Book Reviews

Tradition and Change in Australian Law by **PATRICK PARKINSON (Sydney, Law Book Company, 1994) pp xxiv, 303**

The central thesis of this book is that 'law cannot be understood properly without an awareness that law is, in its very essence, traditional' and that 'Australian law cannot truly be understood without a deep awareness of its history'.[1]

The book therefore provides a detailed account of English and Australian legal history, from *Customary Law before the Conquest* (sec 3.2.2) to the achievement of formal Australian legal independence from Britain by the *Australia Acts.* The history is set in the context of *The Western Idea of Law* (Chapter 2); for it is the author's view that 'many aspects of English history which affected its legal system were currents within a broader stream of European history. In matters of law, the British Isles were not as separate from the rest of the continent as some British legal historians have seemed to suggest'.[2]

These themes take up the first 200 pages. Part One, *Australia and the Western Legal Tradition*, opens with a persuasive argument that law is a tradition, in the same way that religion is a tradition, and contains three significant elements: origins in the past, present authority and inter-generational transmission (Chapter 1: *The Tradition of Law in Australia*). Chapter 2, *The Western Idea of Law*, then provides a detailed survey of the Western legal tradition, from the rediscovery of Roman law and the texts of Justinian, through the various schools of natural law to Hobbes, Locke, Austin and Hart. This chapter is probably the most difficult for students fully to comprehend. The proposition that there is such a thing as a Western 'idea of law' is accepted intuitively by most lawyers, but the articulation in this chapter would have benefited from a more thorough comparison with other 'non-Western' systems. There are passing references to Aboriginal customary law and Chinese and Japanese cultures, but these are insufficient to enable readers new to legal theory to appreciate fully the significance of the fundamental premise of this chapter.

Part Two, *The Legacy of English History* comprises chapters on *The Development of Common Law, Equity and Statute* and *Constitutional Law*; and the *Westminster System of Government.* Part Three, *Colonisation, Federation and Independence* consists of chapters on *Government and Law in Colonial Australia; Australian Federation and the Path to Legal Independence*; and *The Court System in the Australian Federation.*

Up to this point, the book is a fairly conventional legal history: well-written,

[1] P Parkinson, *Asking the Law Question* (1994) Preface, v.
[2] Id 67–8.

with its themes smoothly integrated, although the students for whom it is apparently intended might complain that their understanding of Australian law does not require quite such a level of detail about medieval legal history. Nonetheless, the first three Parts constitute a satisfying whole, which presents legal history in more detail than is possible in most introductory law texts but remains accessible to first year students.

However, the unity of the book is marred by the remaining Parts — Part Four, *Legal Reasoning* and Part Five, *The Future of Australian Law.* Chapter 8, *Tradition and Change in Legal Reasoning*, adequately describes the main theories of judicial reasoning, but the latter part of the chapter on Judicial Law Making and the Need for Legitimacy (sec 8.5) becomes surprisingly disjointed. The cases chosen as illustrative of judicial approaches are unnecessarily difficult for students to follow and, to make matters worse, the descriptions of the cases have been poorly edited. In a lengthy discussion of *Halabi* v *Westpac Banking Corporation*,[3] it is said that the case involves the felony-tort rule, which provides that 'a plaintiff against whom a felony has been committed by the defendant cannot make that felony the foundation of a course of action [sic] unless the defendant has been prosecuted.'[4]

Later in the chapter, the High Court's decision in *Waltons Stores (Interstate) Ltd* v *Maher*[5] is discussed but, because the outline of the facts breaks the fundamental rule that one must always identify 'who is suing whom and for what', the discussion is well nigh incomprehensible to readers not familiar with the case.

More fundamentally, it is difficult to understand how any chapter entitled *Tradition and Change in Legal Reasoning* can omit any discussion of *Mabo*[6] and Justice Brennan's famous prohibition against 'fracturing the skeleton of principle'.

