

REVIEW ARTICLE*

Introduction to Property Law by JG TOOHER, BM DWYER and GL TEH, (Australia: Butterworths Pty Ltd, 3rd ed, 1997), pp xxv + 202. Softcover recommended price \$47.00 (ISBN 0 409 310042)

For many, the arcane rules, conceptual challenges and obscure language of property law have proved perplexing. In recent years students of property law have been able to turn to a range of excellent texts to help relieve such perplexity but sadly few of these texts have been pitched at the brand new property student, the novice, and it is the novice who is most likely to find the nuances and complexities of property law most confronting.

Indeed, no matter where one breaks into the ball of learning that is property law there is usually some degree of assumed knowledge. Therefore, it is generally not until after students have been studying the subject for some time that confusion dissipates. A text such as *Introduction to Property Law* can assist by bringing forward this time. It can assist the pieces of the jigsaw to fall into place. It can provide simple, accessible explanations which reduce the bewilderment and help unravel the intricacies. It can also simply serve as a useful means of checking that a concept or principle has been understood. Hence such a book is potentially useful both in providing a simple framework for substantive law as well as offering reassurance to the tentative beginner.

The text was first authored alone by Bryan Dwyer and published in 1977¹. In 1988, Butterworths brought out a second edition² of this handy little text and now, in 1997, to the delight of students a third edition has been produced. Joyce Toher has joined Gim Teh on the writing team for the third edition, while Bryan Dwyer has been an author on all of the editions.

The preface to the latest edition states that a considerable part of the book was rewritten to reflect changes and developments in the law. This is obvious from the first chapter where the authors, in dealing with the topic "Concepts of Property", have included a section on indigenous perspectives. It would appear that the post *Wik*³ environment, where discussion of extinguishment of native title is rife, only serves to highlight the need to familiarise students (and indeed the community generally) with an indigenous perspective so that there is a realization that property can be held in many different ways and can be underpinned by a range of concepts.

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1 BM Dwyer, *Introduction to Property Law*, Butterworths (1977).

2 GL Teh and BM Dwyer, *Introduction to Property Law*, Butterworths (1988).

3 *Wik Peoples v Queensland* (1996) 187 CLR 1.

Toohar et al seem to have approached the issue of an indigenous perspective and indigenous rights, by explaining that *Mabo (No 2)*⁴ recognised an already established right, which was not a derivation of the common law but which arose by virtue of a long association with the land based on traditions and use. That is certainly true as far as it goes. However, this chapter also provided the opportunity to discuss briefly the differences between indigenous and non-indigenous relationships with the land in the context of different concepts of property; the former being more inclined to emphasise reciprocity and spirituality, and the latter being more inclined to emphasise exclusivity and possession, for example. In not taking up this opportunity, the book's value is somewhat diminished.

Naturally, however, in a book this size (approximately 200 pages) the limitation of space often governs choice of topics. Writing within such restrictions is not easy and a searching, comprehensive analysis is often simply impossible to provide. The authors are mindful of this. They have understood their brief well. They resist the temptation simply to take a broad brush approach and write so generally that the reader is left feeling dissatisfied. Instead they offer a slim volume with a wide range of relevant law and authorities. Their style is reasonably bald, but so it must be when they are writing a largely propositional style text. They tend to write in crisp, focussed sentences but, fortunately, that has not precluded the flagging of interesting, undecided, and controversial issues.

In the chapter entitled "Law, Equity and Priorities" for example, the authors raise the possibility of the High Court reviewing the supposed doctrine that unless a purchaser is entitled to specific performance of a contract for sale they do not receive an equitable interest prior to completion. They refer to contrary *dicta* on the subject (which suggest that the availability of injunctive relief should be the determining factor) and hence they indirectly encourage the reader to consider the benefits of each approach. On the issue of deferred or immediate indefeasibility, the authors also flag the two differing approaches by referring to what the law has come to see as the temporary aberrant digression of Gray J in *Chasfield v Taranto*⁵ down the path of deferred indefeasibility. Similarly, the authors also raise the issue of whether a volunteer can acquire an indefeasible title. They acknowledge the different positions in New South Wales and Victoria and further take a stand on which position they favour.

Moving through the chapters it can be noted that very similar chapter headings to those in the second edition have been used in the third edition. The order is also identical. This seems to work. The divisions do not seem awkward although, of course, by definition the divisions are artificial.

The chapter entitled "Possession, Title and Ownership" rightly appears early in the text and it effectively offers some useful distinctions between these legal concepts. Further, by briefly focusing on the possession of chattels before considering the possession of land, the text is able to highlight the continuity of

4 *Mabo v Queensland* (1992) 175 CLR 1.

5 [1991] VR 225.

key notions which underpin the law. A clear understanding of these enhances the student's ability not only to think conceptually but to express themselves with precision and clarity. However, given this chapter devotes attention to an analysis of *Wilson v Lombank*,⁶ one wonders whether the inclusion of a brief discussion of actual possession, an immediate right to possession and constructive possession would also have enhanced the text.

The discussion of the *jus tertii* which is offered on page 19 is brief but insightful. Naturally no exhaustive commentary is provided but by referring to *Oxford Meat Co Pty Ltd v McDonald*⁷ we are able to appreciate the way in which the defence can operate. With this as a basis for understanding, further research can be undertaken by a reader wishing to flesh out the issue.

The chapter on "Adverse Possession" is clear and well balanced, raising some of the fundamental points associated with this topic, as well as raising issues such as the applicability of adverse possession to Crown lands and the consequences of a series of successive adverse possessors.

The material on Tenure and Estates is also a basically clear and concise account which respects the historical background of the doctrines without over-emphasising their feudal genesis. However, the use of words such as "subinfeudation" without explanation might be better avoided in an introductory text. Readers can simply check a legal dictionary to ascertain meaning, but an introductory text should make this task largely unnecessary by offering a brief explanation in the text itself. By contrast, the material on leaseholds in this chapter, which tends to follow the framework set out in *Sackville and Neave's, Property Law, Cases and Materials*,⁸ is simple and efficiently communicated. The leasehold material is further elaborated on in Chapter 10.

The material on "Registration" is appropriately briefly dealt with but it still manages to expose the inadequacies of the Deeds Registration Scheme. This chapter then acts as an effective transition between the treatment of old system land and the chapter on Torrens Title, where the issue of indefeasibility and the exceptions to it, are raised in a clear and stimulating manner.

The chapters on co-ownership, covenants, easements and mortgages which form the last part of the book set out the principles with confidence and clarity. These chapters rely on the use of relevant and numerous authorities blended with simple explanation and the result is accessible and palatable text.

Introduction to Property Law provides a simple but very good overview of property law. It is concise, well structured and thoughtful, and my gripe with the earlier editions - that they contained a Victorian bias - seems to be fast disappearing. I am confident that the book's aim (as expressed in the preface) of serving property students in all Australian states, but particularly those in New South Wales and Victoria, will be met.

6 [1973] 1 All ER 740.

7 [1963] SR (NSW) 423.

8 M Neave, C Rossiter, M Stone, *Sackville and Neave's, Property Law Cases and Materials*, Butterworths (1995).