Taking New Zealand's *High Court Rules 2009* as its model,[33] the harmonised rules authorise service out of Australia without the court's prior leave in defined categories of case with a connection to '*Australia*'. So, the New South Wales rules allow service of an originating process out of Australia when 'the claim is founded on a tortious act of omission … in respect of which the damage was sustained wholly or partly in *Australia*'.[34] There are ample grounds to be critical, first, of the nexus to 'Australia' in State jurisdictional rules and, secondly, of Brereton's claim that the nexus merely reflects the reality that 'each State Supreme Court now has nationwide jurisdiction'.[35] Fundamentally, though, the harmonised rules' extension of State courts' jurisdiction to 'situations connected to Australia but not to the State' raises a question of constitutional validity.[36]

Commercial Issues in Private International Law will be of interest to those seeking a well-reasoned analysis of some contemporary issues in commercial private international law. One message that is likely to resonate is the importance of private international law to modern legal practice in Australia.

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Heydon on Contract (Thomson Reuters, 2019) ISBN 9780455500201 Hardback, 1238 pp.

by The Hon Dyson Heydon

This eponymous book on the *general part of the law of contract* will be the standard Australian work for some time to come.

It aims to provide a guide to that legion of legal readers 'who are searching for basic statements of contract law'.[37] It purports to eschew any attempt to be historic, or fatidic. It does not look to suggest reform. It merely seeks to 'expound the law … deliberately and often dogmatically'.[38] Heydon wryly observes that this aim may seem 'modest', but it is 'actually very difficult to achieve'. Throughout a long journey the author displays his literary hallmarks: elegant and accurate

33 Dickinson (n 31) 32.
34 See, eg, *Uniform Civil Procedure (Amendment No 83) Rule 2016* (NSW) sch 6, item (a)(ii).
35 Brereton (n 9) 316.
36 Dickinson (n 31) 33.
37 JD Heydon, *Heydon on Contract* (Thomson Reuters, 2019) i.
38 Ibid.

description, analysis and discussion, informed by frequent shafts of wit (at times acerbic).

The distinction between the *general* part of the law (formation, third-party rights, invalidity, termination, etc), and a second field, the more specialised subdivisions (agency, bailment, suretyship, etc), is fundamental to the treatment. One may confidently expect this second field to receive the author's analysis in due time.

Writing 40-odd years ago, Heydon himself reviewed a treatise[39] of similarly ambitious range and scope. He noted then that it 'belongs to a genre which was once very common but is now becoming increasingly rare'.[40] He ascribed the infrequency of the writing of such *meisterwerks*, inter alia, to the fact that 'the role of legal practitioners as authors is for some reason declining: those capable of valuable legal writing do not share the need of their predecessors to supplement exiguous incomes by Grub Street activity, and wish to make a mark on the literature for non-economic reasons seems relatively less common'.[41]

He, fortunately for the lawyers of Australia, has had a 'lifetime's interest in the subject'[42] and is uniquely equipped to write about it, from the combined perspective of academic, practicing barrister, and distinguished jurist. We are fortunate that, despite a 'constitutionally compelled retirement' from judicial office, the writing of this book has preserved the author from 'the seedy and dismal fate' Boileau foretold, *le pénible fardeau de n'avoir rien à faire.* The labour involved in completing this work appears stupefying.

The writing reveals massive scholarship and learning. There is copious reference to citation to support the apodeictic statement of principle if a doubting tribunal seeks more authority than the treatise itself. As well, there is reference to secondary material to exemplify and explicate particular controversies. The absence of discernible orthographic, or any other, errors is a tribute to the editorial team that produced it.

The book is almost 1200 pages long and divided into 31 chapters. For ease of reference, each discrete sub-topic has been given its own internal paragraph number. Despite the self-effacing denial in the Preface, many parts of the book combine a detailed analysis of the history of a proposition, the various approaches that the courts have taken to it, and the way in which disparate authorities may be reconciled.

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39 Norman E Palmer, *Bailment* (Law Book Co, 1979).

40 JD Heydon, 'Book Review' (1980–82) 9 *Sydney Law Review* 265, 265.

41 Ibid.

42 Heydon (n 1) i.

The section on 'negative injunctions' is a good example of the general method.[43] The reader will find, severally, a reference to the *locus classicus* (Lord Cairns LC in *Doherty v Allman*[44]), discussion of the limitations of the 'rule', and a concise statement of the present position, replete with reference to the leading cases in the High Court of Australia — a point the author makes in the Preface and exemplifies in the treatment is that lower courts must adhere to the ruling precedent, rather than engage in some form of 'bastard legalism'.[45]

The extended treatment follows an orderly pattern. Part A (chs 1–6) deals with formation, Part B (chs 7–11) with the terms of the contract, Part C with third parties (chs 12–13), Part D with vitiating factors (chs 14–20), Part E (chs 21–25) with discharge, and Part F (chs 26–31) with remedies for breach.

But the very complexity of the contract in all its manifestations brings to mind the celebrated statement of Lord Macnaghten on *Shelley's case*, that 'it is one thing to put a case like *Shelley's* in a nutshell and another thing to keep it there'.[46] So, here, the author's detailed discussion demonstrates that although it may be possible to state a general principle at its most basic, the law is so encrusted with possible exceptions, and underlying policies, that for every rule there is an exception. Importantly, he does not hesitate to point out when there has been a divergence from classical orthodoxy.

