

Book Reviews

Contractual Non-Disclosure by ANTHONY DUGGAN, MICHAEL BRYAN and FRANCES HANKS (Melbourne, Longman Professional Publishing, 1994) pp xxii, 225.

The purpose of this admirable book is to examine some intriguing questions in contract law. Why are the courts generally reluctant to intervene to assist a party to a contract who claims to be the victim of the other party's non-disclosure? Why, on the other hand, are courts generally willing to intervene in so-called special cases of non-disclosure, where there is a fiduciary relationship between the parties or the contract is one of insurance? Standard text books do not generally address these questions in any detail. The authors of this book address such questions in depth.

The application of the law in the area of non-disclosure seems to give rise to inconsistencies. The authors highlight three instances. First, a court may be prepared to set aside a contract on the ground of a mistake concerning price, but it is generally not prepared to do so in respect of a mistake concerning value. Second, a court may be more prepared to intervene in the case of seller non-disclosure than in the case of buyer non-disclosure. Third, a court is likely to treat the non-disclosure of extrinsic facts (market information) more leniently than non-disclosure of intrinsic facts (information concerning the attributes of the contract subject-matter). Accordingly, the authors ask what is the rationale for these distinctions seemingly drawn between pricing errors and valuation errors, buyer non-disclosure and seller non-disclosure, and intrinsic and extrinsic facts?

After a general introductory chapter which sets the themes of the book in an historical context (Chapter One) the authors proceed logically to an examination in Chapter Two of the actual law relating to non-disclosure. The topics covered comprise mistake, misrepresentation, unconscientious dealing, fiduciary non-disclosure, and insurance. Far from presenting this material in a standard way, the authors underpin the chapter with a set of twenty-seven simply stated but challenging hypothetical cases. This imaginative approach lays a firm practical foundation for the later more theoretical chapters.

In the rest of the book the authors examine the problems they have posed from the vantage point of selected theoretical perspectives. Chapter Three is devoted to autonomy theory (subjective and objective will theories). Chapter Four deals with fairness theories (good faith, altruism, equity and equal access). And Chapter Five examines economic theories. The differences between these three bodies of theory are explained as depending, at least in part, on competing policy considerations. The need for security of transactions is emphasised by most autonomy theories, whereas the importance of

informed consent is emphasised by fairness theories. The economic approach stresses the need to preserve incentives for the creation and exploitation of useful information.

In Chapter Six the conclusion is persuasively reached that the economic approach provides the most convincing explanation for the law's current attitude to non-disclosure, and best explains the seeming inconsistencies that exist. The authors agree, however, that the economic approach does not necessarily represent the last word. Each of the competing theories explains part of the puzzle, and therefore none of them should be disregarded. It seems that no theory can realistically be expected to solve every problem.

This book is very valuable both from a theoretical and practical point of view. On the theoretical level there is a thorough and critical evaluation of classical and modern writings on disclosure. A detailed bibliography is provided at the end of the book. In the text the reader is taken back to Cicero's treatise on duties 'De Officiis', written over two thousand years ago, and through to modern writers, mainly North American, such as Anthony Kronman, Randy Barnett, Kim Lane Scheppele, and Charles Fried. This theoretical aspect of the book is significant well beyond the particular topic of non-disclosure. And although the theories studied are selective, the ones selected are of central significance.

On the practical level the book is a shining example of bringing abstractions down to earth. The twenty-seven hypothetical cases are all set out, for convenience of reference, at the beginning of the book. They are then referred to *seriatim* in Chapter Two (as a vehicle for explaining the law) and *passim* in later chapters (as a vehicle for testing theories). All the hypothetical cases deal with the same subject-matter, ie, sale of a painting, with variations on that theme. This approach facilitates comparisons. Every teacher knows (and the authors certainly know this) that examples are all important in explaining and testing theories and concepts. It should be noted that the book does not set out to discover which is the best theory in a normative sense, but rather to find which theory best explains the cases. The authors state that whether the law should take more account of fairness rather than economic considerations is ultimately a matter of community opinion. But they do point out that a policy that places greater emphasis on information sharing is likely to result in reduced information production.

The principal thesis behind this book is that a deep understanding of modern contract law is not achievable without knowledge of contract theory. This is true, and the authors are to be congratulated on their singular contribution to theoretical legal scholarship. Their erudite but practical work deserves to reach a wide audience of judges, lawyers, economists, students and moralists.

