The Reading List

Book reviews for Society members, by Society members

Administrative Appeals Tribunal, 3rd Edition

D Pearce
June 2013
LexisNexis
RRP $220

In every field of endeavour there are accoutrements. Some find an occasional use and others are 'good to have', but a few are indispensable. For those who conduct matters in an administrative tribunal, particularly the Commonwealth 'AAT', Professor Pearce's text Administrative Appeals Tribunal is an invaluable resource.

By means of a detailed Table of Contents and index, precise and objectively written statements of the law (including competing viewpoints) and an extensive reference to case law to support the stated propositions, the practitioner receives in simple language all the essential propositions that underpin the jurisprudence of tribunal proceedings. Often there is also 'the answer' to the question that prompted resort to the text.

It is one of those books, like Ogders on Evidence and Professor Pearce's other work of note, Statutory Interpretation Australia (now written in conjunction with Professor Geddes and in its 7th edition), that are essential references. They give the legal answers, leaving only the comparatively easy task of applying the law to the facts.

Administrative Appeals Tribunal does not canvass the law on particular subjects within the AAT's jurisdiction, for example the Safety, Rehabilitation and Compensation Act 1988, but it provides the 'road rules' for conducting any matter in the AAT. It deals in detail with the nature of the AAT's jurisdiction, particularly its freedoms and its constraints arising from the often difficult question of what the Tribunal may do within the ambit of reviewing a decision. It examines questions of standing and procedure at hearing, particularly the manner in which evidence may be given or otherwise received where 'the Tribunal is not bound by the rules of evidence but may inform itself on any matter in such manner as it thinks appropriate.'

By use of numerous subheadings in each chapter, Professor Pearce highlights and then deals with the many subtle but important questions that often arise when the Tribunal is considering options, particularly if a party is urging a decision to be varied rather than the more straightforward outcome that the decision be confirmed or set aside.

Professor Pearce also addresses the difficult questions that can arise, substantive and procedural, where the law has changed since the decision under review was made but the Tribunal is required to consider an issue de novo by reference to the evidence before it.

In all, this is a very useful book.

Geoffrey McCarthy, Blackburn Chambers

Western Legal Theory: History, Concepts and Perspectives

A Zimmermann
December 2012
LexisNexis
RRP $100

This text links classical western philosophy with the social context in which law operates in a particular society. The following perspectives are canvassed: natural law, legal positivism, legal realism, Marxist jurisprudence, economic analysis of the law, libertarian and feminist jurisprudence. Interestingly, there are chapters on National Socialist and postmodern jurisprudence.

Zimmerman argues that 'natural law' has had a significant impact on the development of legal theory. It is the theory that a higher or natural law (which reflects principles such as justice, moral action and freedom) should underpin law. St Thomas Aquinas was a prominent medieval Christian natural law theorist. In his view, the validity of human laws is dependent on their level of justness - 'that which is not just seems to be no law at all'. John Finnis is a contemporary exponent of natural law theory. Finnis refers to 'practical reason' as a natural faculty of the human mind, a capacity to understand and to form judgments. 'Reason' is said to enable a person to distinguish between right and wrong, and between justice and injustice. Natural law has had a substantial impact on the development of Western legal systems.
According to Zimmerman, one of the questions posed from a 'legal positivist' approach is 'whether humans have a duty to comply with laws?' The distinction between natural law and legal positivism can be drawn thus: natural law theorists would argue that the content of law depends on its moral status, whereas legal positivists would argue that the key factor in determining whether a law is valid is, whether the law has been enacted in a proper manner by a proper legal authority. Hans Kelsen, a legal positivist, argues that law must be analysed 'scientifically'. An 'immoral' law could still be legally valid.

Another common touchstone in legal theory is 'the rule of law'. The notion of the rule of law, says Zimmerman, has been conceived in a number of different ways. He points to Friedrich Hayek, who said that 'the rule of law' is a political ideal of what the law ought to be. For Joseph Raz, 'the rule of law' means that public authorities behave in accord with specific procedural requirements. Ronald Dworkin is important here, as he is critical of the separation of law from morality. In his view, moral rights are composed of social values that should be recognised in positive law and enforced through the courts at the behest of citizens. Dworkin also anticipates a role for judicial activism in developing 'good law'.