The following chapter, *Interpreting Statutes*, provides a fairly cursory, and in some places, misleading, survey of the statutory interpretation process. It suggests that the mischief rule has traditionally been used where there is an ambiguity,[7] which rather overstates the importance of the mischief rule. *Cooper Brookes (Wollongong) Pty Ltd* v *Commissioner of Taxation (Commonwealth)*[8] is referred to on the same page both as an example of the golden rule and as an 'important restatement' of the traditional rules of interpretation. Overall, one cannot help suspecting that the book Professor Parkinson wanted to write was the book constituted by Parts One, Two and Three and that he was prevailed upon to add something about judicial reasoning and statutory interpretation. These two chapters do not carry the same conviction as the earlier Parts.

This impression is intensified in the final chapter, *The Challenge of Inclusion.* This reads like a perfunctory recital of contemporary 'access to

[3] (1989) 17 NSWLR 26.
[4] Parkinson, op cit (fn 1) 222.
[5] (1988) 164 CLR 387.
[6] *Mabo* v *Queensland (No 2)* (1992) 175 CLR 1.
[7] Parkinson, op cit (fn 1) 241.
[8] (1981) 147 CLR 297.

justice' issues: one page on Aborigines, one page on women, slightly more on children, multiculturalism and alternative dispute resolution. The superficiality of the coverage contrasts sharply with both the detail and intellectual sophistication of the earlier Parts of the book. The impression is unavoidable that the book was conceived as 'The Tradition of Australian Law' and that its author is not comfortable with the addition of 'Change'.

The book is attractively produced, with a striking red and black cover, notes at the end of each chapter and very few typographical errors (the early notes to chapter 9 being out of order). Professor Parkinson's writing is eminently readable, apart from a surprisingly non traditional excess of commas.[9]

Overall, *Tradition and Change in Australian Law* can be highly recommended as a legal history, but a book on 'Change in Australian Law' still waits to be written.

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Legal Practice in the 90s by DAVID and CHARIS STEIN (Sydney, The Law Book Company Limited, 1994) pp vii, 292.

'A tornado of change is sweeping towards them.... Will lawyers survive?' These graphic words on the dust jacket of the Steins' book are probably, for once, no exaggeration. The first chapter, entitled 'The Gathering Storm', identifies eight issues transforming the practice of law in the 90s: a disappearing market, reducing market share for lawyers, regulatory changes, increasing competition between lawyers, increasing focus on quality management, the impact of technology, human resource dynamics and the accelerating pace of change itself. Professor Fred Hilmer provides the foreword. He warns that lawyers can either 'wait and see' what economic reform and legislative change bring or they can question every aspect of their practices and operations and make changes before it is too late to be pro-active.

This book is a lively and useful introduction to those issues and to the management tools that can be used to respond to them. Open the professional journals of any of the law societies in Australia. You will see there articles on 'surfing the internet', 'quality management' and 'human resources'. However, as the authors observe, 'often, management advice and education offer solutions that sit, like brightly coloured bottles, on a store shelf. Legal practitioners are like Alice in Wonderland confronted with a range of these bottles. Many fear that picking the wrong bottle may leave their practices with nothing but an embarrassed smile.'[1] One strength of this book is that topics such as marketing, technology or human resource are not dealt with in isolation but as part of a broader context: the importance of setting a strategic direction for a legal practice or a legal career.

[9] For example: 'although, the terms of that legislation vary from jurisdiction to jurisdiction': Parkinson, op cit (fn 1) 247; and 'Far fewer still, hark back to their origins': id 281.

[1] D and C Stein, *Legal Practice in the 90s* (1994) 194.

The Steins are well credentialled to venture into the eye of the storm because they combine the experience of having been practicing lawyers with business and management skills. Previously a private practitioner and a corporate lawyer respectively, they are currently directors of a company specialising in strategy, marketing and quality management advice to law firms. Both hold MBAs. David Stein was also a member of the Standards Australia Committee which wrote the standard[2] for the legal profession.