PETER HEFFEY
Senior Lecturer in Law
Monash University

Family Law in a Nutshell by HARRY D KRAUSE (St Paul, Minnesota, USA, West Publishing Co, 1995, 3rd ed) pp li, 511.

It is both the fascination and frustration of American law that one can find authority, from one or other of its 53 jurisdictions, to support any proposition under the sun.

This is particularly true of an area so volatile as Family Law.

Harry Krause's great quality is the ability to provide a balanced synthesis of the extraordinarily diverse approaches which have gained credence. He does more. He examines trends, he forecasts developments, and he queries conventional wisdom. Above all, his style is so trenchant and witty that he is hard to put down. Concise this book may be. Superficial it certainly is not.

Krause's treatment of Marriage Regulation (chapters 3, 4 and 5) is typically provocative. American laws of marriage are stricter than those of Australia — which, in fact, are the most liberal in the world. But Krause argues for even more state control over the conditions of entering into marriage. He debunks fashionable notions of homosexual marriages and suggestions that non-marital cohabitation should have the same consequences as marriage. He examines the policy behind consanguinity and incest, and finds current prohibitions (and non-prohibitions) wanting on both eugenic and social grounds. He examines health prerequisites for entry into marriage — which again are far more stringent than those in Australia, which are non-existent. An Australian reader must surely find it hard to justify this country's failure to test potential spouses for VD and AIDS. But should we emulate the prescriptions of some American States for testing for TB, German measles, drug addiction or Rh compatibility?

What Goethe said about language is true about law. 'A person who does not know foreign languages knows nothing of his own.'

The value of reading a 'panoramic' book such as Krause (and I know of none of such intensive brevity) is that it forces one to query laws which we Australians have taken for granted. For instance, 'openness' is now translated into the adoption laws of every Australian state. But the USA Uniform Adoption Act recommends anonymous adoption. Indeed it would permit release only of *non-identifying* information — that is to say, information of a genetic nature.

Drawing on the experience of the several states influenced by their Hispanic, Mexican or French pedigree, Krause convincingly argues that a regime of community property for spouses is in no way the panacea that some Australian commentators, unfamiliar with European systems, would suppose. His animadversions on the artificial creation of children (especially on surrogate motherhood) deserve careful consideration — especially as Krause is widely regarded as being the most influential American reformer of laws improving the status of children born outside marriage.

This is a stimulating and literate work of a scholar who can be classified as neither a conservative nor a radical. He deserves, rather, what might be the highest compliment payable to a scholar — that of being a balanced

commentator who examines the pros and cons of each issue without doctrinal tendentiousness.

On reflection, he deserves an even greater accolade — he is a writer of style and panache.

J NEVILLE TURNER
Senior Lecturer in Law
Monash University

Cases on Criminal Law by DAVID M HEILPERN and STANLEY M H YEO (Sydney, The Law Book Company, 1995) pp xxix, 523.

According to the authors, the book is intended to serve as a companion to one of the standard textbooks on criminal law.¹ However, it should be stressed that it is, quite literally, a 'casebook' in that it contains no commentary or other materials. As such, it is of little use to practitioners or academics and is obviously aimed at the student market. Unfortunately for students, the absence of commentary does not translate into a dramatic reduction in price. At a cost of \$75 for the soft-cover edition, students are entitled to ask what are the advantages of this as opposed to a more traditional casebook.

In terms of providing students with their own copies of relevant case extracts, this book fulfils that limited role well. It contains most of the major cases which form the core of a general criminal law course, covering homicide, sexual and non-sexual assaults, property offences, ancillary offences and defences. The cases are generally well chosen and organised clearly under appropriate headings and sub-headings. In addition, the authors suggest that the lack of commentary allows more cases to be reproduced and in lengthier extracts. While this is true in some instances, a comparison with another casebook² did not reveal a huge disparity in the number or length of cases extracted.

Beyond this, the lack of commentary severely restricts the usefulness of the book in terms of supplementing a standard text. The cases are drawn from the common law jurisdictions³ and will therefore not always be of interest to students from the Code states. Even within the common law jurisdictions, the lack of commentary means that students receive no guidance in relation to the significant legislative differences which exist. Consequently, not all cases which are extracted are relevant to all jurisdictions. The authors acknowledge this and state that in certain areas⁴ they have leaned towards using New South Wales cases. Whilst this bias is understandable from a pragmatic point of view, it significantly detracts from the usefulness of the book in other jurisdictions.