The chapter on National Socialist jurisprudence focuses on the philosophical foundations of the Nazi legal system. Nazi jurisprudence was inspired by the Freirechtsbewegung (Free Law Movement). Nazi jurisprudence borrowed the concept of 'departing from the strict language of the law' so as to look at social values and principles. Ernest Rudolf Huber argued that the rights of the national community should always prevail over the rights of an individual. Carl Schmitt was the leading legal philosopher of the Nazi regime. He argued that law and morals were no more than the end products of an ongoing struggle between hostile groups for political power.

Zimmerman's book demonstrates that legal philosophy cannot be an anodyne topic. His historic overview of legal theory demonstrates the implications for the individual where a particular philosophical perspective holds sway. Law can be fashioned into a brutal instrument. Hence, questions about integrity, morality and the role of the state and individual will continue to be relevant as societies respond to perceived threats and social changes.

Jane Grace, Australian Communications and Media Authority

LexisNexis Annotated Acts: Essential Personal Property Securities Law in Australia, 2nd Edition

C Wappett
May 2013
LexisNexis
RRP $137

The introduction of the Personal Property Securities Act 2009 (Cth) (‘PPSA’), and the imminent expiry of the transitional period is a topic of great interest to all commercial and business practitioners. It is arguably one of the most significant law reforms in Australia’s history affecting almost every business and commercial transaction.

The book contains a detailed summary and overview of the PPSA including the background of personal property security law in Australia, a guide to registration on the Personal Property Securities Register (‘PPSR’), the PPSA itself and the explanatory memorandum and bill.

Being such a new area of law in Australia, the book understandably has a predominant focus on the statutory regime of personal property securities law. That said, it contains a number of useful case summaries and commentaries from jurisdictions that have been operating in the personal property securities law context for a period of time such as New Zealand and Canada. This commentary and the summaries provide a useful insight into how the Australian judicature may interpret the various aspects and complexities of the PPSA on the many occasions it is sure to be tested on our shores.

One of the most useful tools in this book is the guide to registration on the PPSR. The easy to read style, combined with tables and section headings help to clarify important points in the registration process. I look forward to using this book as a useful resource in both providing advice to clients and prompting consideration of all aspects of the PPSA in commercial and business drafting and transactions.

Erin Taylor, Associate, Griffin Legal

LexisNexis Q&A: Legal Practice and Ethics

M Ebejer
July 2013
LexisNexis
RRP $59

This book, small in stature but big in content, provides a clear and systematic approach to successfully addressing assessment questions in the area of legal professional practice and ethics. Obviously aimed at students, it would be a great resource for practitioners as well. I haven’t seen such a concise yet clear outline of the caselaw and legislation covering this area.

Each chapter begins with a discussion of the key principles of the subject area, and includes an analysis of the major issues, with a summary of relevant case law and legislation. The use of comparative tables of legislative provisions for each state and territory also underscores the clarity and accessibility of the book, regardless of what jurisdiction you are in.

Sample questions with fact scenarios are included at the end of the chapter. Each has a suggested answer plan, with comments and insights from an examiner’s point of view, along with advice on common errors when answering questions. I’m not entirely convinced by this format, as the range of expectations from examiners varies greatly, but the content is so comprehensive you can’t help but be impressed.

Areas covered include ethics, morality and the legal profession, admission to practice, handling money, lawyers’ duties to clients, the court and the profession, and complaints and discipline. It manages to integrate the regulatory and ethical aspects of professional conduct into a very readable package.

Ethics and professional discipline is an area we can never be complacent about, nor can we ever stop reflecting on it and updating our knowledge of it. Teachers will find it a handy resource and it would be an ideal companion text to some of the more comprehensive works that exist. It would also serve as an effective way for practitioners to brush up on their skills or address an ethical query. It is an impressive reference work and is highly recommended.