The authors encourage lawyers to develop a 'strategic mind' based on adaptability, awareness and understanding to meet the winds of change. Chapter 3 describes different types of strategic models or analytic models as 'tools of the trade' that can be used to develop strategy. These include SWOT analysis (strengths, weaknesses, opportunities, threats), forecasting, environmental scanning and writing scenarios, inventories and business plans. Here and throughout the book, concepts are explained simply and directly. (For those who want more information, the endnotes contain detailed references to the literature.) Jargon like 'SWOT', 'KVA' (key value activity) and KSF (key success factor) are promptly deciphered. Models are illustrated with tables, diagrams or practical examples. The following chapters consider the impact of the eight issues bringing about change on specific areas of legal practice such as marketing, finance, the structure and culture of legal practice, offices and office systems and technology. Two chapters deal with quality management, discussing three forms: client care, standards quality and TQM ('Total quality management').

Legal Practice in the 90s will appeal to a diverse readership. Established practitioners who are grappling with change will find it a useful handbook to management techniques, full of tips and advice and practical examples. They will appreciate the provision of information succinctly through bullet points and the inclusion of checklists and scorecards. Younger lawyers and law students will be challenged to evaluate their expectations of legal practice and the level of their own strategic thinking about their careers. As the authors say, 'for each person, a career is her or his greatest personal asset. Leadership starts with self-command. People market their services to legal practices, just as legal practices market their services to clients. A successful career management strategy starts with information about personal needs and the needs of legal practice.'[3] This book provides insights into the organisation and management of law firms that might be difficult to achieve from summer clerkships, which is the most common way law students currently learn about legal practice before they graduate.

Those interested in the practice of law who are not practitioners will get some sense of what it is like. The Steins understand prevailing legal culture:

> If the professional frame of reference is the source of sanctions for lawyers,

[2] AS 3901/NZS9001/ISO 9001.
[3] Stein, op cit (fn 1) 163.

> it is also the source of motivation and reward. Lawyers value autonomy, the esteem of their peers and the chance to practice and perfect their skills.[4]

They perceive the pain of change and the difficulties which it brings:

> Conflict may also inhibit decision making in legal practices....Lawyers have formalised this dispute process via the judicial system, so that advocates can earn their living by persuading judges to adopt one precedent over another. Within legal practices, however, it is less easy to resolve disputes.[5]

Different types of legal practice such as the corporate legal department, 'mega' firms and a suburban firm are depicted in the examples which are found throughout the book. As to what the future might hold, the last chapter, entitled 'Beyond the Millennium' uses the 'scenario' technique to envisage what legal practice might be like for lawyer Pauline Proctor in 2010 practicing in a multi-disciplinary partnership in a paperless environment.

The authors' considerable achievement is to present their ideas and techniques in a pithy, clear and, perhaps surprisingly, enjoyable manner. Each chapter of the book begins with a short vignette. For example, to introduce the discussion of quality assurance and the need to respond to clients with speed and flexibility, chapter 9 begins like this:

> It is 4.20 am, Sydney time. As thousands of Australians watch on the giant screens at Circular Quay, the President of the International Olympic Committee opens the envelope. He reads out their city's name and the crowd erupts. Pictures of the celebrations are carried back instantly to television sets around the world.
>
> Worldwide, technology has shortened society's reaction time from months or days to seconds.[6]

Perhaps the vignettes were too often drawn out of the United States context. Nevertheless, they provide an unusual and interesting introduction to each section.

The authors often address the reader directly. Paragraphs are short, sometimes even epigrammatic, for example: 'The business plan is only a tool. Neglect and indifference dulls it. Usage and practice sharpen it.'[7] Once or twice the writing became disjointed through overuse of very short paragraphs or incomplete sentences. Every now and then the punctuation was astray. Chapter 1 was overladen with statistics and examples but perhaps these were needed to convince the doubters and to shock the complacent. However, taken as a whole, the variations of style and methods of presentation, ranging over the anecdotal, explanatory and diagrammatic are likely to hold the interest of a diversity of readers.

In his address at the 26th Australian Legal Convention, Justice Sir Daryl Dawson of the High Court remarked:

> The new emphasis upon the marketplace and marketing techniques is not just a shift in language; it reflects a fundamental change in the way in which

4 Id 133.
5 Id 131.
6 Id 182.
7 Id 73.

> the profession is practised.... Traditionally it was the subordination of personal aims and ambitions to the service of a particular discipline and the promotion of its function in the community which marked out a profession. It is the shift from social trustee professionalism to expert professionalism which explains why the practice of a profession is now regarded as a commercial activity, albeit a commercial activity of a somewhat special kind.

