BOOK REVIEWS

Maher, Waller and Derham, **LEGAL PROCESS — COMMENTARY AND MATERIALS by** *Malcolm Smith and Kevin Pose* (The Law Book Co, 5th edn 1988) pp xxx, 593.

This is the fifth edition of a work which is well-established in Australian legal education. It has been produced by the same authors as the third and fourth editions and one might be forgiven for assuming that where a work is subject to continual practical review in the classroom they should have done it right the fifth time around. In almost every respect this is indeed the case and it is the very advanced and sophisticated nature of the book which, it will be suggested, invites a reappraisal of its scope and function.

There are some significant new sections in this edition, prompted both by legislative and judicial developments, and by a new realisation of the pluralism of Australian society. In the latter category are two extracts on the recognition of aboriginal customary law, and it would be a matter of regret to find that this interest is only a consequence of the bicentennial (*vide* 23-24). Among the former are an analysis of the Australia Act 1986 (UK) and the significant amendments to the Acts Interpretation Act 1901 (Cth) and Interpretation of Legislation Act 1984 (Vic), each of which directs the courts to take account of a wider range of materials in interpreting legislation. There is a range of new cases from State, Commonwealth and English courts; one of the striking parallels here is that in the same year (1987) both the High Court and the House of Lords departed from their own clear precedents (in the latter instance one with only two years' tenure) thereby demonstrating a vigorous contemporary approach to the *stare decisis* doctrine, an important theme in the book. There is additional material on the legislative process and a new chapter 12, entitled A Framework and a Methodology, includes an interesting attempt to provide an intellectual structure for the reasoning used by lawyers and judges. Of the meta-legal innovations there is a more extensive survey of dispute resolution, including very timely references to the subject of Alternative Dispute Resolution — though as its principles and practice are hardly new to Australian law only the wrapping can be regarded as American law's anniversary gift; there is also a short section on plain English and the law. These inclusions are made at small cost, apart from a few dated

cases, though connoisseurs will regret the omission of the section on The Agony of Decision which deprives the work of an enigmatic heading and some realist jurisprudence.

Apart from these changes there is a substantial reorganisation of the material, which involves the sudden immersion technique in the very first chapter — though the waters are shallow. The facts of an everyday motor accident case are used to introduce students to some general issues of criminal and civil law, and thence to elementary legislative and judicial materials. Then the judgment in *Benson v Lee* [1972] VR 879 is used to provide the context for the familiar treatment of damages for emotional injury. Only in the second chapter do the authors provide an overview of the Australian legal system. Thereafter the waters deepen.

Part III, in the authors' view, is the most important section of the book, and in the reviewer's view it is the most impressive. It deals skillfully with the quintessential characteristic of the common law, precedent in action. The topic is dealt with in all its variety, and includes attention to such matters as the influence of obiter dicta and minority judgments in the juidicial development of the law. The expansive scope of precedent is again revealed through the case law development after *Donoghue v Stevenson* and its restrictive ambit through the various sequels to *Rylands v Fletcher.* This part is systematic and comprehensive with an array of questions to probe, test, stimulate and provoke in the teaching situation. It is not, however, always easy-going, with little concession to the faint-hearted and only a few diversions of the snail in the bottle and sulphur in the underpants variety. But then while *Legal Process* is an introductory work it is not a first book, and students are assumed to have a reading knowledge of the authors' companion work *An Introduction to Law* (5th edn 1986) to which various cross-references are again made.

Part IV is a very full chapter on legislation and its interpretation. It begins in good fashion by dealing with the categories of legislation from the layman's (layperson's?) point of view, the legislative process, and the internal and external sources of contextual interpretation. Unfortunately in the last two chapters on the courts, common law and legislation it enters the difficult cross-currents which so often cause this subject to founder. The maxims come in quick succession and by the time we encounter *reddendo singula singulis*, whose easy resonance should be on every lawyer's lips, even the most resolute student might feel a little subdued. Now not too much should be made of this point since the reviewer can always score a few points on the topic and an author may justifiably ask for a suitable alternative. It must be admitted that such is hard to find. This is simply a difficult field for the legal apprentice. Indeed the organisation of this part is helpful in that the judicial perspective is only introduced after the non-pathological aspects of statute law have been dealt with; this is also appropriate in that most legislation, after all, is used, interpreted and applied far more frequently outside the courts than inside them. However perhaps in this kind of work the focus should be restricted to an outline of the different kinds of legislation, questions of commencement, amendment and repeal, keeping abreast of the statute book, the resolution of conflicts in legislation, and on generally coping with this most important source of modern law. In this way the more perplexing 'case law of statute law' could be dealt with very economically, or left for more specialised texts. In any event the

