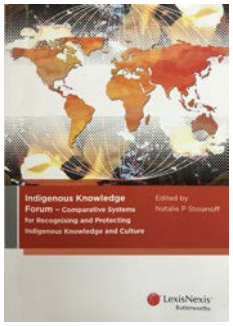

Indigenous Knowledge Forum – Comparative Systems for Recognising and Protecting Indigenous Knowledge and Culture

by Natalie P Stoianoff (ed)

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This book is a collection of papers arising out of the second meeting of the Indigenous Knowledge Forum in 2014. Natalie Stoianoff, Professor of Law and Director of the Intellectual Property Program at the University of Technology, Sydney, is the editor.

The Indigenous Knowledge Forum began in 2012 to bring together Indigenous people, lawyers, scholars, and government to discuss the legal and policy dimensions of Indigenous and local knowledge, and laws regarding biodiversity and intellectual property. At its inaugural meeting a research project was started for the purposes of formulating legislation that recognised and protected Indigenous knowledge and culture. At the second meeting in 2014 speakers focused on comparative systems of recognition, from which this book arose.

It is a large, comprehensive book. There are 17 chapters split between three parts: the first part discusses the meaning of Indigenous knowledge, the second addresses Indigenous knowledge issues in Australia, and the third focuses on Indigenous knowledge systems in other countries.

Indigenous knowledge is defined as a subset of 'traditional knowledge', which is knowledge, innovations and practices of Indigenous and local communities around the world.

In the early chapters, Professor Stoianoff, with Evana Wright (a PhD candidate) and Ann Cahill (an Australian/NZ patent attorney), develops the concept of Indigenous knowledge with reference to consultation undertaken with Indigenous communities in NSW as part of a White Paper for the NSW Office of Environment and Heritage in 2014. There is reference to various important international instruments, including the Convention on Biological Diversity 1992, and the Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization (known as the Nagoya Protocol, which Australia has ratified and which entered into force in 2014).

As a signatory to the Nagoya Protocol, Australia is obliged to ensure that the use of genetic resources in Australia is underpinned by mutually agreed terms between the user of the resource and Indigenous communities. The significance of the obligation becomes apparent when it is acknowledged that Australia has approximately 44,000 species of plants, making it one of only 17 mega-diverse countries in the world.

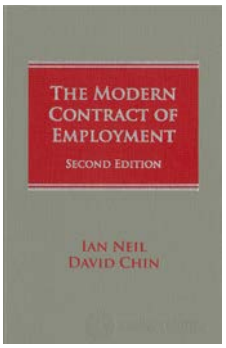
The later Australian chapters identify a desire for *sui generis* legislation in Australia to properly protect traditional knowledge. They also focus on the ways Aboriginal knowledge can differ from other knowledge, including in the way Indigenous Australians may, within stories, imbed privileged information attracting confidentiality, stories being a reliable method of passing information from person to person, generation to generation, from group to group. In chapter 4, there is a very brief introduction to the possible ways that a duty of confidence, equitable estoppel, unjust enrichment, or trade practices laws might protect Indigenous knowledge when knowledge is conveyed to an outsider, such as a researcher, anthropologist, or commercial third party. In chapter 7, Dr Virginia Marshall discusses the common law recognition of Indigenous relationships to land (encapsulated now in the *Native Title Act 1993* (Cth)), and via a case-study on Aboriginal perspectives on water rights in the Murray-Darling Basin system, highlights the unsatisfactory effects of conceptualising Aboriginal laws and knowledge through a Western legal lens.

The authors also consider current regimes in Australia at the Federal level and at the local level. Specific mention is made of Queensland's *Biodiscovery Act 2004* (Qld), which was implemented following the endorsement by all Australian States and Territories in 2002 of the general principles in the *National Consistent Approach for Access to and the Utilisation of Australia's Native Genetic and Biochemical Resources*. But, as the authors point out, the focus of these regimes is the regulation of biological resources, not traditional knowledge, and so the limits are stark: the relevant Federal legislation only applies to Commonwealth land, and the State and Territory regimes often only apply to Crown land, or, as in Victoria, make no reference to the protection of Indigenous knowledge at all.

