BOOK REVIEWS

Australian Lawyers and Social Change edited by DAVID HAMBLY, Professor of Law, Australian National University and JOHN GOLDRING, Senior Lecturer in Law, Australian National University. (The Law Book Co. Ltd, 1976), pp. i-xxiii, 1-392. Recommended retail price $17.50 (ISBN: 0 455 19344 4).

[Because of the scope of the theme of the seminar which is recorded in this book, it was thought appropriate to invite reviews from two commentators, who would reflect the range of professional and academic interests represented by the participants in the seminar. This course also has the advantage of eliciting from two distinguished commentators contributions to the discussion of the social role of Australian lawyers. The first review is by The Honourable Mr Justice Kirby, who is the Chairman of the Law Reform Commission and a Deputy President of the Australian Conciliation and Arbitration Commission. The second reviewer is Professor James Cutt, Professor of Administrative Studies at the Australian National University.]

Review by Mr Justice Kirby:

It was inevitable, I suppose. Bring together some of Australia's best legal scholars: seven judges, eight law professors, five silks, nine academics from Economics and Government faculties, a trade union advocate, M.P.s and others. Expose them to each others' ideas. Toss in a provocative paper or two. The result? A fascinating discussion of some of the most pressing legal problems of the decade.

This is a timely, thought-provoking, dare I say exciting book? It recalls the controversies that were agitating lawyers in this country in August 1974 (the occasion of the seminar that brought this talent together). Accordingly there is, inevitably, an occasional hint of *déjà vu.* References to the Human Rights "Act" [*sic*] and the Superior Court of Australia, then so confidently foretold by some of the participants, spring from the page to do a passing offence. In the 18 months since the seminar, so much has happened that even a month's delay in publishing the proceedings ensures the beginning of nostalgia. The first paper, by Mr Gareth Evans, was at such pains to provoke the audience (and it succeeded) that it tended on occasions to trade subtle intellectual analysis of the workings of the High Court for incitement to semi-political commitment.

A distinguished Canadian visitor recently told me that, on a visit to Canberra, when he found he could not sleep, he reached for a wellknown text on Australian constitutional law. It did the job with marvellous speed. Just as well for his slumbers that this book was not beside the bed.

The seminar recorded in these pages, fell into two parts. The first explored the working of the Constitution, its institutions, the legal profession and the processes of legal change. The second part scrutinised the role of the law and lawyers in regulating economic activity. Five principal papers were read. From them, few of our institutions emerge

unscathed. These papers and commentaries and discussion upon them form the principal subject matter of the book. But it opens and closes gracefully with thoughtful, reflective comments by the Governor-General, Dr Coombs, Professor Stone and Sir Anthony Mason.

Gareth Evans's paper "The Most Dangerous Branch? The High Court and the Constitution in a Changing Society" takes its title from Alexander Hamilton's suggestion that the judiciary is the department which will always be "the least dangerous to the political rights of the Constitution". Mr Evans assails formal amendment and co-operative federalism as incompetent to accommodate the changing constitutional relationships in Australia. This brings him to the conclusion that "It is the judges rather than the people or the politicians who have in practice borne the primary responsibility for adjusting the Constitution to the reality of social and economic change" (page 23). The principal purpose of his examination then becomes to assess the success of the High Court faced with this burden. He gives the Court a *beta minus*. If the language of judgments is "sober and dull", the "prolixity [is] unrivalled among the final appellate tribunals of the English-speaking countries" (page 37). Rejection of highly relevant material (*e.g.* Parliamentary history and *travaux préparatoires*) for the "crabbed English rules of statutory construction" comes in for particular attack. The Court's procedures, its personnel ("the tightest of all closed shops") and its "pedantic legalism" all earn Mr Evans' wrath.

What a long way this is from the unselfcritical observations on the Court that we were used to, not ten years ago. Such assessments are dismissed by the author as having a "self-congratulatory air". Most scathing of all is his attack on Dixon's wellknown assertion that "[t]here is no other safe guide to judicial decisions in great conflicts than a strict and complete legalism".

Now, it did not take Mr Evans to tell us that extra-legal factors play a role in judicial decision-making, most especially in constitutional cases. Professor Stone has taught this to three generations of lawyers. Lord Reid in 1972 put it this way:

> There was a time when it was thought almost indecent to suggest that judges make law—they only declare it. Those with a taste for fairy tales seem to have thought that in some Aladdin's cave there is hidden the Common Law in all its splendour and that on a judge's appointment there descends on him knowledge of the magic words Open Sesame. . . . But we do not believe in fairy tales any more.[1]

Armed with the new weapons of jurimetrics and scaleograms and provoked by the Dixonian language, Mr Evans hits out at what he sees as being the excessively narrow personal background characteristics of High Court judges, their "parsimonious and timorous" perception of their own role and their uncertainty of or unwillingness to articulate the "underlying motives and influences at work". Remedies are suggested

[1] Lord Reid, "The Judge as Law Maker" (1972) 12 Journal of the Society of Public Teachers of Law 22, 22.

to rescue the Court from its "myopic pettifoggery" in constitutional matters. These include legislative action to extend the range of evidence admitted, compulsory retiring ages, creation of a specialist constitutional court and the frank politicisation of judicial appointments.