overall objective should be to leave the student feeling modestly confident and not bilingually confused about the subject. There were some other minor quibbles in this section: there is no treatment of conflicts between different species of subordinate legislation; the *leges posteriori derogant priori* maxim should arguably be dealt with first, in view of its constitutional importance, and *generalia non specialibus derogant* thereafter as an exception to it; the legal status of the maxims could be given more attention; and the matter of drafting a model statute on emotional shock seemed to be left somewhat in the air.

A short Part V on Judges as Lawmakers ends with some futuristic insights with challenging perspectives for the lawyers of tomorrow — and the sixth edition. Pound's aphorism that 'taught law is tough law' — enduring, self-perpetuating, persistent — can no longer be a source of comfort to its professional instructors.

In this updated form *Legal Process* provides the law teacher with a sophisticated resource for group instruction and the student with a convenient text for private study. There were some inconveniences in the organisation of the material, but none of major consequence. There was at times a slight loss of narrative continuity (eg in the shift to economic loss for negligent misstatements at 209ff), but a text of more than 600 pages could clearly not be countenanced. There were also, from the perspective of the intended user group, some questions which were a little obscure (eg question 1 at 458), or at least difficult to answer with the limited resources available, but then the book is designed for interactive learning and not a desert-island read. There is also a Victorian bias, alluded to in earlier reviews, but I did not find it too pronounced — though probably sufficient to make it a problematic choice as a basic text in other states.

The more interesting critical issue which a book such as this raises concerns the extent to which it should deal with extra-legal influences on the law. Here a cynosure has been provided by the two recent commissions into legal education in common law jurisdictions, chaired by Professor Harry Arthurs in Canada and Professor Dennis Pearce in Australia, which have called for a more inter-disciplinary approach to law so that the legal order, the policies underlying it, and its relation to society can be better understood by those who operate it. As far as Maher, Waller and Derham is concerned two points must be conceded in this regard. The first is that the work is about *legal process* and not about *law as process* and therein lies a difference. The second is that the authors use a legally integrative technique in taking a social problem, such as a road accident, and showing how the law in all its manifestations copes with it; this avoids the dangers of the Jerome Frank disease of 'appellate court-itis'. At the same time, however, the book carefully avoids departing from the legalist paradigm and a pluralist model of law (and common sense (545)). The real problem is where to stop after one has acknowledged the dynamic role inherent in contemporary courts' discretion, in judicial creativity, in a laxer doctrine of precedent, and in the inexorable process of legal evolution, or once it has been admitted that the High Court is 'able to develop and change the law to keep it in tune with the changing needs and demands of the community' (161). Once these realities have been disclosed and the shibboleths of crude positivism cast aside it is too late to reseal the bottle of legal autonomy. In reality legal evolution is always dual-factored: it

is effected by factors internal to the legal system such as judicial policy, procedural formalities, precedent, and so on, as well as by factors external to it, such as economic imperatives, political expediency and social policy. In this work there are some glimpses of the external forces in the comments of the authors (171), in the motivations of legislators (325), and in judicial statements — from those of Murphy J (270) to Barwick CJ (235). But in all cases it is lawyers (in the term's widest sense) who provide these insights. In highlighting the theme of legal evolution and in dealing with the dynamic interface of common law and statute the authors themselves are suggesting the need for a more sociological approach to the legal process. The other side of the coin would be to show the social consequences of particular legal principles and processes, for example the economic interests which are served by the changing contours of tort law; again the work does not pretend to enter this realm. In some substantive areas of the law this approach might be more easily justified but *Legal Process* is concerned with introducing students to law and its techniques. Legal education is serious business, not only for its vocational relevance but also because it is where the first socialisation in the law takes place. Legal understanding, once established, is notoriously difficult to reorient. In this regard it is parsimonious, at the least, to leave students with the notion that 'the strength of the common law . . . lies always in its ideas' (280). What about the living vitality of the common law which lies more in its adaptation to policy than its ideas? — and policy serves identifiable interests, is political and partisan, and is rooted in social reality. It is a reappraisal in respect of these matters which is being suggested, without losing sight of the fact that it might result in a very different kind of book.