What follows looks only at chs 1 to 6. To endeavour to deal discursively with every chapter in the same way would be a work of supererogation.

Capacity to enter into a contract is fundamental and dealt with in ch 1. The author notes that the rules surrounding incapacity in its various forms — the law is complex because of the tension between the interests of those who need protection, and those who seek to contract with them.[47] Chapter 2 deals with the vexed question of offer and acceptance, and the general supremacy of the 'objective theory' of contract.[48] There is a detailed discussion of the various justifications for the concept of an 'invitation to treat' or 'chaffer'. The examiner's favourite, the recondite subject of communicating acceptance in a unilateral contract, is analysed in full,[49] with an acute observation at fn 431 about its latest treatment in *Chitty*.

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43 Ibid [28.70]–[28.160].
44 (1878) 3 App Cas 709.
45 Heydon (n 1) vii.
46 *Van Grutten v Foxwell* (1867) App Cas 658, 671.
47 Heydon (n 1) [1.20].
48 Ibid [2:90].
49 Ibid [2.780].

'Uncertainty' is discussed in ch 3. *Masters v Cameron*[50] — a topic of perennial importance — is given a very full treatment.[51] The continuing controversy over the enforceability of a 'promise to negotiate in good faith' is discussed briefly with the pungent conclusion that given the heat of the argument 'it is difficult to predict how, if at all, the law will develop'.[52]

Chapter 4 looks at 'intention to create legal relations'. The discussion reveals an advantage that the author enjoys and which is manifested in various parts of the treatise — his undoubted expertise in a wide range of subjects that interrelate closely with contract law. For example, Heydon is the Australian authority on evidence. Paragraphs 4.100 to 4.210 and following examine in detail the burdens and onera of proofs in relation to intention and other cognate matters that are invaluable for a practitioner who faces pleading the facts relevant to these issues.[53] (It may be said here that since the publication of O'Leary and Hogan's[54] simple but elegant work many years ago, now long out of print, there is no simple authoritative Australian guide to pleading — Bullen and Leake[55] is betrayed by both its age, and English origins.) Further on, ch 19 contains a detailed statement of the law with respect to the restrain of trade doctrine about which the author has written the standard work.[56]

Consideration (ch 5) is always a difficult subject matter. Its various ambiguities, and related issues of waiver and estoppel, are treated in detail. Particularly useful is the analysis of *Walton Stores (Interstate) Ltd v Maher*[57] and its 'anomalies'.[58] Heydon concludes with the telling observation that 'the *Waltons* doctrine does not operate harmoniously with many other rules of law'.

Deeds, writing, part performance, and various species of contract specifically requiring writing are examined in ch 6.

Bell P, President of the New South Wales Court of Appeal, 'launched' the book on 5 September 2019 in the Banco Court of the Supreme Court of New South Wales.[59] As one might have expected, the 'launch' combined all the legal acumen, and wit, for which is Honour is renowned. In discussing Heydon's analysis[60] of

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50 (1954) 91 CLR 353.
51 Heydon (n 1) [3.110]–[3.190].
52 Ibid [3.200].
53 See, further, ibid [5.60]–[5.70].
54 Kevin F O'Leary and Alan E Hogan, *Principles of Practice and Procedure* (Butterworths, 1976).
55 Justice William Blair et al, *Bullen and Leake and Jacob's Precedents of Pleading* (Sweet & Maxwell, 19th ed, 2019).
56 JD Heydon, The Restraint of Trade Doctrine (LexisNexis, 4th ed, 2018).
57 (1988) 164 CLR 387.
58 Heydon (n 1) [5.790]–[5.810]
59 New South Wales Bar Association, *Bar News* [2019] (Summer) 89–94.
60 Ibid 92

the divergent and confusing approach of the English courts to rectification as exemplified in *Chartbrook Ltd v Persimmon Homes Ltd*,[61] Bell P extols the 'stringent attention to detail, the closeness of the analysis and reading of the relevant cases and the depth of the author's scholarship and historical grasp'.

In writing, Heydon always has his eye on the main game, and is acutely conscious as both advocate, and jurist, of the runaway tendency of any larger contractual dispute to take on a life of its own. On a practical level, and most damagingly to the goose and the golden eggs, any large-scale contractual dispute generates 'excessive discovery, huge tenders of ill-digested documents, the preparation of diffuse witness statements and prolix cross-examination'.[62] It is no doubt for this reason that so many arguments now find their way into an arbitration behind closed doors before an expert panel with hearing limited to five days.

In his review of Norman Palmer's work 40 years ago, Heydon observed that '[t]he labour that goes into a book of this scale can only be appreciated by one who has undertaken it'.[63] He goes on to note that the publishers were also to be commended for producing such a tome — *Heydon on Contracts* unsurprisingly has flown off the shelves — Bell P has suggested the acquisition of a double-set: one for Chambers and one for home.

It is unusual for a legal treatise to be both accurate and beguilingly readable. The reader is constantly turning the pages to find both a statement of basic principle for use in court or conference, and the legal or literary or historical trope that enlivens it. The author's personality shines through each page — Heydon *noster*, one and only.

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61 [2009] AC 1101.
62 Heydon (n 1) [9.1520].
63 Heydon (n 4) 268.