edition of the most comprehensive textbook of the law of evidence at common law and in statute. In this respect, although uniform evidence legislation largely displaces the common law in those jurisdictions where uniform evidence legislation has been enacted, the common law remains relevant. It remains relevant to non-curial processes (e.g. discovery) sought in a court proceeding in respect of which the privileges contained in in Pt 3.10 of the uniform legislation (both in the NSW and Commonwealth Acts) does not extend to pre-trial processes such as subpoenas, discovery, interrogatories and the like – see s 131A(1)) [e.g. the privilege against self incrimination under s 128 is excluded from the provision extending the privileges in Pt 3.10 of the uniform law (both in the NSW and Commonwealth legislation)]. The common law principles also remain relevant in fora other than courts that do not formally apply the rules of evidence.

Cross on Evidence is an indispensable tool for practitioners. Its place on the shelf of every practitioner who routinely engages with the laws of evidence is assured. Moreover, it quite rightly deserves its place as the leading textbook on the law of evidence, having the benefit and authority of the learning and experience of its author.

Reviewed by Radhika Withana

Remedies (2nd Edition)

By David Wright | Federation Press | 2014



The book serves as a useful springboard providing a comprehensive overview identifying the key principles and case law and important doctrinal disputes and lines of authority.

Remedies are, as the author of *Remedies* tells us, what clients want. Yet for the practitioner, they may sometimes be an afterthought. And by the time consideration of the remedy comes around, the time for evidence in support of the preferred remedy may have passed. *Remedies,* now in its second edition, is a welcome addition to the library of any private law practitioner, covering a broad array of remedies, both at common law, in equity and based in statute (to keep the book within manageable limits it does not deal with the remedial consequences that might attend if one of the disputing parties is the Crown). The book's style is simple and accessible. Its anticipated audience covers a wide spectrum of experience from law student to practitioner. There is much in this book for the experienced practitioner.

Whilst *Remedies* lacks the comprehensive detail and doctrinal analysis of a *McGregor on Damages*, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (MGL) or Spry's *Equitable Remedies*, it does provide an accessible overview of the three main forms of remedies available in private law. *Remedies* is not a substitute for the detail and learning contained in these leading texts. Rather, it is complementary to them. The book serves as a useful springboard providing a comprehensive overview identifying the key principles and case law and important doctrinal disputes and lines of authority. Key principles are succinctly explained. Although intended to be accessible, Wright has achieved that accessibility without the cost of over simplification. Each chapter is well referenced, with footnotes indicating useful texts and academic articles and other relevant cases. Where relevant he also highlights further development in thinking contained in recent case law (for example, the gradual recognition of the High Court of the remedial constructive trust) and text writers (for example, the concept of the fusion fallacy in remedies developed in MGL).

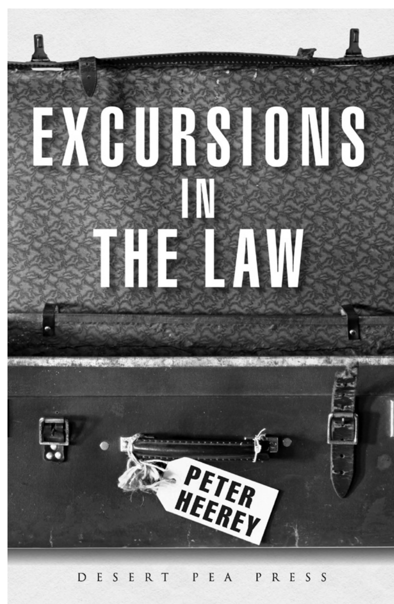
There are 18 substantive chapters. Chapters 2 to 4 deal with compensation at common law including contractual damages, tortious damages and restitution. Chapters 5 to 15 deal with equitable remedies and includes a chapter each on: Lord Cairns' Act damages, account of profits, rectification, the (remedial) constructive trust, specific restitution, specific performance, rescission and injunctions (final and interlocutory). Finally, chapters 16 to 19 might best be described as 'other' remedies not readily characterised under the common law or equity badges including *Mareva* orders, *Anton Pillar* orders, remedies under the *Competition and Consumer Act 2010* (Cth) and declarations. The second edition was published in 2014. It therefore contains a comprehensive account of the most recent authorities of the High Court in these areas (the most glaring omission, simply by virtue of the timing of publication, is that the section on the defence of change of position to a claim in restitution does not refer to the latest decision of the High Court in *Australian Financial Services and Leasing Pty Limited v Hills Industries Limited* (2014) 88 ALJR 552).