These, however, are considerations for the future and if one returns to its self-defined ambit this work must be classified as a very fine one. The material is treated systematically, comprehensively and thoughtfully. The presentation is generally outstanding with an improved chapter directory. There is no index, which in a book as carefully produced as this is certainly not an oversight; there are good reasons for dispensing with such a valuable tool in certain circumstances but I could not detect their presence here. (Nor could a reviewer of the first edition — (1969) 7 Melbourne ULR 144-146). Errors seemed to be very scarce, though I noticed one miscitation (at 453) which was carried over from the fourth edition, and two punctuation gremlins (at 467 — in the same paragraph!) from the third. The orientation is also very good with user-friendly symbols (*vide* compact disk player at 49) for the diskette generation.

It must in conclusion be confessed, in the tradition of autobiographical reviews, that this work was evaluated at two levels: first in terms of its stated objectives and potential audience, and secondly in terms of its capacity to introduce the Australian legal process to a less fledgling newcomer. I thought that it also succeeded very well at the second, uncalled-for, level.

Laurence Boulle
Lecturer in Law, University of Adelaide.

THE LAW OF THE LAND by *Henry Reynolds* (Penquin Books 1987) pp xii, 225.

This is one of the most provocative books written in contemporary times about the relationship between settler colonists and indigenous peoples. The work traverses the entire gamut of concepts of sovereignty and proprietary rights in law, (domestic and international) politics and history or sociology. It is a classic study of what in contemporary legal studies is termed 'law in context'. Law is no longer regarded as a brooding phenomenon in the firmament designed to police human behaviour but a social fact. The work is a legal history of a people. It is intellectually narrated and devoid of racial prejudice such as the world is wont to see from time to time from people who make it their duty to present history from the point of view of the race to which they belong. It is a classic case of intellectual integrity.

The author sets the tone by positing that even before the first settlers, a 'motley collection of convicts and gaolers' (at 7), arrived at Sydney Cove on 7 February 1788, zealots of British imperialism were prepared to ignore the arrival date and to backdate the date of settlement to 12 October 1786, the date on which King George III actually gave Governor Phillip his Commission to go ahead with the inauguration of the Australian settlement! And it could only be a matter of the figment of the imagination that Australia should be regarded as a *terra nullius* — an un-peopled land — in view of what Captain Cook and his crew saw of aboriginal activities during the voyage in 1770. That this view has persisted to the present is not only a perversity of history but a tenacious effort to discount reality. Not only was history distorted but legal principles also, and as the author succinctly puts it:

> 'the truly amazing achievement of Australian jurisprudence was to deny that the Aborigines were ever in possession of their own land, robbing them of the great legal strength of their position and of compensation which should have been paid following resumption by the Crown' (at 2).

Indeed, 'The intellectual and moral gymnastics required to sustain the position have been quite extraordinary' (at 2). The author goes to great length to provide decided cases from all over the world where the Englishman has transported his law — Africa, Canada, the United States and New Zealand to show that in none of these places did the Crown's assumption of sovereignty deprive indigenes of property rights in the land of their ancestors, the only place they can call their home or country.

He makes use of apposite legal material, especially from Canada and the United States whose experiences are similar to the Australia experience, to show that when native people's rights are extinguished it is by legislation; that there are such things as prior occupation, possession and native title, and that when land is taken away from the owners, appropriate compensation is payable and it is a legal principle and not dependent on bounty or benevolence. He has offered examples of native reserves in the United States, Canada and even South Africa. The fact that a people roam their land for forage and game — that they are nomadic — does not render them landless. It is sheer hypocrisy to say people are of the land but the land does not belong to them. *The Gove Land Rights Case* (1971) 17 FLR 270 exemplifies the truly difficult position in which judges are placed when they divorce history from law. Admittedly a judge is not to

interpret history but administer law; yet as Von Savigny properly points out

> 'in the earliest times to which authentic history extends, the law will be found to have already attained a fixed character, peculiar to the people, like their language, manners and constitution'.

