

## Book Reviews

*Intellectual Property in Australia* by JILL MCKEOUGH and ANDREW STEWART (2nd ed, Sydney, Butterworths, 1997) pp xlix, 525.

The publication of the second edition of *Intellectual Property in Australia* comes in time to herald a new phase in the development of intellectual property law in Australia. The first edition emerged at the time when intellectual property law was establishing a firm foothold in the academic and practitioner environments. Now recognised as a major area of practical importance, the law in this area faces new challenges, such as digital technology. In fact there are those, such as John Perry Barlow, whose influential article 'Selling Wine Without Bottles'<sup>1</sup> calmly announced the death of intellectual property, who believe it has ceased to be of relevance. So why then the need for a new work in this area? The authors of *Intellectual Property in Australia* directly confront these and other questions arising from the impact of digital technology and prove conclusively the continued relevance and worth of the various legal regimes that, grouped loosely together, make up that body of law known as intellectual property.

McKeough and Stewart acknowledge the difficulty in successfully articulating a unifying principle behind the various concepts classified as intellectual and industrial property. Indeed it is this willingness to deal with the 'difficult' issues that make this book so readable. However, they do not allow the book to become bogged down in philosophical discussions; accepting the somewhat anachronistic practice of grouping all of these concepts together in a body of law with the word property in the title, they move on.

The work is a successful combination of practical information and an exploration of the grey areas. It is written in an easy to read, conversational style, providing both academic and practitioner guidance. In addition to a thorough description of the law in a particular area, the authors of the book provide information and insights that give a practical focus to the legal arrangements under discussion. It is interesting that the title does not include the word 'law' as in 'intellectual property law in Australia'. In fact, the scope of the work goes beyond merely describing the relevant legal principles. In particular, it outlines the administrative arrangements of the various intellectual property regimes and the problems that can arise with this structure. It discusses the particular steps that need to be taken in intellectual property litigation and alternatives to litigation. It also examines issues such as the social and economic costs of counterfeiting, the costs of bringing a patent infringement action and the increasing complexities of content licensing and exploitation in the face of the convergence of communications and entertainment media.

<sup>1</sup> Barlow, JP 'Selling Wine Without Bottles: The Economy of Mind on the Global Net' in Peter Ludlow (ed) *High Noon on the Electronic Frontier: Conceptual Issues in Cyberspace* (1996).

As the authors note in their preface to this second edition, 'much has happened in the field of intellectual property' since the first edition of the work was written. In particular, the authors have had to incorporate the changes brought about by a new Trade Marks Act (in fact two), a new Patents Act and the conclusion of the TRIPS Agreement (Trade Related Aspects of Intellectual Property, part of the General Agreement on Trade and Tariffs), as well as the new digital agenda. This book is one that you can pick up to gain a quick insight into a particular topic or read from cover to cover in order to gain an understanding of the entire field of intellectual property.

The book asks the conceptual questions that plague intellectual property law, questions such as whose rights are being protected, the owner's, the creator's or the consumer's; issues of morality involved in the patenting of biotechnology and the balancing of the rights of creators and consumers. It also touches on sensitive areas such as the ability of judges to deal effectively with these issues. How well, for instance, can a judge determine typical consumer behaviour? This question brings into sharp focus the flaws and dilemmas in the law affecting misappropriation of trading reputation.

The areas covered by the book include confidential information, copyright, patents, passing off, misleading and deceptive conduct, designs and trade marks. There are also chapters dealing with international aspects of intellectual property protection and commercialising intellectual property. Each chapter has been substantially altered from the 1991 edition. For example, the designs chapter contains an extended consideration of the 1995 Australian Law Reform Commission Report on Designs and criticism of the current legislation. The patent section includes a lengthier discussion of biotechnology issues including a discussion of the Human Genome Project.

The section dealing with confidential information is concise. It gives the reader the gist of the state of the current law in this area, but in a sense leaves the reader wanting more. For any complex question arising in this area one would need to consult a more detailed work.