Lawyers are currently engaged in vigorous debate, internally and externally, about the consequences of regarding legal practice as a commercial activity. The Prime Minister's 1995 *Justice Statement*[8] begins in this way: 'The Government is committed to reform of the legal profession to ensure greater competition within the profession, as well as increased choice and improved service for consumers.' In turn, the Statement advocates advertising, contingency fees, the opening of the profession to para-legals and the further consideration of multi-disciplinary practices. But lawyers are questioning this. Some suggest that competition policies threaten the fiduciary relationship between lawyer and client and broader responsibilities of the lawyer to the court and to the administration of justice. The passion involved in that debate is signalled by an editorial by Michael Phelps, incoming President of the Law Council of Australia, provocatively titled, 'Who are these people?':[9]

> It seems to me that the economists look at those engaged in the practice of law not as members of a profession — with everything which the concept of a profession connotes — but simply as providers of services in a marketplace that should conform to the demands of the great god of competition at whose feet we are told we must worship.

Sir Daryl Dawson laments the current state of legal practice which, in his opinion, puts the making of money ahead of giving service. He sees this focus as derived from carrying on legal practice as an industry selling its product to consumers for whose custom the members of the profession openly compete. He attributes the alienation from legal practice that practitioners feel to a range of consequences stemming from the impact of market forces and the pursuit of profit, including the growth of large firms, increasing specialisation, diminished client loyalty and greater mobility of lawyers between firms.

In the Introduction, the Steins explain that the purpose of their book is to 'map our strategies that will help legal practices to be profitable and competitive'. It is significant that they chose Professor Fred Hilmer, the architect of competition policy, to provide the Foreword. This book therefore rests on the premise that lawyers provide services and clients are consumers. The authors however argue that legal practices providing services which are valued by clients will survive and prosper:

> Using a lawyer involves a recognition by the client, and those people important to her or him, that an issue warrants the status of professional expertise. Legal process has an educative value for most people. Above all,

[8] Attorney-General's Department, May 1995.
[9] (1995) 30 *Australian Lawyer* 3.

lawyers are uniquely expert at legal problem solving, in ways that most alternates and substitutes only partially match.[10]

Professionalism and its ethical standards differentiate lawyers from others and confer a competitive advantage. In the authors' view, regulatory controls that fetter the genuine exercise of professional discretion would benefit neither lawyers nor clients. They recognise that a consumer focus may not always be compatible with professionalism. For example, they point out:

> If lawyers seek to become completely flexible in meeting client needs they risk stepping beyond the professional norms that limit risk to clients, professionals and society...Legal practices must also beware of adopting standards or systems, for example, to tender for certain types of business, that inhibit professional discretion. Lawyers must decide whether a system adopted to meet the needs of one client will stop them from meeting the needs of other clients.[11]

In the case of multi-disciplinary partnerships, they ask what ethical standards will apply. It is beyond the scope of the book to do more than flag the issues and admittedly it does this. However, it would be difficult for readers outside the practicing profession to gain an appreciation of the significance of the debate, or its heat, from the brief treatment here.

On the other hand, the Steins' analysis suggests an interesting alternative to the mega firm alienation referred to by Sir Daryl Dawson. On their analysis there are two potential strategic directions for legal practices. These are 'client specialist' and 'subject specialist'. Whereas the subject specialist practice concentrates on an area or range of areas of law, the client specialist practice meets the legal needs of its clients through its knowledge and understanding of them. Practices like this could range from a sole corporate lawyer or a large firm whose partners sit on client boards. Practitioners in this kind of firm would have the breadth of legal experience, the chance to exercise 'deliberative wisdom' and enjoy the client continuity which Sir Daryl lauds. The Steins show that this kind of practice may have its own competitive advantage.

As the authors say, 'the aim of thinking strategically is to create room to move.'[12] This book shows that responses to change in general and competition in particular may sometimes be surprising.

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10 Stein, op cit (fn 1) 82.
11 Id 137.
12 Id 162.