As might be expected, such a cascade of provocation tended to polarize the seminar. Many who practice before the Court rushed to its defence. Mr W. Deane Q.C. stressed the real dangers of the Court's "assuming to itself the power and intellectual arrogance of a super-legislature" (page 80). Speaking to another paper, the present Attorney-General put it figuratively. We have a tiger here and his advice to those expounding the view of non-legalism was "Hold that Tiger".

For myself, I think the legal "realists" tend to underestimate the role and importance of "myths" in the working of society. There is much to be said for the "Brandeis brief" and for ensuring that the highest court informs itself appropriately in a legitimate way, on matters before it. However, frank politicisation would undermine the influence and authority of the Court. One gets the impression that the "Young Turks" at the seminar underestimated the importance of this factor for orderly government in a federation. Professor Zines, speaking of "vague political conceptions" which may underline constitutional decision-making, admonishes us all to "[r]emember the centipede who remained immobilised for the rest of its life when it came to think how it actually walked" (page 81). Good advice there.

Professor Sawer's paper "Who Controls the Law in Australia?: Instigators of Change, and the Obstacles Confronting Them" states its conclusion at the outset. "Things are", says Professor Sawer "boringly, more or less as they seem" (page 118). He has a word of advice for institutional law reformers. It is to stick to "lawyers' law" and to avoid legal change which has "any significant component of social change" (page 120). This invited a rather sterile debate which, fortunately, the participants avoided. Instead, they addressed themselves to the various instruments of legal renewal in Australia: law departments, adventurous politicians, law commissions, the courts and the legal profession. It is my view that the debate, recorded in this book, grapples effectively with the first of the two major problems facing organised law reform in Australia, namely the mechanics of translating commission proposals into legislation. Who can doubt that Mr Justice Mason and Mr Justice Blackburn are right in urging that law reform commissions should come to be regarded as "a new growth in the constitutional structure"? (page 155). Unless our legal system is to capitulate to the stresses of change, the turn of this century must see a mechanism firmly established by which most legal reforms can be accomplished in the manner of delegated legislation.

Unhappily, the second great issue was scarcely touched upon. It is the problem of uniform law reform. Professor Sawer overstates, I fear, the role and effectiveness of the Standing Committee of Attorneys-General. Perhaps it will come to play the role that is obviously needed by the scattered communities of this large country. One should not hold one's breath waiting for it to do so.

The remaining papers examine the role of lawyers in economic regulation. Professor D. E. Harding's outstanding paper "The Role of Lawyers in the Regulation of Economic Activity" examines a number of particular areas of regulation with a view to suggesting the contributions which lawyers and economists might make to policy-making and the formulation and implementation of regulation. The focus of attention is specifically upon company law, securities regulation and consumer protection. He suggests that the new interest in legal implementation of economic policies, made more attractive by advances in economic knowledge and possibly by recent High Court constitutional authority, will tend to throw lawyers and economists together more and more. He asks the central question: "Will courts in Australia make a positive and useful contribution or are they likely to be negative and obstructionist?" (page 242).

If the High Court came in for some straight talk earlier in the seminar, now it is the turn of the Arbitration Commission, the Prices Justification Tribunal, the Trade Practices Tribunal and others. The decisions are "riddled with inconsistencies" says one commentator (page 257). The "real reasons" are not stated (page 260). The "legalism" of lawyers provides impediments and judges, it is suggested, are "often inappropriate people to make choices between competing economic philosophies" (page 265).

The interdisciplinary tensions, picked up by Professor Harding and his commentators, are followed through by Professor Maureen Brunt's paper "Lawyers and Competition Policy". There is a special sense in which the legal profession "can be said to be captured by the law" (page 272). Trial procedure, the adversary system, the rules of evidence, the role of the economist as an expert witness: all of these come in for pertinent, searching criticism. The legal system has played a special part in Australian economic regulation ever since the establishment of the first Arbitration Court in 1904. We stand on the verge of an enormous expansion of these kinds of tribunals. The message of the economists is clear. If the law is to be a relevant instrument for social control, we ought not as lawyers, to retreat from these developments. But the old procedures, rules of evidence and methods of going about things must be changed to cope with the multifaceted issues that have to be resolved. Unless we can do so, we will not only fail as a society effectively to process our economic decision-making, we will damage the reputation of the judiciary generally, by involving judges in activity designed to do no more than "put the seal on a power situation".

The last paper, by Mr Deputy President J. E. Isaac of the Arbitration Commission presents lawyers with an interesting perspective of their art. Professor Isaac was the first economist to be appointed to the Arbitration Commission. He is, as one participant put it, not an "outsider" looking in, but a "topsider looking down". He examines the role of the Arbitration Commission and the High Court in industrial relations. He is a little too kind, I am sure, to the *Boilermakers'* doctrine and the artificialities that it has caused for the working of the arbitration system. Although some of the commentators do less than justice to the Arbitration Commission's struggle for consistency, we read the seminar debates

with the advantage of hindsight. We now know the very considerable changes that have occurred since August 1974, in this area of operations especially.