With respect to the copyright chapters, it is worth noting that now is a very difficult time to be describing copyright law in a book format. The authors do not shy away from these difficulties. The work considers the amendments contained in the *Exposure Draft Bill* 1996, which was released in February 1996, just prior to the Keating government losing office. Most of these amendments have now been picked up in the *Copyright Amendment Bill* 1997 sponsored by the Howard Government. The chapters have been fully updated to take account of the explosion of digital technology, which was contemplated but not prevalent when the first edition was written. The work considers the foreshadowed amendments to the Copyright Act to deal with the emergence of the Internet and cable technology, although the book was completed prior to the release of the Attorney-General's Discussion Paper on *Copyright Reform and the Digital Agenda*. It also includes an extended section on moral rights, whose introduction, although long debated, now appears closer to reality.

The authors also consider the new beast of the copyright world, multimedia, and other issues arising from convergence.

The work also deals with issues arising from the protection of computer technology, canvassing new areas of legal uncertainty such as multimedia and databases. The chapter has been extensively rewritten to take account of national and international developments. Despite the fact that the authors are supporters of intellectual property as a whole, they are clearly not convinced of its expansion into all new areas of technology:

It is not necessarily self evident that such protection is desirable. In many instances it is arguable that the legal monopolies conferred by intellectual property rights are at least as likely to stifle innovation in the field of information technology as they are to encourage it — quite apart from any impact they may have on freedom of expression and access to information.<sup>2</sup>

This represents a healthy approach to the special problems in this area.

The patents chapters include an analysis of the economic and social effects of the patent system. This is certainly no dry articulation of what is one of the more complicated legal regimes, but a user friendly explanation of the role of and the conflicts within the patent system. As an aside, it is interesting to note that the 1991 edition predicted that the famous blue rose would be on the market by 1994. In the latest edition this date has been moved to 1997. Will we have blue roses by the time of the next edition?

Other new issues dealt with include regulation of appellations of origin, discussed in the section dealing with misappropriation of business reputation, and domain names, in the trade mark section.

The reader strongly gets the impression that this book is written by people who have not only a thorough intellectual understanding of the law in this area but also how that theory operates in the marketplace and affects issues such as competition, consumer choice and future economic development. One entertaining aspect of the book is the fact that you get some sense of the authors' stance on particular issues. The reader is left with a strong impression of the cases with which the authors disagreed with the result.

The 1991 edition contained a section dealing with 'Government Initiatives in Technology Transfer', noting new government initiatives to support the commercialisation of Australian intellectual property, the funding arrangements affecting research and development and the proposed development of Co-operative Research Centres. This section has been entirely omitted from the 1997 edition. Also gone is the section dealing with public enterprise joint ventures. Gone with these sections is the optimistic tone evidenced by the authors for the future encouragement of Australia's intellectual and creative output. Perhaps they have been omitted because of space considerations or because they deserve a separate treatment but there is a lingering feeling that these issues have sadly diminished in importance.

<sup>2</sup> J McKeough and A Stewart, *Intellectual Property in Australia* (2nd ed, 1997) 226–7.

Overall, this is a very useful and user friendly explanation of an area that is still growing in importance. It will be a valuable addition to the shelf of the student and the busy practitioner who needs an accessible guide to the law in this area.

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*Legal Issues For Non-Profit Associations* edited by MYLES MCGREGOR-LOWNDES, KEITH FLETCHER and A S SIEVERS (LBC Information Services, 1996) pp 224.

*Legal Issues for Non-profit Associations*, edited by professors McGregor-Lowndes, Fletcher and Sievers, consists of nine essays presented to the Programme on Non-profit Corporations at the Queensland University of Technology. This book will be of interest to and most useful for both counsel experienced in the representation of non-profit associations as well as counsel who are new to this area.

The order of the essays sets out a soup to nuts review of non-profit associations, beginning with Keith Fletcher's essay on 'Developing Appropriate Organizational Structures for Non-profit Association' and appropriately ending with Andrew Keay's essay on 'Winding-Up Incorporated Associations: A Queensland Case Study'.

The opening essay sets out thoroughly the legal basis for non-profit associations, both corporate and non-corporate, and gives detailed guidance on why one structure might be chosen over another. The footnotes are replete with references to the various state statutes, and the distinctions among the different states' laws are well documented.

