Reviews

From Subject to Citizen

by Alastair Davidson; Cambridge University Press 1997; 330 pp; $35.00.

Citizens Without Rights

by John Chesterman and Brian Galligan; Cambridge University Press 1997; 268 pp; $30.00.

Indonesia calls its parliamentary elections a Festival of Democracy; analogously, in Australia we have recently had our Festival of Constitutional Law; aka the Constitutional Convention. In Australia, the cycle seems to run only every hundred-odd years but its characteristics are nonetheless recognisable. Citizenship rights — the content, rather than the structure of any system of government — are simply not on the agenda, be it 1890s or 1990s. Two recent books, though, go some way towards redressing this Australian blind spot, where arid legal structures masquerade as meaningful political outcomes.

Of the two books, Davidson's is the broader, and more theoretically grounded in its exploration of the content of Australian citizenship rights. Author of *The Invisible State* (1991), a pivotal text on legalism's erosion of human rights in Australia, Davidson has now drawn up an ambitious, multidisciplinary identikit of the Australian citizen. Although lawyers still get a fair walloping in his latest book, Davidson reminds us that citizenship rules and regulation have never been the province of constitutional law experts but rather the responsibility of the Commonwealth Department of Immigration (later, 'and Ethnic Affairs'). Not surprisingly then, his charting the evolution of Australian citizenship — from pure 'British Subject' pre-1948, through decades of gradual de-Britishing, and into 1980's full autochthony — is sometimes heavy on data, bland with copious policies and light on legal landmarks.

A key concern of Davidson's is the million-odd permanent residents who have chosen not to become Australian citizens, thereby denying themselves the vote; and more broadly, skewing the workings and assumptions of Australian democracy. Somewhat worrying indeed, but exploring the motivations of these eligible non-citizens might have revealed a far more profound malaise: the low value of Australian citizenship in the global market. Although the formal viability of our citizenship will always be assured by its captive audience — the sheer numbers of locally born — this is a long way from actual desirability, and the ramifications here for Australian identity are substantial. Several new factors, not addressed by Davidson, reinforce this drift in our national identity. A younger generation, bearing the brunt of declining local living standards, sees *e*migration law as a major issue. About half of all Australians are eligible to live and work, as of right or via an extended privilege, in one or more other countries. For the remainder, especially the young, Australian citizenship is increasingly a barrier to global mobility; an outdated, once-exclusive club.

Indigenous Australians have also been lumped in an ignominious club, for most of the past 210 years. Membership of this club appeared to otherwise prevail over normal British Subject/Australian citizen rights. *From Subject to Citizen* has its own chapter on this sorry story, but Chesterman and Galligan's *Citizens Without Rights* is a much-needed more comprehensive treatment. Although its organisation of the topic — State-by-State and Commonwealth (in its role as Northern Territory suzerain for 66 years) — can seem clumsy and empiricist, positing a coherent national thread would probably be only wishful historical revisionism. Even after the Commonwealth got a broad Aboriginal affairs power in 1967, federal governments of all persuasions have consistently emphasised the important, ongoing role of the States. The label 'Citizen of Queensland' would be only a self-conscious joke for its non-Indigenous wearers, but for others it was a living and forceful reality; and a very unfunny one.

Chesterman and Galligan write with a cool and dispassionate tone throughout, which is academically orthodox of course, but in applying this to their chosen topic they tend to veer towards a point between complacency and outright conservatism. That 'rights' such as voting, being pitched at the level of Empire and Commonwealth, passed far over the heads of Indigenous Queenslanders, Victorians etc., points to a long — and continuing — delusion in the heart of our national consciousness. The authors address the misunderstood 1967 referendum, and patiently explain that its substantive effect on Indigenous rights was in fact minimal. They do not take the next step, however: that our federal structure and Constitution are implicitly deeply racist; and the only countervailing law there has ever been is a 1975 Commonwealth Act, as aided by some wide High Court interpretations; and even such modest inroads are starting to look flimsy and unsustainable in 1998's Realpolitik.

Curiously enough, the traditional Australian confluence between citizenship and immigration laws can even be seen at work with Indigenous Australians. In lieu of a single federal agency was a highly dispersed administration that maintained a unity largely by the zealous local enforcement of borders. The many restrictive Acts and regulations that geographically imprisoned most indigenous Australians between about 1850 and 1960 (or 1990, in Queensland) are well documented by Chesterman and Galligan. Of course these laws did many other things as well; such as licensing the removal of children, and even prohibiting the selling of paintings.

One of the more illuminating oddities from this depressing archive is the Commonwealth *Emigration Act 1910,* which prohibited 'aboriginal natives' from leaving Australia without a permit. The authors comment on this as yet another dubious 'protective' provision, but surely it stands in a category of its own, as the only law ever to prevent a class of adult Australians from emigration. What in the world could really have been worse than the squalid state-administered reserves of 80 years ago, I wonder; and was the

Commonwealth actually more concerned about possible international embarrassment? In any case, it is clear that, to this day, the States (including here the NT wannabe) — as the successors of the old-style Protectors — know or care little about international embarrassment, which probably suits the current federal government just fine.

