Review of Sally Wheeler, *Reservation of Title Clauses: Impact and Implications*, Oxford: Clarendon Press, 1992. HC $80.00

After reading *Reservation of Title Clauses: Impact and Implications* by Sally Wheeler, the reader is left with the impression that reservation of title clauses ("Romalpa clauses") are a most ineffective security device, rarely protecting the sellers of unpaid for goods in the case of the buyer's insolvency. The reader is also left feeling sorry for the hapless suppliers who have been advised by their lawyers to insert reservation of title clauses in contracts of sale, only to be defeated by the negotiating prowess of the insolvent purchaser's solicitors, whose main purpose is to erect as many hurdles as possible against recovery of any sort.

The author's expressed aim is to look at negotiation of commercial disputes in their structural context. She selects reservation of title claims as the legal framework. Her aim is to fill a gap in the available literature on negotiation models by the empirical study of commercial disputes involving a total denial of liability ("zero sum negotiation"). This is in contrast to disputes which centre on quantum of recovery, where concessions are offered by each party (for example, out of court settlement of insurance claims). Although Wheeler's study of reservation of title claims centres on suppliers (claimants) and their legal representatives, and insolvent purchasers (defendants) and their legal representatives, drawn mainly from Birmingham and the West Midlands of England, her work has relevance to an Australian context. Reservation of title clauses are a feature of commercial life here and, as in England, their legal implications are governed by common law and statute.

The study was conducted initially by interviews with 13 lawyers, 18 insolvency practitioners (managers of insolvent companies) and 32 manufacturer/suppliers. These were supplemented by documentary analysis (mostly of solicitors' files) and participant observation where possible. A total of 259 claims was examined. The fact that the number of interviewees was small compared to the number of claims appears to be a weakness in the study. Wheeler, however, making no mention of this shortcoming, describes the legal files examined as comprehensive and claims that they enable "a very detailed picture" to be built up (page 12). It would have been useful, though, to know how many of the claims were defended by the same lawyer and whether the suppliers involved made more than one claim each. This would have enabled the reader to know how many different parties were involved and the extent of personal contact, or the lack of it, with them.

Out of the 259 claims examined, only a very small proportion of claimants (15 per cent) succeeded in recovering anything; and of these 92 per cent accepted the first offer made to them, which was never higher than 50 per cent of the original claim, and often much lower. Wheeler explains this by taking us through the history of a reservation of title claim, starting with the construction of the claim (Chapter 4) and then dealing with the process of negotiation (Chapter 5). Each stage (notification, submission of claim, creditor's letter, first visit, access, etc) is illustrated with extracts from letters and interviews with the parties involved.

What emerges is a picture of insolvency practitioners and their lawyers as the dominant actors. They are able, by various means, to defeat the claims of most suppliers (and their lawyers, if they are represented) who lack the necessary expertise and experience to compete successfully with their opponents.

The fact that the supplier's claim may be legally good, Wheeler emphasizes, is no guarantee of recovery, though it is invariably a pre-condition . But just what is legally good is uncertain. The author exposes the uncertainties and lacunae in the law relating to reservation of title clauses in Chapter 2, while at the same time showing how, ironically, case law has evolved in favour of the reservation of title clause user. Specialized negotiating skills and "self- presentation" are, according to Wheeler, of greater importance than the strength of the legal position (page 102).

In Chapter 6 the author focuses on the role of lawyers in reservation of title claims, noting that only 24 per cent of claimants had legal representation. Of these, it was not legal representation per se that was the reason for a successful claim. Rather, the most successful claimants were those who used lawyers who had experience in this area, a conclusion which is unsurprising in itself. More surprising was the fact that this was less than 20 per cent of represented claimants, the rest using general practice solicitors. To interpret and explain these statistics, a table correlating the typology of the claimants (size of firm, turnover, etc) with the type of legal representation used should have been included in the book as should a table correlating the magnitude of the claim and the type of legal representation.

The fact that most claimants were represented by general practitioners, Wheeler posits, was due not only to the perception of lawyers in large firms as "parasites" (page 169) (a conclusion which she draws from anecdotal evidence) but also to a commercial naiveté among suppliers, who obviously failed to realize the complex nature of making a reservation of title claim and the consequent need to instruct someone more experienced than the local general practitioner.

Similar explanations are offered for the lack of legal representation generally. There is some speculation as to why general practice lawyers accept reservation of title claims when they are in general so ill-equipped to deal with them in terms of knowledge and negotiating skills. Wheeler's explanations include the fact of an existing professional relationship simply carrying over. Unfortunately, we are given no data as to the number of lawyers in the study who were already in a solicitor/client relationship with the claimants.

Wheeler's basic conclusion from her study is unremarkable: the existence of a right to goods, or proceeds from their sale, does not translate into automatic recovery; negotiating skills, competent representation and persistence are indispensable. This is the case in most civil disputes. But two things in particular make Wheeler's work invaluable. First, it highlights the difference between negotiation of the sort studied (zero sum negotiation), where one party's aim is to dispose of the other party's claim, and "bargaining within the shadow of the law" (page 198), where the law is envisaged as giving a particular result, with the parties manoeuvring around this to gain a compromise. Wheeler demonstrates that there is not simply one mode of negotiation. Informal bargaining does not always produce the best result for both parties in a commercial dispute.

Secondly, Wheeler's study may have implications for the way "business" is regarded by the law. In commercial contexts, it is generally assumed that parties

enjoy equal bargaining power. This has had implications for formal commercial law. In contract law, for example, exclusion clauses are more likely to be construed against those engaged in business than against consumers; and in the Commonwealth Trade Practices Act 1974, businesses, regardless of size, are not able to take full advantage of many of the consumer protection provisions because they do not always come within the definition of "consumer". Wheeler's study shows not only that there may be inequalities even where both parties are in business but that this inequality can even extend through the parties to their solicitors.

An obvious implication of Wheeler's study (weakened as it may be by some important omissions of data or at least by her presentation of data), and one surprisingly that is unstated by her, given that it is in a sense the "ultimate" implication of her study, is that reservation of title clauses should be consigned to the legal scrap heap for failing to achieve the purpose for which they were designed. If this seems too drastic, then at the very least existing legislation should be more detailed and precise in recognizing and regulating this proprietary right. These possibilities remain unexplored.

Another question unfortunately not addressed by the author but one that cannot help but intrigue the reader is, that given the "proven" inadequacy of reservation of title clauses, why is it that their use is so widespread (Chapter 3)? Given the frustrating experiences of those who have used them, would not conventional wisdom and lore among suppliers be to steer clear of them?

Nevertheless, despite some obvious omissions by Wheeler, this book, and books of its type, should be required reading for all law students and would-be practitioners, for they demonstrate "dramaturgically" (a favourite word of Wheeler's: see pages 87, 89 and 200) the gulf that exists between theory and practice. Courses on negotiating skills would also seem to be a must.

AVIVA Y M FREILICH

Lecturer in Law, The University of Western Australia.

Review of H Astor & C M Chinkin, *Dispute Resolution in Australia*, Sydney: Butterworths, 1992. $55.00

Alternative Dispute Resolution ("ADR") is a term that has surfaced in legal circles only in the last ten years or so. Initially it was used exclusively to describe a fairly simple procedure whereby legal disputes were resolved by mediation. But more recently it has expanded to include virtually every dispute settlement process imaginable other than actually appearing before a judge in an established court of law.

In Western Australia the idea of settling disputes without resorting to a court started with the publicity given to mediation by the Australian Commercial Disputes