¹ For example, Howard's *Criminal Law* (5th ed, 1990) or Gillies' *Criminal Law* (3rd ed, 1993).

² Brett, Waller and Williams, *Criminal Law Text and Cases* (7th ed, 1993).

³ New South Wales, South Australia, Victoria and the Australian Capital Territory.

⁴ In particular, partial defences to murder, sexual assault and property offences.

For example, Victorian cases on what was known at common law as 'felony-murder' are not included,⁵ although New South Wales cases on diminished responsibility are. Similarly, in the area of property offences the focus is on the common law offence of larceny which is relevant in New South Wales and South Australia, but not in Victoria where the law was amended by the *Crimes (Theft) Act 1973*. It may have been preferable for different editions to have been produced for different jurisdictions or, at the very least, for commentary to have been provided guiding students to relevant cases or legislation where there is a difference of approach.

It is also difficult to accept the authors' claim that this type of casebook is more conducive to a Socratic method of teaching on the basis that students are not provided with any guidance in the text. Such a claim seems inconsistent with its use as a companion work to a standard text as presumably students will find their guidance there. I doubt that any student would derive much benefit from sitting down and reading this compilation with no guidance other than the appropriate topic headings.

It would seem that the primary justification for such a casebook is convenience and no doubt for this reason it will find a ready market. There are many students who would prefer to pay for the convenience of having the major cases copied for them. This may be particularly useful in law schools which have limited resources or for students who participate in 'distance education'. However, even in this respect, I do not see that it has any advantage over a more traditional casebook. A casebook which provides not only extracts of cases but also commentary and other materials would seem far more preferable, particularly for the price, than a mere compilation of cases.

JONATHAN CLOUGH
Lecturer in Law
Monash University

Restrictive Trade Practices: Commentary and Materials by A HURLEY
(Sydney, Law Book Company, 1995, 2nd ed) pp xxxiii, 667.

As stated by the author in her preface to this edition, the object of this casebook is to 'provide students with a comprehensive set of materials essential to the study of restrictive trade practices law'. As such, the book is a valuable addition to the study of this area of Australian law in which there is certainly not an oversupply of good texts and casebooks.

The book is organised in a clear and logical manner with the first two chapters introducing students to historical and constitutional considerations relevant to a study of Part IV of the *Trade Practices Act 1974 (Cth)* (the 'Act'). The third chapter then introduces some basic definitions of key restrictive trade practices terminology such as 'competition', 'market' and 'market power'. In chapters 4 to 9, Hurley considers each section of Part IV of the Act

⁵ *R v Ryan and Walker* [1966] VR 553 and *R v Butcher* [1986] VR 43.

in turn and examines the individual elements constituting each class of conduct prohibited under Part IV. She also examines some of the legal and policy considerations relevant to the interpretation and application of each section. The final chapter of the book then goes into the various remedies and penalties available under the Act in relation to contraventions of Part IV.

All the chapters are well set out and easy to follow. Each chapter commences with an overview of the relevant legislative provision which is then broken down into its constituent elements for closer consideration. These elements are considered through clear and concise extracts from relevant case law and other materials, mostly government reports.

As the book is basically a set of study materials, commentary tends to be kept to a minimum, although more detailed commentary appears in sections of the book which deal with some of the more complicated aspects of restrictive trade practices law in Australia. A good example of this is the commentary on the interrelationship between the various subsections of s 47 concerning regulation of exclusive dealing.

The materials presented in each chapter have been well selected. The reader is not overburdened with an excess of information peripheral to the topic at hand, nor is he/she left struggling to fit the extracts into some kind of context. The commentary clearly ties the extracts together and explains what principle or idea each extract is intended to exemplify. Moreover, the material extracted represents a good balance between 'black letter' interpretations of the law and policy considerations underlying the legislation.

References are also made in the commentary sections to additional materials which students might like to consult regarding some of the issues raised by aspects of the extracted materials. Some reference is also made, both within extracts and in the commentary, to overseas competition law and policy, particularly United States antitrust law, where such comparisons are useful in explaining the Australian position.