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Proprietary Claims and Remedies

by Malcolm Cope; The Federation Press, 1997; 218 pp; $60.00 hardcover.

Professor Cope has carved out for himself an extensive niche in trust and equity law. Six years ago, he published his treatise on constructive trusts (*Constructive Trusts*, Law Book Company, 1992). Now he has published a companion work that both expands and contracts on the previous book. It expands by examining other proprietary remedies besides constructive trusts, such as tracing. It is more narrow in focus by excluding other issues and concentrating solely on the remedial aspects of disputes.

Although Cope states in the introduction that the focus is on England, Australia and New Zealand, with lesser emphasis placed on Canadian cases, this seems an unfortunate restriction. Both Canadian and US courts have developed some interesting principles regarding proprietary remedies (their differing interpretations on unjust enrichment especially) and even a limited exploration of these jurisdictions would have proved fruitful.

The book opens with an exploration of proprietary claims in the context of bankruptcy and insolvency as if they should be the main determinants in assessing the nature of a remedy. Obviously, the effect on creditors is important, but surely there are other reasons for awarding or not awarding proprietary remedies. Much of common law experience in this area can be explained by historical accident. In some countries, France for instance, the normal remedy for breach of contract is specific performance, because it was seen as important for the State to encourage the keeping of promises. Other legal systems award proprietary remedies in very different circumstances from common law countries. One would have at least expected an introduction into what proprietary remedies are, and why specfic performance, to take just one example, is not considered to be one.

In my view, this is an area of law that suffers from too much thought. Legal academics are in the business of categorising and pigeonholing sometimes irreconcilable decisions, but the multiplicity of opinion between scholars in the overlapping fields of restitution, equity, contracts and trusts, as to when proprietary remedies are acceptable and when not, at times numbs the mind. For instance, many have searched for common factors or underlying principles that reveal the true nature of a constructive trust. Some have tried to categorise the diversity of cases into a few simple statements or rules (see, for example, B. McDonald, 'Constructive Trusts' in *Principles of Equity*, ed. P Parkinson, Law Book Company, 1996, p.709 at 718-20). Others, such as Lord Goff and Professor Gareth Jones argue that proprietary claims should be available to do 'justice' in the individual case (R. Goff and G. Jones, *The Law of Restitution,* 4th edn, Sweet & Maxwell, 1993). According to Roy Goode, in order to properly analyse a remedial proprietary remedy such as a constructive trust, it is necessary to separate events relating to substantive property rights from events that bring upon the court's discretion (R.M. Goode, in *Essays on the Law of Restitution,* ed. A.S. Burrows, Oxford, 1991 at pp.219-22). Peter Birks, in contrast, shuns this kind of conceptual distinction in favour of a division between enrichment received and enrichment surviving claims (see P.B.H. Birks, *Restitution — The Future,* Federation Press, 1992 at p.122). There are more theories on how best to analyse and remedy these kinds of wrongs than is warranted. It would be interesting to know how many practising lawyers are familiar with these theories, and how everyday practice is affected by them.

The difficulty then, is finding where *Proprietary Claims and Remedies* fits in, and what it adds to the debate. Unfortunately, for me, there is a pervasive feeling that this book is simply foundering at sea. Despite the abundance of scholarly comment and classification schemes, the judiciary continues to chart its own course in developing equitable proprietary claims. None of the classification schemes developed by commentators has found absolute favour with judges, and I can comfortably predict that Cope's attempt will similarly be adopted where necessary, and discarded where inappropriate.

Even if the book did present a substantive revolution, the ideas are often drowned out by obfuscation. Sometimes the diction is virtually impenetrable or unfathomable. Here are a couple of examples:

> In this case [*Lord Napier and Ettrick v. Hunter*] it was held that stop loss insurers were entitled to injunctions restraining a party in receipt of damages from paying out of damages to Lloyds' names and from each Lloyds' name receiving without first providing amounts which had or shall be found due to each name to the insurers by way of subrogation. [p.58]

I could not begin to say what that case stands for. And similarly:

> The principles adopted in *In re Hallett's Estate* were applied in *Aluminium Industries v. Rompalpa* [presumably meaning *Romalpa*] . . . According to this analysis the goods were sold as agents for the plaintiffs to whom he stood in a fiduciary relationship and they were therefore accountable for those goods and their proceeds to the principal. [p.69]

This is a recurring problem. Also common are smaller, perhaps typographic, errors that render some of the sentences nonsensical or confusing. A typical example occurs in the description of *Sinclair v Brougham.* Cope states: 'It is therefore difficult to see how the position of the shareholders [party A] was any different to the shareholders who paid money in consideration for the shares [party B] . . .' (p.74). It would have been better to refer to the two distinct groups as members and non-members, or members and *ultra vires* lenders, not only because that is how the judges in the case refer to them, but also simply as an easy way to keep the competing parties and interests separate.

Another example of a simple error became an obsession during this review. I was haunted by an incorrect footnote reference early on in the book. A crucial quote was attributed to Lord Goff and Jones at page 61 of their highly respected work, The Law of Restitution, 4th edition. But the quoted text is not there. In fact, it is nowhere to be found