

## BOOK REVIEWS

*Australian Lawyers and Social Change*, edited by A. D. HAMBLY and J. L. GOLDRING. (The Law Book Company Ltd, Sydney, 1976), pp. i-xxiii, 1-392. P/B recommended retail price \$17.50. (ISBN 0 455 19344 4).

This book comprises the proceedings of a Seminar held at the Faculty of Law in the Australian National University on 23-25 August 1974. The Seminar papers deal with a daunting range of topics—daunting that is for a reviewer anxious to do justice to all the principal contributors and yet bold enough to attempt to inject some element both of overview and critical analysis. Moreover, this reviewer confesses to experiencing a measure of anguish having considered the book at length only to be confronted by Professor Julius Stone's masterly encapsulation of the proceedings and the issues they raise (pages 376-384).

For the most part Australian lawyers have not been renowned for their responsiveness to social change, although paradoxically there has, it seems, always been a small band of progressive lawyers at the forefront of moves to effect social change, and to harness the resources of the legal system in the hope of making the changes work. If however, one takes as examples, first, the peculiarly antipodean use of a quasi-judicial framework as a means of promoting peaceful industrial relations, and secondly, the implementation of workers' compensation schemes, it appears that the progressive lawyers were acting in a variety of roles. In many important respects their role as political activists tended to overshadow their secondary role as practising lawyers.

The *organized* legal profession, reflecting the views of the vast proportion of individual practitioners, has consistently eschewed any responsibility for ensuring adaptation in the legal system or the profession consequent upon changing social circumstances. On the contrary change has, in a variety of contexts, been strenuously resisted and this tradition of conservatism and obstruction regrettably continues unabated. If only we lawyers could see ourselves as most others see us! Probably the time has passed when legal professional organizations could comfortably accept the need for continuing re-appraisal of the role of lawyers in modern society. As a largely self-regulating community, practising lawyers enjoy a special privilege in the community at large. Changes are now being forced upon us and that pattern will continue. The public at large can be expected to adopt an even more critical stance. But the lessons seem to be lost on the profession at large. Now the pace and focus of social change is beginning to bear *directly* upon the issue of proper provision of universal and efficient legal services. Disappointingly, but not surprisingly, the response of practitioners and their official organizations tends to be dogmatic and defensive. The worst price-fixing excesses of the conveyancing industry and the multifarious restrictive practices of the separate bars seem as entrenched as ever.<sup>1</sup>

In Victoria we practitioners are treating the public to the deplorable

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<sup>1</sup> Elsewhere in similar legal systems the pace of related change is speeding up significantly. See *e.g.*, *Goldfarb v. Virginia State Bar* (1975) 44 L. Ed. 2d 572 (minimum fee schedules constitute illegal restraints of trade) and the U.K. Royal Commission on the Legal Profession which has recently been set up.

spectacle of the Law Institute of Victoria<sup>2</sup> (of which the reviewer is a member) resorting to expensive<sup>3</sup> litigation to nullify a nationally funded scheme of salaried<sup>4</sup> legal services which, despite its many faults, represents an enormous leap forward and which has tremendous potential in the struggle for radical improvement in the delivery of legal services.

The Seminar papers and discussions reveal a variety of attempts to grapple with the foregoing and related issues. In his commencement address "Australian Law and Lawyers: Instruments or Enemies of Social and Economic Change?" the Governor-General leaves no doubt as to his assessment of who is responsible for promoting and responding to change. He absolves lawyers (including the judges) from responsibility for accomplishing desirable social and economic reform. For him Australian lawyers are not really acting as a conservative pressure group. Cheaper conveyancing and the abolition of the negligence action are attainable by political forces and it is "the community's failure to reach [appropriate] compromises which has tended to bring down upon the legal profession a disproportionate amount of blame for the general inadequacies of society at large" (page 11).

This is provocative stuff indeed, some might well say folly. But it sets the scene for the lengthier papers which follow. The scheme of the Seminar involved two, largely general inquiries on the theme of Australian lawyers and social change, one dealing with the High Court and the other with law reform, followed by three papers concentrating in particular on the role of lawyers in the regulation of economic activity. In each instance the paper is followed by several short commentaries and the re-arranged and edited transcript of the proceedings.

The longest and most challenging contribution comes from Gareth Evans whose "The Most Dangerous Branch? The High Court and the Constitution in a Changing Society", convincingly demonstrates the inadequacies of the High Court as a mechanism "for keeping the Constitution in step with social change" (page 19). It is an original piece of scholarship in an area which until recently attracted little academic or professional interest and no public interest. And yet the High Court needs to be subjected to increasingly searching scrutiny. The discussion arising out of Evans's paper gave rise to lengthy criticism of the author. Leaving aside so much of the criticism as is based on misconceptions about the author's thesis, the net

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<sup>2</sup> In fairness to the Council of the Institute it needs to be said that the High Court challenge to the Australian Legal Aid Office was forced on the Council by a group of the Institute's membership following a poll; see (1975) 49 *Law Institute Journal* 62, 149, 339, 440. Since this review was written, there has been much speculation about the Fraser Government's plan for the A.L.A.O. That Government has been negotiating with State governments to hand over responsibility for the A.L.A.O. to the States. In these circumstances the reviewer understands that the challenge to the constitutionality of the A.L.A.O. is not being pursued.