Thus when history is distorted, so is law, and one cannot blame the judiciary for the distortion.

The author offers an answer or counter argument to every conceivable argument upon which the settlers lay a claim of right of ownership of Australian land. To the argument that the native inhabitants do not have proprietary interest in the land of their birth and ancestors he posits the claim of native title; to the claim of prescription by the settlers, he offers the right of first occupation which can be displaced only by proof of *animus deserandi*; to the settler claim of estoppel and acquiescence he asks the question: what was the resistance against the white 'invaders' for, and for which so much aboriginal blood was shed? To the settler argument of lack of proprietary right in the natives because they had no settled system of living and because they roamed and hunted for animals and behaved as savages, he asks if British lands which are not occupied are ownerless for lack of a settled population; in any case proprietary right does not depend only on agricultural use of land but also on a people's way of life. In this case pastoral use of land confers a proprietary right to the land on which the people roamed.

But most importantly, if a colonised people become British subjects, why should a part of British law which safeguards the sanctity of property be withheld from them? Why should their land be expropriated without compensation or making alternative land available to them to sustain their system of making a livelihood?

But the point was well taken that something went wrong with the drafting of the South Australian Constitution Act 4 & 5 Will IV c5 — the preambular portion of the law which declared that the place was 'waste and unoccupied . . . fit for the purposes of colonisation'. How anybody thought that fatal portion could be altered short of a repeal or amendment is the mystery in this whole saga of Australian history. Neither Letters Patent nor Instructions from the Colonial Office could make right that wrong. Thus Australia remains, two hundred years after nationhood, the only exception to British colonial policy which preserved the land rights of native peoples of colonies, protectorates and settlements.

The Australian judiciary continues to draw on its blinkers refusing to take cognizance of all the new developments in the around the world on the question of native title: see the recent decisions of the Supreme Court of Canada in *Calder v A-G for British Columbia* [1973] DLR (3rd) 34 and *Guerin v R* (1985) DLR (4th) 336. A similar position was taken by the ICJ in its *Advisory Opinion on the Western Sahara* (1975) ICJ Rep 39.

Peace is a natural concomitant of justice. There will be no peace between races where injustice reigns supreme.

H A Amankwah
Faculty of Law, University of Papua New Guinea

THE STUDY OF LAW edited by *Jim Corkery* (The Adelaide Law Review Association in association with the Corporate & Business Law Centre, University of Adelaide 1988) pp 191 and Appendix.

The Study of Law is an innovative approach to a subject already dealt with in Australia by such authors as Enright, Derham and by Morris *et al* in *Laying Down the Law.* What differentiates this work from the standard textbook is that it is a collection of essays presented from a local and personal viewpoint; there are a variety of authors writing on intersecting topics seen from different and original angles and in parts the style is anecdotal and candid. Of the sixteen chapters the majority of the contributors are from members of the academic staff of the Law School, two are by local law librarians and the authors also include the former Supreme Court Judges Dame Roma Mitchell and Andrew Wells.

Given the writers' endeavours to communicate as 'clearly and effectively and entertainingly as is possible considering their subject-matter' (at 6), these aims have been achieved. It has been written first and foremost for the law students at the University of Adelaide. Prospective law students may find reading the first part of the book on the O-bahn or the Glenelg tram a taxing exercise on their powers of concentration. The concise self-contained chapters allow for some leeway in this view since changes in style, topic and authors of each chapter offer respite and assist the process of comprehension.

The book can be divided into two parts. The first, covering chapters one to six, introduces the reader to the elements of the history of Australian law and the Constitution. Common law, case law, precedent, statutory interpretation and the courts are considered. Discussion centers around law, its traditions, legal practice and procedure, after due regard has been given to their historical origins, evolution and adaptation to various conditions, be they geographical, demographical, local, economic or social, resulting, says Castles, in an Australian version and product. For those uncertain how justice in our legal system works, it is worthwhile reading Boulle's chapter on precedent. He does well to point out the criticism surrounding the doctrine of precedent for its 'inherent flexibility' and ideological role; his measured conclusion balances the negative standpoint by stating that precedent does offer some framework in the legal reasoning process, and its application by the courts is more sophisticated. We need, therefore, to understand its rules and practical application, as well as 'master both its formal principles and the ways in which they are avoided and circumscribed' (at 87).