With an eye to the student market, and the increasing appetite of law schools to teach remedies, whether as a stand-alone subject or incorporated within key subject areas such as torts and equity, each chapter concludes with a problem question (with answer). For the practitioner this part of each chapter will be of limited utility (although not without a certain degree of passing curiosity and interest), however, it forms only a small part of each chapter and does not detract from the overall usefulness of the book for the private law practitioner.

Reviewed by Radhika Withana

Excursions in the Law

By Peter Heerey | Desert Pea Press | 2014



The foreword to this book was written by Sir James Gobbo. Sir James was the author's pupil-master when the author moved from his hometown of Hobart to Victoria and joined the Victorian Bar. Sir James remarks that he soon came to enjoy the author's breadth of interests, literary flair and wry sense of humour. Those traits are displayed clearly in this book which contains over 30 of the author's papers and other writings including poems.

True to the word 'excursions' in the title, the subject-matter of the papers, which is divided into five parts, is diverse and extends from Hobart and Victoria to overseas jurisdictions including Vanuatu, Canada, the United States and Ireland.

The first part of the book is entitled 'Tasmanian Stories'. It commences with a paper on the Tasmanian-born Andrew Inglis Clark for whom the author has a great admiration. The author describes him as the having 'laid down the basic structure of our Constitution'. The paper traverses Clark's life and concludes with commentary on the movement (supported by the author), in recent years, to seek to rename the federal electoral division of Denison, which is named after Sir William Denison, lieutenant-governor of Van Diemen's Land from 1847 to 1855, to Clark. It is a very interesting paper especially for those who either have forgotten or did not ever know of Clark's role in preparing the initial draft of the Constitution.

Clark also appears in the paper which follows which celebrates the 'First Century' of the Supreme Court of Tasmania from 1824 to 1924 and in the first poem in the book which alludes to the apparent broken promise by Alfred Deakin to appoint Clark to the High Court. The paper entitled 'The Orr Case Revisited' is, perhaps, of more interest to the community as a whole. It concerns the *cause célèbre* of Professor Sydney Sparkes Orr who was dismissed from the University of Tasmania in 1955 as a result of the allegation that he had had a sexual relationship with an undergraduate. This part of the book concludes with 'Hobart – A Guide for Innocent Mainlanders'. That takes the reader from Salamanca Place and through Hobart and its surrounds. It ends rather delightfully with the suggestion that 'If your visit to Hobart is in any way employment-related, don't forget to put in for your hardship allowance'.

The second part of the book is 'The Justice Business'. It comprises a broad array of papers. One is a short history of the Victorian Bar which is based on a talk given by the author to the Victorian Bar Readers Course on 26 September 2012. Many matters mentioned are similar to those discussed in the NSW Bar Practice Course. However, two matters the author raises concerning silks are of particular note to those in NSW.

The first concerns the rosette which Victorian silks wear on the back of their gown. It would appear that although there are those in NSW advocating for a return to queen's counsel, no-one is suggesting a change to the silk gown so as to include a rosette. The author states that the purpose of the rosette was to prevent powder from the eighteenth century wig staining the back of the gown. Perhaps nostalgia for the concept of powdered wigs was stronger in Melbourne than Sydney following the separation of Victoria from NSW in the nineteenth century. In a subsequent short paper entitled 'Counsel's Baggage' the author sets out the history of the barrister's wig, gown and bag. The second matter concerning silks raised by the author is that although in Sydney 'there has long been a practice' that a silk, when robed, 'should never be seen carrying books or papers', no such practice has applied in Melbourne. The author comments that this is a paradox given that Melbourne is supposed, stereotypically, to be 'stuffy and conservative' while Sydney 'laid back and larrikin'.