The latter chapters of the book focus on regimes protecting Indigenous knowledge around the world. There are fascinating chapters with case studies from Peru, India, Thailand, Costa Rica, Ethiopia, Canada, China, New Zealand and Samoa. For example, in chapter 9, Manuel Ruiz Muller, a lawyer and Director of the International Affairs and Biodiversity Program of the Peruvian Society for Environmental Law in Lima, provides a review of Law 27811, a law to protect traditional knowledge in Peru. The law applies to the collective knowledge of Indigenous peoples associated to biodiversity: the emphasis on collective highlighting the evolution of knowledge within traditional community structures.

The book is almost 500 pages long. The authors range from lawyers to academics and so the style of writing differs, making the flow of the book somewhat clunky. But the book's content is strong, and the depth and range of case studies provides a comprehensive introduction to the protection of traditional knowledge worldwide. It is a very detailed and authoritative introduction to this developing area of law. I would recommend the book to any lawyer, academic, anthropologist, or practitioner working with Indigenous communities, who has an interest in intellectual property, Indigenous property rights and culture, and biological diversity.

Reviewed by Charles Gregory



The Modern Contract of Employment 2nd Edition

Ian Neil SC and David Chin

Brevity in legal writing is to be admired. Combine it with accuracy and you have the makings of a great legal textbook.

2002 was a great year for employment year texts. LexisNexis published Mark Irving's comprehensive text *The Contract of Employment* and Thomson Reuters published Ian Neil SC and David Chin's concise yet potent *The Modern Contract of Employment*.

In late 2017 Neil and Chin produced a second edition of *The Modern Contract of Employment*. It is written by two of the leading employment law practitioners at the NSW Bar. In the preface to the first edition they identify that they look to a textbook primarily for answers, rather than more questions. As a result they wrote a book

which seeks to be definitive and yet concise. They have included those citations that seem to them would help a reader to appreciate the proposition, rather than every citation.

The result is a text that allows a practitioner, whether expert in the area or otherwise, to readily identify the key principles guiding the law of contract of employment and the leading authority or authorities that underpin those principles.

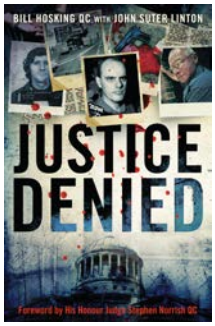
The second edition to this excellent text is very welcome in circumstances where there have been some significant changes since 2012. Not least is the High Court decision in *Commonwealth Bank of Australia v Barker* (2014) 253 CLR 169 which put to rest the so-called implied term of mutual trust and confidence but has given potential scope to the implied term of good faith as it applies in an employment context.

The new edition also addresses recent authorities on the test for identifying a contract of employment including *ACE Insurance Ltd v Trifunovski* (2013) 209 FCR 145 and *Tattsbet Ltd v Morrow* (2015) 233 FCR 46.

There are times as a practitioner when you have the time and inclination to immerse yourself in the full depth of the law on a subject, and there is a place for textbooks which consider what the law might be or should be.

Yet for most practitioners there is a special place on the shelf for textbooks which strive simply to give you the law as it is, and state it briefly and accurately. The Modern Contract of Employment is such a text.

Reviewed by Ingmar Taylor SC



Justice Denied

Hosking QC and Linton

Memoirs of retired judges and barristers are occasionally worth reading, but rarely page-turners.

Bill Hosking's recently published book, *Justice Denied*, is a cracker. It is structured as a series of gripping true-crime short-stories, each telling the tale of a significant case.

I suspect that its very readable style is due in large part to Hosking's co-author, John Linton, who has written extensively for radio, television and print media, and five true-crime books.

