Reviews

Debt, Seduction and Other Disasters
The Birth of Civil Law in Convict New South Wales

by Bruce Kercher; Federation Press, 1996; $24.95.

Law does not have a tradition of popular writing. One would look in vain for the legal equivalents of Stephen Jay Gould or Richard Dawkins, authors who take seriously the public's hunger for knowledge about science yet who appreciate that while non-specialists can understand difficult concepts they will not have a mastery of arcane terms or the most recent theories or discoveries.

It is the great strength of Kercher's latest book that it can be described as a piece of popular legal history. While it has all the paraphernalia associated with scholarly writing (footnotes and a genuine attempt to deal with previous authors) and can be profitably read by professional historians and legal academics, it reads best as an attempt to expose the legal history of early NSW to non-specialists.

Debt, Seduction and Other Disasters is a history of the first 25 years of law in colonial NSW through the lens provided by court cases. Kercher warns us to be prepared for an unusual legal playground. When it is noted that for most of this period the judges and magistrates had no legal training, that the only lawyers were convicts and that the possession of a copy of Blackstone made one a legal authority, it becomes clear that we are in for some unorthodox law. Add to this a drunken, yet curiously sympathetic, judge-advocate, chronic indebtedness amongst lawyers, judges and litigants, and a pair of stern, English trained judges and the mixture becomes heady indeed.

The merits of this book for the general reader are twofold. First, it is a marvellous introduction to the history of early New South Wales. What better way of entering into the society of the time can there be than reading what people fought about? When one considers the small size of the settlement, under 10,000 people for most of this period, the amount and variety of matters that came before the courts was astounding. Perhaps litigation was so popular because it was the best entertainment around, especially since everyone probably knew the parties involved. Certainly, listening to a convict lawyer, Crossley, arguing Magna Carta before a (presumably) bemused judge-advocate, must have been as entertaining as anything else going in Sydney Town. After one has read this book it would be difficult to forget that on trips from Britain to the colony sailors would sometimes drink the entire load of alcohol shipped in the hold or that everyone, it appears, was up to their neck in debt during the early years of Australia. There are some grand stories in these cases and Kercher tells them well.

Secondly, Kercher achieves the almost unbelievable in devoting over 200 pages to a close analysis of legal doctrine and doing so in a manner which should be comprehensible to any interested layperson. His writing is, in the main, clear and easy to follow and his explanations of the various types of law are lucid. To this reviewer this is the major merit of this book. To write a history of law which is accessible to laypeople and which makes no concessions to a serious analysis of previously uninvestigated legal records is an achievement indeed.

This book was obviously a labour of love. The records used by Kercher were not the neatly presented, clearly articulated, judicial reasons which make up the reports of today. In the main, they are handwritten minutes of cases, often with only the decision noted and reasons missing. Deciphering the handwriting alone must have been a mammoth undertaking. Yet from what was basically an unmined treasure trove Kercher has put together a clear and comprehensive study of the law applied in the courts of NSW from 1788 to 1814.

Is Kercher the Stephen Jay Gould of the law world? Sadly, no. In some ways *Debt, Seduction and Other Disasters* is a very good book but it has its flaws and some of them are serious. In this book, as in his other recent work of Australian legal history, Kercher too often tends to a simplistic, good guys/bad guys view of history. Similarly, his treatment of other writers, while always fair doesn't always display the depth of analysis required. An example may convey this reviewer's concerns.

One of Kercher's main themes is what he calls the growth of an indigenous jurisprudence, which was often at odds with the official, British law. He is quite convincing in his discussion of this theme. But one would have liked him to address seriously Pocock's idea of British history. Pocock, who Kercher has read, argues that during the time covered in this book it is appropriate to talk of a broad British history, covering the separate nations of the British isles, the colonies in North America and, the recently settled NSW. There was an overarching unity in this history as well as a vigorous and interacting series of particular histories within it. If Pocock is correct, this raises several important questions which Kercher fails to respond to in any depth. Was the indigenous jurisprudence that he identifies one variation of a general British jurisprudence, genuinely different but still only a variation on a general theme? Was there any real difference in the things that mattered? Was the indigenous jurisprudence on a trajectory of independence from British law or was it tolerated because it was not a threat to British law? Answers to these and other questions would have added a richness to his analysis.

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How Many Cheers for Engineers?

edited by Michael Coper and George Williams; The Federation Press, 1997; 159 pp; $40.00, softcover.

What with the discovery of Tony Blackshield's wonderful facility for composing comic songs and the enjoyment of the relentless hospitability of the affable Michael Coper and his co-convenors, it was a great conference. I should know. I was there at ANU in August 1995, and my question to members of the panel on 'Has *Engineers* reached its "use by" date?', like the questions of many of the conference goers, is published here (with only the odd mistranscription), together with the papers of the scheduled speakers. And the conviviality was

not the conference's only virtue — it brought together many of the doyens of practising constitutional lawyers in this country, as well as the usual suspects from the ranks of academic constitutionalists, and two leaders of our constitutional court, Sir Anthony Mason and Sir Gerard Brennan. The synergy generated by this mix, its comparative rarity perhaps a legacy of the professionalisation of common law pedagogy in the late 19th century, was for me the most valuable aspect of the conference.