<sup>3</sup> On the basis that *all* High Court litigation is expensive. No estimate of the actual cost to date is available. The Institute has noted in its accounts a contingent liability of \$20,000 in respect to costs being awarded against it; see (1976) 50 *Law Institute Journal* 128.

<sup>4</sup> Quite apart from political threats, the prospects for *salaried* schemes are affected by legal uncertainties; see K. O'Connor, "Salaried Legal Service: The Professional Relationship with the Legal Aid Client" (1975) 12 *U.W.A.L. Rev.* 199; J. Disney, "Salaried Legal Aid Lawyers and the Courts", App. to R. Sackville, *Legal Aid in Australia* (Canb., 1975).

effect is that Evans manages to mount an unanswerable case for a *realistic*<sup>5</sup> assessment of the Court's role. Hitherto there has been an aura of unnecessary mystery and reverence surrounding discussion of the Court. In fact "[t]he point about the High Court at the moment is not that it is not politicised at all, but rather that it is not frankly and openly so."<sup>6</sup> (Page 75.) The desirability of having an activist judiciary is not, however, confined to the highest appellate court. But the *excessively legalistic* techniques hitherto employed by the High Court must inevitably influence State courts in like manner.

What then are the prospects for overcoming the institutionalized conservatism of the Australian legal system and profession in the face of dynamic social and economic forces? In an equally scholarly manner, although clearly less provocative in tone than Gareth Evans, Professor Geoffrey Sawer sets about exploring a host of variations on the law reform theme in his paper, tantalizingly entitled "Who Controls the Law in Australia? The Instigators of Change and the Obstacles Confronting Them". Once again considerable ground is covered and the author's categorization, from a law reform perspective, of the legislative output of each of the State Parliaments in 1973 provides us with a valuable insight into the nature and extent of recent law reform measures. Perhaps the most interesting aspect of Sawer's paper is his assessment of the legal profession's ambivalent record in this area and his conclusion that legal professional organizations cannot really be blamed for not adopting particular stances, and not lobbying, in relation to sensitive economic and social issues. My immediate reaction was to conclude that he understates the actual extent to which such bodies are involving themselves in controversial issues. One criticism which can be levelled at Sawer concerns his use of the designation "lawyers' law" in his scheme of categorization. The dangers involved in such usage are twofold. First, it overlooks the fact that there is usually some social or economic significance in even the most innocuous looking law reform measure. Secondly, it encourages the view that some areas of law reform are the exclusive preserve of lawyers.

Lawyers and their organizations adopt policy positions relative to controversial socio-economic issues by means of *active* participation in debate and by *passive* adherence to long-standing regulatory regimes. A recent example of the former category is the varied resistance shown to the ill-fated National Compensation Bill 1974 (Cth) and all the attendant cant about the grave threat to that most cherished of rights, the right to sue in negligence. An example of the latter type of influential political passivity,

<sup>5</sup> I am using "*realistic*" here in the sense one would use it being a follower of the American *legal realists*. We need to decide for ourselves what the High Court *in fact* does, not merely accept what the Court *says it does*. See K. N. Llewellyn, "Some Realism About Realism—Responding to Dean Pound" (1931) 44 Harv. L. Rev. 1222, 1236-1238.

<sup>6</sup> It is trite to comment that much depends on the types of appointments made to the High Court. There are signs that Murphy J. is emerging as an iconoclast, perhaps somewhat in the way Justice William O. Douglas did. See *e.g.*, the dissents in *Walker v. Duncan* (1975) 49 A.L.J.R. 231 (refusing to facilitate extradition of Aboriginal activists to Queensland) and *Attorney-General for Australia (ex rel McKinlay) v. Commonwealth* (1976) 50 A.L.J.R. 279 (Constitution requires one vote one value) and also his unabashed use of *travaux préparatoires* in the interpretation of statutes, *e.g.*, *Dillingham Constructions Pty Ltd v. Steel Mains Pty Ltd* (1975) 49 A.L.J.R. 233.

although not one expressly raised in the book under review, is the largely uniform attitude of lawyers to housing policy and in particular to the issues surrounding equitable and efficient allocation of resources between private home ownership and rental housing. The conveyancing industry serves the political cause of private home ownership. Established legal regimes operate to foster such ownership and to strike a balance between the interests of vendors and purchasers. At the same time landlord and tenant laws are nothing short of scandalous because of the lack of any semblance of protection for tenants. Practising lawyers have no obvious professional reason for seeking appropriate changes and it is up to outsiders, and the increasing number of radical lawyers outside the mainstream of private practice, to press actively for change.