The text has a thoughtful structure that shows an appreciation of the major sources of legal problems raised by non-profits. For example, an obvious mandatory subject of concern is the tax implications of non-profit associations, and this is well covered in the chapter by Sandra Rodman and Myles McGregor-Lowndes 'Income Tax Exemptions for Non-profit Associations'. Although I found the introductory material on the history and rationale of tax exemptions in this chapter fascinating, I suspect most readers will gloss over this and go directly to the heart of the chapter where the authors set out a detailed laundry list of the permissible bases for tax exemptions. Also particularly useful is an appendix sample work form to be used to determine and to document tax exempt status.

For those counselling directors and committee members of non-profit organizations, there are two important chapters worthy of serious study. First, Sally Sievers sets out in chapter two the explicit fiduciary obligations of

directors and committee members. The differing state statutes governing statutory duties are set out for a complete national treatment of the subject. In addition, the chapter gives a thorough analysis of the governing cases on the duties of directors and committee members.

The chapter on duties is succeeded by a complementary chapter by Myles McGregor-Lowndes on 'Effectively Managing Risks and Liabilities of Non-profit Associations'. Following up on the discussion of duties imposed on members of non-profit associations, this chapter sets out the specific risks associated with these duties, and then suggests appropriate responses to minimize these risks. Useful checklists to identify risks and insurance concerns are included as appendices to this chapter.

The book is primarily concerned with the present state of the law, and most of the essays are well researched guides to the problems likely to arise in actual practice. One chapter though, differs from this, and instead, is essentially prescriptive. In 'The Australian Football League: Is it Time to Siren the Blow?' Kerrie Levy argues that the continuing status of the Australian Football League as a non-profit structure is an abuse of the advantages given to non-profits by an organization that is really commercial in nature. Although Levy's suggestions for grand reform are unlikely to make much headway, the essay is well worth serious study for its intrinsic appreciation and understanding of the social policies that justify continued support for non-profit associations as an institution.

Structurally, the book is easy to use, and it has a thorough topical index in the back as well as a complete table of cases and statutes preceding the articles. Although no short single volume can cover all legal aspects of non-profit associations, this text certainly should be the starting point for anyone working in this area of the law.

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*Principles of European Community Law Commentary and Materials*  
by SIMON BRONITT, FIONA BURNS and DAVID KINLEY (LBC  
Casebooks, 1995) pp 586.

This book is a welcome edition to the voluminous literature on European Community law. Written by three members of the Law Faculty at ANU, it is a specifically Australian guide through the thickets of EC law, the law of that mysterious thing, the European Union.

Beginning with the rationale, origins and structure is essential. Coming to grips with the labyrinthine structure and Byzantine complexity of the Communities and Union is the first step to understanding how it works. This

includes the institution, the multiple forms and procedures for legislation, and the jurisdiction of the European Court of Justice. There is also some more profound discussion of the philosophical and constitutional roots of the Community.

Part 2 covers the internal market, the 'common market in goods, services, persons and capital'. The authors give only two pages to the new citizenship of the Union which reflects its current attributes rather than its potential.

Part 3 covers competition law, a huge area given the complexity of EC markets, and an area highly relevant to Australia, both for potential investors in Europe and as a regulatory model.

Part 4 covers the 'social dimension', the 'Social Protocol' on workers' rights, gender discrimination in pay and in other aspects of employment. The social dimension has become of increased relevance since the book was written with the election of a Labour government in Britain meaning that Britain, to which Australia looks for so much of its social policy, will now sign the Social Protocol, enabling the promulgation of EC-wide social legislation. As the authors point out, EC gender discrimination law has done little to address the causes of discrimination: it has stressed the right to equal treatment rather than equality. Nevertheless, it is a richly developed area of law.

Part 5 covers the environment, one of the few areas on which the EC can directly legislate. This is of particular interest in Australia given the tendency of EC standards to be models for global standards, and given the current push by the EU for binding targets for greenhouse gas emissions.

The book consists to a large extent of materials, such that the authors' own contributions are specifically highlighted. There is an alphabetical index of cases which is very useful. The text is ideal for an introductory course in EC law. Although the Treaties have since been revised by the Treaty of Amsterdam, there has been little substantial change since publication.

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