The second part of the book is lighter reading since it deals with the teaching and studying of the law as well as working life in the profession. According to McGinley, Australian law schools have been influenced by British and United States methods of legal education, adopting a variety of approaches. The editor's suggestion for the book to provide an opportunity 'to articulate a philosophy of legal research and learning and set down some guidelines for our students' future studies in the law school' (at 5) is acknowledged in a number of ways. Dame Roma Mitchell is correct to assume that today's law faculty cannot offer one set course as in the past, since it is agreed that present law graduates, including women, have a wider range of employment choices. McGinley also sees the changing role of the lawyer to one of 'negotiator, mediator or judge' (at 104), and the need for Australian law schools to develop small group teaching as one attempt to nurture these skills.

Finlay's article on 'How to use a law library' explains in general the arrangement of Australian law school libraries and their materials, primary and secondary sources and the traditional methods of legal research. He does well to explain related terms, synonyms and common terms; for example many novices to law are confused not realizing that the terms statutes and acts are synonymous. His article ends with a brief mention of information systems and networks affecting or about to affect the retrieval and organisation of legal material and research. The second edition should expand on computer developments in the legal area and their application in South Australia where changes are rapidly occurring and are influencing the law school's philosophy of legal research and learning.

Another side to the philosophy of legal research and learning is articulated by endorsing the protestant work ethic both in student and professional life. Wells' essay with its evangelical overtones is reminiscent of a good sermon, powerful, lucid, uplifting and entertaining. He demands of the faithful a belief in his message, concerned that his flock enter the paradise of the legal profession. The advice offered by Wells, Bradbrook, Corkery and Corcoran is practical and requires personal commitment and hard work on the part of the student, debunking preconceived notions of those who are 'bright' and 'not bright'. Intellectual and moral growth are fused and developed by following the straight and narrow, practising a harmonious and orderly life involving a good management of time, diet, rest and exercise. Striving for perfection and truth will reward you with personal and job satisfaction. Bradbrook's message on 'Study methods and sitting law exams' is approached from a different viewpoint and style. One truthful observation made by Bradbrook and experienced by the reviewer during her brief career as a law student in 1986 is that 'many students who pretend to their colleagues that they do little work in fact secretly work quite hard. The reasons for this mystifying behaviour appear to be obscure' (at 111).

An encouraging aspect of the book is the editor's emphasis on the importance of style in legal writing and his assigning two chapters to the topic. It is an area largely ignored and needs to be addressed, especially to new law students, making them aware of the pitfalls in legal writing and preventing the perpetuation of past errors. Not all members of the establishment are to be taken as role models and revered for their style of legal writing.

The reader soon learns that the aim of law school is to teach you how to apply the law and not to teach the law itself, which is always undergoing change; that it is not how much you write but its relevance to the issues identified and analysed. Bradbrook says that one way to do well at law school is to choose areas of law which interest you. Continuing legal education will assume increasing importance in keeping the practitioner up-to-date and filling in those areas not covered at law school.

The chapters by Nicholson and Dame Roma Mitchell are a frank look at professional life. Nicholson's detailed description realistically portrays the problems encountered and skills needed to be a successful practitioner, and should disenchant any starry-eyed reader. Dame Roma Mitchell's account is biographical describing the time of her student days to her becoming the first woman judge in Australia; her description of Adelaide's close knit, discriminatory and parochial society at the time is interesting and written from a woman's perspective.

Finally the Chapter by Livissianos on 'Judges of the High Court of Australia' is a selective bio-bibliography of the 37 Justices of this Court. An appendix is included being the *Adelaide Law Review's* Legal Style and citation guide, followed by an index.

The Study of Law is essential reading and an excellent introduction for students of law and law librarians new to the profession and others new to the subject will also find the first part of the book particularly useful. University law librarians should find it interesting reading from the point of view of the philosophy and direction of legal education in Australia and in anticipating the needs of their library users in the future. I commend the editor for providing a creative outlet and debut for some contributors. As history develops, legal practices and procedures change, and methods of legal research are affected by technological advances which in turn influence learning and the direction of studies in the law school; these factors will ensure the book will have a long and useful life, and I look forward to many revised editions.

Elizabeth Naumczyk
Deputy Law Librarian, University of Adelaide.