John Alati, Australian Medical Association
The Future of Dispute Resolution

M Legg (ed)
December 2012
LexisNexis
RRP $119

The former Chief Justice of the Federal Court of Australia, Michael Black notes: ADR is here to stay and there is every reason to suppose that it will continue to develop. ... Most complex civil litigation proceeds through sequential, costly and delay laden steps until they are ready for trial only to settle on the steps of the court. ADR may provide a solution to the cost and delay caused by tactics, strategy and harassment of the other side while still providing a legal resolution of the dispute.

The Future of Dispute Resolution is a series of essays which issue an invitation to the reader to look forward forty years and imagine a justice system which provides parties to civil disputes with a broader access to justice and an efficient, timely and relatively inexpensive method of resolving civil disputes, including those described as 'complex civil litigation.' The authors do not predict a system where litigation is replaced by ADR, but imagine a justice system which may be a hybrid of today's civil litigation processes, mediation and arbitration with an emphasis on facilitating the parties to reach their own resolution of a dispute.

Case management which includes greater emphasis on full disclosure and early notification similar to that already found in the 'super tribunals,' and a greater emphasis on utilising information technology to speed up communications between parties and between the legal system and the public is envisaged. While the role of lawyers will change over the next forty years, advocacy will play an important role in the mediation process.

The scope of the courts, development of mediation procedures, access to justice and education in dispute resolution methods are key topics discussed. Educators, courts and tribunals and legal practitioners will recognise that these essays make a vital contribution to our consideration of dispute resolution in the future.

Jann Lennard, Senior Member, ACT Civil and Administrative Tribunal

Australian Medical Liability, 2nd Edition

B Madden; J McIlwraith
February 2013
LexisNexis
RRP $177

Since the first edition of Australian Medical Liability was published in 2008, there have been significant developments in Australian medical law which has altered the legal landscape significantly.

The second edition of Madden and McIlwraith's text is not only insightful and useful, but it comes at a particularly timely juncture. The new text updates the previous edition by considering developments in case law, in addition to a comprehensive review of the various differences in civil claims across each jurisdiction.

The text is divided helpfully in the context of duty, breach, and causation, including consideration for special categories including wrongful birth claims and intentional torts. Particular focus is given to principles of informed consent and treatment cases, including in the context of recent developments and trends in the judicial interpretation of two of the more significant areas of medical law.

Notwithstanding in the scope of the material covered, the text is concise and easy to follow with the topics following sequentially. The reproduction of the cases are enhanced and supplemented by the discussion of the underlying principles, rather than simply being a substitute for the authors' own analysis.

Overall this is a well referenced, detailed and eloquently written authoritative text in medical law and is highly recommended for those seeking an up to date examination of a constantly evolving area of law.

Liam Casey, Slater & Gordon

LexisNexis Q&A: Corporations Law, 4th Edition

J Harris
May 2013
LexisNexis
RRP $59

Corporations Law, 4th Edition is a collection of question and answer based chapters on various aspects of the Corporations Law. The book touches on topics such as registration, corporate liability rules, directors duties, share capital transactions, members' rights and remedies, debt and equity fundraising and external administration.

In canvassing all of the issues mentioned above, the book provides useful study guides in the form of examination style questions and includes worked answer guides for each question. The answer plans include the relevant statutory and case law examples in answering each aspect of the examination question. Usefully, in addition to the worked answers, the book provides a 'keep in mind' section under each answer which highlights other issues that may arise in similar factual scenarios for students and practitioners to consider.

As the book itself mentions the study guides are a mere summary of the key issues in Corporations law and it does not provide an in depth answer for the gamut of Corporations law issues that students and practitioners alike encounter.

From a practical perspective for practitioners, though the book is clearly targeted at students as opposed to practitioners, it is a useful starting point for guidance on issues that arise daily in the context of providing corporate and corporate governance advice to clients as it highlights both the statutory and common law regime relevant to each issue.

Erin Taylor, Griffin Legal


**Law of Torts, 5th Edition**

R Balkin and J Davis  
June 2013  
LexisNexis  
RRP $171

The *Law of Torts* has been a leading text on the subject for over twenty years. This edition, the fifth, will again be required reading for those needing a comprehensive and comprehensible explanation of this area of the law.