The panel proceedings have been collected in this slim Federation Press volume together with some golden oldies/hoary chestnuts of what has passed for constitutional legal theory in this country (from Sir Robert Menzies, R.T.E. Latham and Sir Victor Windeyer) and two additional essays. The question is why. I once read a *TLS* review of a clutch of new scholarly monographs in English Studies in which the waspish reviewer described his subjects as products of 'the streetcar named tenure'. The only compelling reason I can come up with to honour the *Engineers Case* in print in this way is that the relentless pressure on Australian academics to publish, so that our hard-pressed institutions can scramble successfully for a share of a shrinking resource pool, has led to the willingness to publish the pedestrian because people don't have the time and space to generate the profound or potentially transformative. And that publishers are persuaded by us for precisely these reasons.

This is not to say that there are not some things in *How Many Cheers for Engineers?* which generate interest. Leslie Zines' analysis of *Engineers* and the question of the 'federal balance', while conceptually conservative in approach, is admirably clear, and would be extremely useful and accessible for students. Keith Mason casts his characteristically acute eye over the then emergent Chapter III jurisprudence and registers the single most important insight in the volume: that 'implied rights is really a very significant shift of power from parliament to the judiciary.' Jack Goldring's contribution, a version of chapters from his recent study *The Privy Council and the Constitution*, occasionally reads like a thriller and offers some fascinating historical insights. However, while it confirms his status as the renaissance man of Australian legal scholarship, like much in this volume it is often frustratingly narrow in its theoretical and critical reach.

This narrowness is thrown into vivid relief precisely because of the concerns of the *Engineers Case* — constitutional interpretation, and a distinctively Australian federal constitutional theory. Despite the contribution by Arthur Glass, arguably the closest thing Australia has to a serious scholar of constitutional interpretation, this volume only fleetingly diverges from the blandly doctrinal. *How Many Cheers for Engineers?* makes it painfully clear that while Australian constitutional lawyers may not be ready to bury the case, it is past time — nearly a century from Federation and now 77 years after the decision itself — for them to jettison increasingly inadequate interpretive paradigms and to reimagine their project.

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Mabo: What the High Court Said and What the Government Did

by Peter Butt and Robert Eagleson; The Federation Press, 1996, 2nd edn; 99 pp; $19.95, softcover.

Peter Butt is a Professor at the Law Faculty of the University of Sydney specialising in real property law. Robert Eagleson is a distinguished legal practitioner practising in Sydney. Together they have produced an elegantly simple guide to the *Mabo* decision and its legislative aftermath. The first edition of *Mabo: What the High Court Said and What the Government Did* was a plain English guide to the *Mabo* decision. The second edition adds a straightforward chapter setting out the principle objectives of the *Native Title Act 1993* (Cth) and an outline of the Coalition Government's proposed amendments to that Act.

The book is an accessible and straightforward account of the *Mabo* decision. It is an ideal introduction to the decision and should encourage all non-lawyers who read the book to discover that the legal concepts set out in the *Mabo* decision are neither as obscure nor wayward as political representation of them has suggested. The several threads of the reasoning in the majority are usefully set forth under chapter headings, grouping each of the judgments within topics. This allows the reader to grasp the areas where there was basic unity of opinion within the majority.

The writers have simplified the text faithfully and have refrained from footnoting and other referencing for the sake of keeping the text as simple as possible. While that objective is basic to the aims of the book it may have been appropriate, for the reader whose appetite is whetted by the book, to have included some further technical references to the *Mabo* decision so that such a reader may have known where next to turn for more thorough investigation of the decision.

The *Mabo* decision itself is actually a wonderful read, full of scholarship, history and (for judicial dicta) impassioned statements of the position in Australian society of commonly held notions of human rights and community expectations of justice as well as a candid statement of the role of the High Court itself. In this book some of the erudition of the original decision is necessarily lost in the quest for elementary statement of the principles set out in *Mabo*. The inspiration which flows from reading the original text could be 'marketed' to the reader of this useful guide. An epilogue which guided the reader to the original text of the decision may be an appropriate addition should the authors venture into the beckoning field of the plain English guide to the *Wik* decision. They have shown, with this text, that they can render the complex reasoning of the High Court into every day language which demystifies the 'legalese' of this significant decision.

The chapter on the *Native Title Act* and its proposed amendments is set out in the same basic style giving simple expression to the objects of the Act and the amendments. Pending the post-Wik amendments, Butt and Eagleson's summary of the Act is a useful guide for people struggling to understand the Act and its location in Australian law.

This book should be included as reading for everyone from high school students to politicians who clearly have not grasped why *Mabo* is not a radical departure from the principles of the common law on which the Australian rule of law depends. *Mabo: What the High Court Said and What the Government Did* helps show why the decision is in fact a faithful rendering of the

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