It should perhaps be noted that the wording of the actual provisions of Part IV of the Act have not been extracted in each chapter. Hurley has instead given the reader only a paraphrase of the relevant provision and a statement of the policy aims behind the provision. It is therefore worthwhile for students and teachers who are not familiar with the exact wording of ss 45 to 50 of the Act to have a copy of the Act in hand and consult it closely when using the book. This is because the drafting of Part IV of the Act is quite complex and it may be difficult for students to meaningfully link the issues raised by Hurley into a solid understanding of the legislation without access to the legislation itself.

Unfortunately, the publication of this edition of the book has suffered somewhat from a case of bad timing. The edition presents the state of the law as at January 1995. This was six months before the enactment of the *Competition Policy Reform Act 1995* (Cth) which made some significant amendments to Part IV of the Act as well as setting out a national Competition Code to be instituted at state level throughout Australia. This Code will extend the operation of restrictive trade practices law in Australia to people and organisations outside the constitutional boundaries of the original Part IV.

Hurley acknowledges the likelihood of such new legislation in her preface to this edition. Throughout the book, she makes extensive reference to portions of the Hilmer Report on which much of the new legislation was based, as well as referring to the draft Competition Policy Reform Bill which was available at the time of publication of the book. However, to the extent that the legislation, as ultimately enacted in mid-1995, differed from the original draft bill, this edition of Hurley's book contains some outdated material. Because of this, the book should be used with a copy of the new legislation in hand if possible to prevent an inaccurate grasp of the current state of restrictive trade practices law in Australia.

Notwithstanding the unfortunate timing of this edition, it is nevertheless one of the few casebooks in this difficult area of law and one of the most up-to-date. It is a very comprehensive and clear study tool and will be particularly useful to students new to the study of restrictive trade practices law and policy.

Restrictive Trade Practices Law by S CORONES (Sydney, Law Book Company, 1994) pp xxxii, 494.

This is, to the best of this reviewer's knowledge, the second major work on Australian restrictive trade practices law by Professor Corones. It is based on his earlier book, *Competition Law and Policy in Australia* (1990), but has been significantly rewritten and updated hence its new title. This book is a very readable text aimed at both practising lawyers and students of restrictive trade practices law. The subject matter is well organised and the writing style is easy to follow.

The text is arranged into four major sections. Part A deals with introductory concepts behind restrictive trade practices law such as economic theories supporting the legislation in this area, historical background material and an examination of the scope of the current legislation. There is also a chapter which deals with definitions of key economic concepts behind the law in this area such as 'market', 'market power', and 'substantial lessening of competition within a market'. An examination is also made of the kinds of economic evidence Australian courts are likely to accept in assessing these concepts in restrictive trade practices litigation.

Part B examines the substantive provisions of Part IV of the Act in turn. The organisation of this part is similar to the organisation of the bulk of Hurley's casebook. In contrast to Hurley's book, however, Corones deals in much greater detail with the finer policy issues relevant to each provision. He also includes a significant amount of comparative material which contrasts the Australian position with restrictive trade practices legislation in a number of overseas jurisdictions such as the United States, the European Economic Community and New Zealand. Another feature of this section of the text is that the author tends to examine closely the interrelationships between different provisions of Part IV of the Act. In so doing, he gives case studies of

types of conduct that may contravene more than one provision of Part IV and considers how actions for such conduct may be framed.

Part C examines the impact of restrictive trade practices law on particular types of commercial arrangements such as joint ventures, intellectual property licences and franchises. A number of useful case studies are presented and, again, there is a significant amount of overseas comparative material included here.

Part D deals with public and private enforcement of Part IV of the Act and remedies available for contraventions of Part IV.

The main problem with this book is the fact that it was published before the enactment of the *Competition Policy Reform Act*. Thus, some of the material is now significantly outdated, even more so than in the case of Hurley's book which had the benefit of the availability of a draft bill of the 1995 amending legislation. Corones has included some reference to the Hilmer Report (which was obviously available to him at the time of writing), but no reference to the draft bill (which probably was not available).

Nevertheless, if the reader keeps in mind the recent amendments to the Act and the effective extension of the legislation to the state level as a result of the adoption of a national Competition Code, the book is a very useful educational and reference tool for those studying and/or practising in this difficult area of commercial law.

JACQUELINE LIPTON
Assistant Lecturer in Law
Monash University