The structure of the book will be recognised by those familiar with previous editions. The book has eight parts. These parts deal with areas such as negligent and intentional invasion of personal and property interests, protection of reputation and protection of trading or business interests. The final part deals with remedies and considers issues associated with particular types of parties to a proceeding such as foreign states, minors and intellectually disabled persons.

The law in the text is as stated at the end of 2012 and a number of important High Court decisions are considered including the causation decision of *Strong v Woolworths Ltd*.

This edition of the text is also the first since the introduction of the Australian Consumer Law. The book now contains an updated and detailed chapter on statutory protections against unfair business practices which deals with when the new consumer law provisions apply and explains when and how such provisions represent a development from the earlier Trades Practices Act.

[The strength of this text over the years has been the both its readability and its detailed consideration of a range of issues concerning this area of the law. (The current edition runs to almost 900 pages with detailed footnotes on each page). Because of this the book is invaluable for the student grappling with new legal concepts and practitioners endeavouring to advise their client on this complex area of the law.

Garrath O’Keeffe, Department of Industry

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**Long Term Contracts**

K Dharmananda and L Firios (eds)  
August 2013  
Federation Press  
RRP $199.95

*Long Term Contracts* begins by telling its readers that there is no legal definition for a ‘long term contract’. It is not a legal term of art. Rather, as Justice Carmel McClure puts it in her contribution to this text: ‘No definition is required. You’ll know one when you see it.’

That opening, and its clear, no-nonsense tone, defines the approach taken throughout this collection of papers on long term contracts. With the commercial practitioner in mind, *Long Term Contracts* has been crafted to provide a sweeping, yet detailed, overview of the issues relevant to those involved in the negotiation, drafting, performance, and enforcement of long term contracts. Although the focus is on long term contracts in the energy and resources sector, the international team of judges, lawyers, and academics that have contributed to this text provide material that is relevant to most long term contracts.

Some of the topics covered include: commercial considerations, drafting tips and processes, state agreements, frustration and force majeure, remedies, and dispute resolution and enforcement.

Aside from its practical approach, part of the value of this text is its international and comparative outlook. Standout contributions include Lucy Reed’s paper on choice of law issues, investment treaties, and arbitration clauses — notable for the way it deftly makes several complex topics easy to understand. And Jonathan Southalan’s paper on the particular risks that attend parliamentary-ratified agreements in the resources sector will be of particular interest to lawyers called upon to advise on long term contracts involving a government party.

Presenting a wealth of material that should provide the starting point (if not the answer to) many of the frequently asked questions on the topic captured in its title, *Long Term Contracts* is highly recommended.

Joshua Kelly, Defence Legal

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**Australian Corporate Law, 4th Edition**

J Harris; A Iargovan; M Adams  
July 2013  
LexisNexis  
RRP $135

Corporations law can be a maze for those not practising in it regularly, but some practitioners are required to advise on it on an ad hoc basis, particularly those working in an in-house environment.

Fraught with risk and dominated by the self-assured, any margin for error was long ago whittled away to nothing. Directors’ duties are particularly poignant at the moment, as many review their roles and responsibilities. This book could well be the starting point when a complex question is referred from the board and an answer is required quickly.

This would have to be one of the clearest works on Corporate law that I have seen. It provides focus issues to help readers go beyond the abstract and consider real matters and the core principles which underpin them. It provides clear explanations of terms and principles.

This is an area where significant litigation has taken place in the last few years, and this edition covers key cases, such as the *James Hardie and Fortescue Metals* cases.

Discussion points are found throughout the book, along with revision questions and guidelines for answering them. All major areas are covered, including business structures, ASIC, incorporation, governance, corporate liability, finance, capital, directors’ and officers’ duties, financial services, administration and insolvency.

The authors, with solid business and law credentials, have put together a comprehensive but easy to follow guide for students and practitioners which makes use of teaching tools such as flowcharts and case studies to highlight current issues. It’s the kind of book you pick up and can navigate very easily. The authors are to be congratulated on that alone. It would be an ideal companion text to a more comprehensive work. For those so inclined, the publishers also provide online support to students and teachers.

John Alati, Australian Medical Association

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