

PL Tan, EA Webb, D Wright *Land Law: Butterworths Tutorial Series* Sydney: Butterworths, 1997.

This book, another in the helpful "Tutorial Series", is highly recommended for students looking for a good overview of the area of the law of real property, with excellent worked examples of assignment or exam questions.

Australia is very well served at the moment with detailed land law books, with recent editions of two major texts (Butt, 3rd ed, 1996; Bradbrook, MacCallum & Moore, 2nd ed, 1997) having been published in the last few years, and good recent casebooks (Neave, Rossiter & Stone, 5th ed, 1995; Bradbrook, MacCallum & Moore, *Cases & Materials*, 1996). But there has been a gap for a few years in the area of introductory books. The gap was more than adequately filled in 1997 by this book, together with the 3rd edition of *Introduction to Property Law* (Tooher, Dwyer and Teh) and the great little "Nutshell" book by Tony Aristei.

Where this work by Tan, Webb & Wright excels is in the well set out summary of major principles followed by an example (or in some chapters a couple of examples) of possible problems covering the area. Students will benefit greatly from seeing the worked answers to problems. The addition of check-lists at different points (eg for determining whether or not an item is a fixture, p.22, or whether the elements of adverse possession are satisfied, p.35) is also very helpful. Finally, chapter 23 contains a number of problems which raise issues from across the different areas, and would be very useful for revision purposes at the end of a course.

What about the actual content of the chapters? In general it is accurate and up to date. The chapter on "Common Law Native Title", while written before the *Wik* decision, nevertheless is one of the best brief treatments of the area I have seen. There is an excellent general coverage of the other topics usually dealt with in real property courses: nature of land and tenure, possession, acquisition and transfer, estates, co-ownership, the Torrens system, leases, easements and covenants, and mortgages. As the course I teach for surveyors focusses heavily on boundary definition issues, I would naturally have like to see more material on boundaries, the doctrines of accretion (though see [5.1.5]) and *ad medium filium*, and statutes such as the *Encroachment of Buildings Act 1922* (NSW). But an introductory book of this sort can't do everything!

To assess the detail of the coverage, I decided to focus on two areas which I know students have had problems coming to grips with: the areas of easements and restrictive covenants. These are dealt with in chapters 19 and 22 respectively, separated by two chapters on Mortgages. This is a curious arrangement, given the close connection of the two concepts as relating to private means of controlling the use of neighbouring land. I also wonder about the significance of the title to the section of the book

containing chapters 19-22: "Encumbrances under the Torrens system". Each of the areas dealt with has a long history outside the Torrens system, which is well covered in the chapters; why focus on the Torrens system as a defining characteristic? If the fact that easements are a specific exception to indefeasibility is thought primary (see *Real Property Act 1900* (NSW) s.42(1)(a1)), then why are leases not also dealt with in this section? (See s.42(1)(d)).

What of the content? Chapter 19 on "Easements and profits" gives a good summary of the traditional "elements" of an easement spelled out in *Re Ellenborough Park* [1956] Ch 131. Unfortunately (in my judgement) not enough indication is given at an early stage that some of these elements are either not valid or incomprehensible when dealing with Torrens system land, the most common form of title in NSW! The requirement that there be both a dominant and servient tenement, for example, has been abolished for certain very common easements imposed by the Crown (see, eg, 88A *Conveyancing Act 1919* (NSW)- footnote 2 on p.282 could be more helpful in offering examples from at least some jurisdictions). Nor is the requirement that dominant and servient tenement not be in the same ownership applicable to Torrens system land: see s.47(7) *Real Property Act 1900* (NSW). Both these facts are mentioned in passing but should probably have been given more prominence, given that students are more likely than not to be dealing with Torrens system land. In para [19.7.3], for example, when one of means of extinguishing easements is stated to be "unity of ownership", the qualification that this is not true for Torrens system land should have been mentioned again.

There are also some errors in the treatment.

The heading to paragraph [19.2.5] suggests that the common law rule is that dominant and servient tenements must not be either "owned or occupied" by the same person (my emphasis); the text of the paragraph states that the prohibition is on land being "owned and occupied". The case cited clearly points to the text rather than the heading being correct.

Paragraph [19.4.6] refers to the "Conveyancing Act 1919 (NSW) s 41(1)(a1)" when dealing with recognition under the Torrens system of omitted easements; the correct provision should be the *Real Property Act 1900* (NSW) s 42(1)(a1).

It is unfortunate that under the heading "Statutory rights of user" at paragraphs [19.5.1]ff the provisions of s.88K of the *Conveyancing Act 1919*, which allow the Supreme Court of NSW to create an easement by order of the Court, are not discussed. The provision came into effect in February 1996; the book is stated to be up to date to December 1996.

Chapter 22 is on the whole a good summary of the law on restrictive covenants. Minor quibbles include the name of the recent House of Lords decision on the passing of the burden of covenants at law, in paragraph [22.4.2] (*Rhone v Stephens*, not *Rhodes v Stephens*), and the word (?) "contiguity" in [22.4.3], point (ii) (rather than "contiguity").

Unfortunately there seems to be a lack of clarity in the proposed

solution to the Problem at the end of the chapter, relating again to the interaction of the Torrens system with the general law. In short, the "Suggested answer guide" on p.343 states at the outset of the problem that "all the property involved in this problem is Torrens title land". Having discussed the passing of the burden of a covenant under general equitable principles (*Tulk v Moxhay* (1848) 2 Ph 774; 41 ER 1143), the suggested answer then seems to come to a conclusion by noting at the bottom of p.344 that "the burden of [the covenant] will run with the land so that Patrick is bound by it in equity". The possibility that the covenant might be noted on the certificate of title is then raised as an apparently separate issue in the next paragraph. In fact on a careful analysis this fact would be crucial for Patrick's success; his obligations "in equity" would be completely irrelevant if he became the registered proprietor of the land.

While the information ultimately given at the top of p.345 is correct (ie that Patrick will be bound if the restriction is noted on the Register), the *impression* is given that this is an optional extra (especially with the introductory words at the top of p.345, "The third way the burden of the covenant may run...", which suggests to the casual reader that two equally valid other ways have just been discussed). This is certainly not the case: there seems no doubt that however binding a covenant may be in equity, it will not bind a subsequent registered proprietor (even with notice) if it is not recorded in the Register: see *Ryan v Brain* [1994] 1 Qd R 681; Butt, *Land Law* (3rd ed) [1772]. It is suggested that the discussion could be much clearer at this point.

Despite these quibbles about some points of detail, however, overall this an extremely valuable book for any student of real property law, and thoroughly recommended.

Neil Foster