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The papers in the second part of the book include the author's response to the article by Dyson Heydon in the *Law Quarterly Review* entitled 'Threats to Judicial Independence: the Enemy Within' in which Heydon criticises off-bench discussions by appellate judges of the case before them. The author, who spent 19 years on the Federal Court, comments that since judges on superior courts exercising appellate jurisdiction 'have typically been successful in a career of two decades or so in a highly competitive, and sometimes combative,

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profession', they are 'unlikely to be shrinking violets, susceptible to seduction by suave glittering phrases or guileful blandishments, or being pushed into decision'. In a subsequent paper in the book entitled 'Judges at Work', the author comments on aspects of judgment writing. In addition, one of the author's poems included in the book is entitled 'Judgment Writing'.

Other papers in the second part of the book include the author's contrary argument to the debate in 2009 on the possible introduction of an Australian Charter of Rights and a paper on Sir Owen Dixon which is itself a review of the biography of Dixon by Philip Ayres.

In the third part of the book ('In Other Lands'), the author travels overseas. The first paper concerns the author's participation in one of the last Australian appeals to the Privy Council. The Author remarks, quite causally, that standing in the sunshine on an autumn morning in London outside the Dorchester Hotel while waiting for a cab 'a pleasing distraction is provided by the departure of the Sultan of Brunei in a powder blue Rolls coupe' with an entourage of bodyguards. The author comments that seeing this and trying to be 'as objective as one can', the thought 'crosses one's mind that ... there is much to be said for the retention of appeals to the Privy Council. Later in the paper, he describes the history of the Privy Council as 'that of the British Empire itself' using the advice in *Srimati Bibhabati Devi v Kumar Ramendra Narayan Roy* [1946] AC 508 as an example. The author describes the facts of *Srimati* as evoking 'a world of adventure and romance reminiscent of Kipling at his best'.

This part of the book also discusses the author's time as an acting judge in Vanuatu in 1992 and some impressions of Canada and, in particular, the position of Quebec in the federation, written in 1996–1997 when the author spent five months at McGill University in Montreal. Five papers have the United States as their theme. The subject of the papers are: aspects of the southern United States, including segregation, which paper followed a period of four weeks in 1993 which the author spent in Birmingham, Alabama teaching a course on comparative constitutional law in the Cumberland School of Law; a review of the fourth of a five volume series on Lyndon Johnson by Robert A Caro; a paper on Antonin Scalia based on a 2009 biography of Scalia by Joan Biskupic; a short piece on Abraham Lincoln following the 2005 book by Doris Kearns Goodwin entitled *Team of Rivals: The Political Genius of Abraham Lincoln*; and a paper entitled 'How Judges Think' on Richard Posner.

There then follows a paper on the author's experience of a dinner, in October 2001, at the home of the Irish Bar in Dublin, the King's Inn. He notes that on a coffee table was the latest issue of the *Australian Law Journal* which had reproduced the author's poem 'Judgment Writing' referred to above. The author states that he was able to give the first performance of that poem in Ireland 'or indeed in the Northern Hemisphere'. Part three concludes with a paper on the Dreyfus affair by reference to Robert Harris' novel *An Officer and a Spy*.

Part four of the book contains five papers under the heading 'Law and Literature'. They include a pithily-written analysis of *The Merchant of Venice* by reference to various issues of trade practices and a more lengthy paper on *Louth v Diprose* (1992) 175 CLR 621. That paper refers to the lower-court proceedings and to various issues arising from the *Louth v Diprose* litigation including what the author terms 'litigation storytelling' and issues of 'gender, class and structural power'. Storytelling also is the subject of another paper in this part entitled 'Storytelling, Postmodernism and the Law'.

The paper 'Aesthetics, Culture, and the Whole Damn Thing' is adapted from an address by the author to the International Conference of the Law & Literature Association of Australia in 2002. It contains various anecdotes including humorous moments in court. One such example concerns the maxim *in pari delicto potior est condition defendentis*. The author states the example is sourced from the west of Ireland, where the plaintiff is pursuing a particularly dubious claim, and is as follows:

> Judge: Mr Houlihan, is your client aware of the maxim *in pari delicto potior est condition defendentis*?
>
> Counsel: My Lord, in the bogs of Connemara they speak of little else.

The final part of the book concludes with four short pieces written by a person whom the author describes in the introduction to the book as 'my mysterious friend Publius who writes an occasional column for the Commercial Bar Association newsletter'. Whether Publius is a friend of Bullfry is anyone's guess.

Peter Heerey is to be commended for a book which contains a collection of papers and other writings on such a variety of topics.

Reviewed by Daniel Klineberg