The role of lawyers in relation to economic regulation is the subject of the remainder of the Seminar. Professor D. E. Harding's paper "Lawyers and the Regulation of Economic Activity" is a detailed and penetrating analysis of the decline in influence of Social Darwinism on our legal system and the rise of the various regulatory frameworks. One major theme of the author is the need to recognize the complexities inherent in reconciling traditional legal values (such as the right to a fair hearing) with economic goals (such as efficiency) whenever any proposal for legal regulation of economic activity is under consideration. Professor Harding analyses the respective roles of lawyers and economists and then proceeds to a thorough inquiry into the record of, and the prospects for, company law reform, securities regulation and consumer protection controls. He draws heavily on his extensive knowledge of relevant American law and practice. In a section headed "Some Generalisations About the Goals and Methods of Regulation" he manages to cover an immense range of topics with economy and erudition. He pinpoints the legal professional barriers confronting the struggle for fair and effective control of economic behaviour and concludes his opus with the inspiring call "Oh for a Brandeis!" (Page 246.)

The remaining two papers look at specific areas of economic regulation. First there is Professor Maureen Brunt's "Lawyers and Competition Policy" and then "Lawyers and Industrial Relations" by Deputy President J. E. Isaac of the Conciliation and Arbitration Commission. The history of federal economic regulatory controls has been dominated by pragmatism, based largely on pandering to sectional interests, and lack of co-ordination. From the beginning lawyers were heavily involved in industrial conciliation and arbitration. On the other hand tariff policy formulation has remained immune from the influence of lawyers. Anti-trust controls, modelled on American law and practice, were enacted at an early stage but were emasculated by High Court decisions. We have recently witnessed the institution of a comprehensive national scheme of anti-trust controls involving both general and specific proscriptions of conduct rather than case by case examination. Lawyers can be expected to dominate this area. Professor Brunt and Deputy President Isaac each raise, *inter alia*, the central problem of the advisability of vesting economic regulatory enforcement responsibilities in the judiciary. In the Australian industrial relations arena the involvement of judicial and quasi-judicial tribunals has endured for over seven decades with mixed success. Professor Brunt explores four specific problem areas which beset such tribunals, namely, the inflexible formality of sequential trial procedure, the adversary system, the exclusionary rules of evidence and the use of economists as expert witnesses. Her concluding reflection, with which most interested observers will readily agree, is that "the legal process is not well-suited to extended rule of reason analysis of

market power." Page (297.) In his commentary on Professor Brunt's paper, Sir Richard Eggleston makes the same point when he quips that "A legal system is like the second trombone in an orchestra. When he succeeds, he is hardly noticed. When he fails, he is agonisingly conspicuous." (Page 299.)

It is clear that lawyers can contribute significant skills and policy perspectives in relation to the suppression of anti-competitive business behaviour and the promotion of friendly and stable labour-management relations. In commenting on Deputy President Isaac's paper, Senator John Button remarks that "The participants in industrial conflict tend . . . to see the legal profession as the Jesuits of the system. Their skills are generally denigrated yet frequently sought after, secretly admired and constantly emulated." (Page 264.) It is however, crucial that in the establishment of regulatory tribunals every effort be made to avoid the trappings and stifling procedures of traditional courts. Constitutional requirements concerning strict isolation of judicial power assist that effort<sup>7</sup> but since enforcement *per se* normally entails some judicial function, there is a constant risk that legislation expressing broad-based economic or social policies will be read down by a conservative judiciary.

Given an activist judiciary willing to act with flexibility in giving effect to broadly expressed legislative policies,<sup>8</sup> the prospects for fair and efficient economic regulation are greatly enhanced. One advantage of such a situation is that it minimizes the need to rely on costly and cumbersome bureaucratic structures. Moreover, we have a long tradition of empowering the judges to make their own rules of procedure. Here then, as Sir Richard Eggleston quite rightly observes, it is the lawyers' fault and not that of the legislators that new procedures have not been adopted.

Professor Brunt and Deputy President Isaac both deal, in their respective areas of interest, with the role of lawyers in relation to the competing objectives of the policy-makers. Each paper is tightly argued and thoroughly documented.

Looking at the Seminar as a whole three interesting features stand out. First, the non-lawyer participants were conspicuous for their criticism of the profession generally and the excessively legalistic tradition of the High Court and economic tribunals, and for their commonsense suggestions for improvement. Secondly, for the most part criticism of conservatism within the legal profession and the legal system as a whole was, upon reflection, somewhat mild. The only contribution involving a radical perspective appears to have come from political scientist Bruce McFarlane in his stimulating assessment of power structures in the Australian economy, in the context of discussion on Professor Harding's paper. Finally, it needs to be asked why the organizers of the Seminar did not ensure that the profession was subjected to more searching examination. There is throughout the proceedings some discussion of the role of legal education but one would like to have seen this topic explored a little further.

The book itself is well produced but seems to have taken an inordinately long time to emerge. For a soft bound title the price asked for it is enormous but is in keeping with the high cost of law book publishing. The footnotes are helpfully gathered at the foot of each page but the book does suffer from the absence of an index.

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<sup>7</sup> But see now *R. v. Joske* (1974) 2 A.L.R. 447.

<sup>8</sup> *E.g.*, Trade Practices Act 1974 (Cth), s. 52.

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