But the content is so good because Hosking was in each of the cases, as barrister or judge, and can bring to life the criminals, barristers and Judges that populate each trial. The extract published with this review gives a decent introduction to the book.

Hosking was for much of his career a public defender, and in that role appeared for the defendant in many of the major criminal trials from the 70s onwards. He appeared for one of the Amanda Marga Three and put the submission that 'the well of justice has been poisoned at its source'. He acted for Carl Synnerdahl, who successfully fooled everyone into thinking he was blind, before escaping from prison. He tells the tale of Peter Schneidas, jailed for three years as a young man for a white collar crime whose experiences in jail turned him into a violent murderer. In his last trial he appeared for one of the five convicted of the Anita Cobby rape and murder.

Part of the joy of the book is the descriptions of how the law and the Bar operated in the 70s and 80s. The book is leavened with incisive pen-sketches of leading members of the Bar and the Bench, including Marcus Einfeld, Frank McAlary, Ken Shadbolt, Justice Wood and Sir Kenneth McCaw. Michael Adams is captured by a quote from Shakespeare: 'And then the justice in fair round belly with good capon lined, with eyes severe, and beard of formal cut, full of wise saws and modern instances.'

The book explains by stark examples the 'police verbal': in the age before tape-recorded interviews these were the typed notes of a police interview allegedly recording a confession which the accused had refused to sign, and were often being the only significant probative evidence. The book includes such gems as Roger Rogerson's statement to the Sun Herald in 1991: 'The hardest part for police was thinking up excuses to explain why people didn't sign up'.

The book is, by its nature, made up of harrowing tales, yet it is laced through and through with humour. Hosking recounts his now famous exchange with Justice Roden, who during a sentencing hearing had become deeply unimpressed with the time Hosking was taking to answer the question 'How does your client explain why the gun was loaded?' Hosking, looking down at his brief, said:

> 'I don't f***ing know.' Justice Roden became flustered, understandably angry and threatened to discipline me unless I apologized and spoke respectfully. I looked up and, with my finger digging into the page, explained "I don't f***ing know". This was answer forty-six in my client's record of interview, Your Honour. Justice Roden severely sentenced my client, which, thankfully, was overturned at appeal.

As well as disclosing his sense of humour, Hosking includes in every chapter something to be learned, whether it is the injustice of a police verbal, the inhumanity of the maximum security jails, the suffering of being committed to a mental hospital when sane, the difficulties of sentencing those with a high risk of re-offending, and the importance of legal representation even for the most evil in our society.

Ulitimately, like all good memoirs, one learns as much about the author as the events. The book concludes with a quote from Justice Keith Mason: 'At the end of the day, judges and lawyers find it impossible not to be themselves, more or less, both on and off the bench.'

Reviewed by Ingmar Taylor SC

The following extract from Justice Denied has been reproduced with permission.

Introduction

Public defenders are briefed in the most serious criminal cases, particularly when clients can no longer afford to retain the Bar's elite. My clientele was wide and varied. The notorious, the oppressed, the young and the old. The wise and the foolish. My clients included solicitors, police, schoolteachers, doctors and nurses, underworld heavies and prostitutes.

These memoirs recall some of the many notable cases in which I appeared as a barrister. They provide a rare insight into the emotion and complexity of a defence barrister's role. I have appeared in cases at all levels, the Local Court, District Court, Supreme Court, Court of Criminal Appeal, and six times before the High Court of Australia as leading counsel - only once successfully - and once for the Crown as junior counsel to the Solicitor-General, Harold Snelling QC. These are narratives of my clients' misfortunes.

It is rare and more interesting to read a barrister's frank admission of his own mistakes and errors of judgement, rather than accounts only of courtroom triumphs. There are both in this book. The emphasis is categorically, and unsubtly, from the defence viewpoint. Human frailty and its dark side underline the criminal trial process.

These are not impartial narratives, but my memoirs. There are none drawn from my years as a judge. Enough has been written about that period by the Court of Appeal and the Court of Criminal Appeal.

Justice is an elusive end, and not always