This is a long review for a short book. But it is a book of special significance for this generation of lawyers. The defects in the legal system voiced by so many participants in this conference demonstrate a heightened sensitivity to the needs of legal renewal in Australia. One participant after another pointed to the long run solution. This solution is to be found in critical introspection by lawyers and improvements, which have already begun, in legal education. Although 18 months have passed since the seminar, the message of this book is still fresh. The editors did well to preserve the record. Indeed, the only significant criticism I can make of their labours is that they omitted to prepare an index to take the reader through these pages as, one by one, the institutions of this Commonwealth submit to thought-provoking assault.

M. D. KIRBY*

Review by Professor Cutt:

This book records the proceedings of a seminar conducted at the Law School of the Australian National University from 23-25 August 1974. The aim of the seminar, expressed by the editors in the preface, had a historical, descriptive aspect—to assess the responsiveness of Australian law and lawyers to social change—and a prescriptive aspect —to consider the extent to which the law and lawyers can, and should, be used as instruments for promoting change.

The book is timely, and of great importance for lawyers and economists, particularly for those lawyers and economists who seek to bridge the thoroughly pernicious gap that yawns between the concepts and practices of the two professions. In a most effective procedure, the editors have managed to allow five distinguished contributors to reflect at length on important topics, and to support those reflections by the observations of an able and distinguished set of commentators and discussants. The book thus has the great merit that, while the vast subject aspired to by the editors is treated only partially, those aspects which are examined are dealt with in substance. This review seeks to comment briefly on the five topics examined, and, with diffidence, to offer a few general reflections on the themes which seemed to crystallise at the end of the seminar.

The first major contribution to the seminar is a lengthy and scholarly, if occasionally partisan and tendentious, contribution by Gareth Evans, on the role of the High Court and the Constitution in times of change. Mr Evans reviews the role of the High Court in the light of pressure, particularly since the Second World War, for increased government participation in five major areas: control and management of the national

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economy; the regulation of commerce; national development, including the exploitation of natural resources, the whole question of conservation and environment, and the planned growth and development of cities and their transportation systems; the question of social welfare; and the question of law reform itself. While he recognises the prevalence and persistence of disagreement on the Bench, Mr Evans notes the distinction between a legalistic and pragmatic approach to the role of the High Court, and concludes that the Court "has not on balance sufficiently discharged the enormous responsibilities which its role in the Australian constitutional system place upon it" (page 71). Further, "the Court should become substantially more pragmatic, purposive and openly policy-oriented in its decision-making style" (page 73). He goes on to suggest, unexceptionably, a compulsory retiring age for High Court judges, and, much more controversially, the appointment to the Court of judges "in general sympathy with the aims and perspectives of the government of the day" (page 75). We must return to the question of "political" judges, and the appropriate degree of activism; suffice it for the moment to note that Mr Evans allows his patently obvious value judgments to discolour an otherwise excellent treatise. A first example—which reflects his centralising pre-occupation—is his assertion that "it is now beyond serious dispute that control of the macro-economy is necessarily a Commonwealth function if it is to be undertaken at all" (page 18). This is a simplistic and frankly erroneous statement. A second, and, in my judgment, much more serious example, is his assertion that the High Court should take risks where the cause is a "just and rational one"; the text provides clear evidence that "just" and "rational" apply only to causes which find favour with Mr Evans.

The second contribution is a much more dispassionate treatise by Professor Geoffrey Sawer on the control of the law in Australia. The contribution explores two main themes—the nature and progress of law reform in Australia, and the role of lawyers in the process of law reform, on the one hand, and the wider area of social change, on the other. Professor Sawer catalogues the progress of law reform in Australia, and underlines an important, activist role for lawyers in the reform of what he calls "lawyers' law"—defined as an area of law of technical complexity, having conceptual interrelations with other branches of law which cannot or ought not to be disregarded. He counsels, however, that an attempt by lawyers and judges to play a quasi-legislative role would be very dangerous indeed. Two quotations from his essay illustrate the point. First, "judges cannot reasonably be expected to do much more than steer the course of judicial constructiveness in the general direction of current values, by small adjustments to the tiller at a time" (page 132). Secondly, "it seems to me that judicial legislation is of such marginal importance so far as any large measures of social reform are concerned, and that judicial integrity is so important to the stabilisation of whatever measures of social reform are otherwise carried into law, that it would be best to interfere very sparingly with the present situation of the judiciary, including the law as to contempt" (page 136). The discussion of Professor Sawer's essay raised, for the

first time, the point that lawyers are invited, indeed required, to involve themselves in areas in which they can claim no technical expertise, and that legal training should begin to reflect this wide diversity of roles.

Having set the broad perspective, as it were, the editors elected, with considerable vision, not to flit around the wide range of topics to which they might have sought contributions, but to focus on one topic and treat it at length and depth. The topic chosen was the role of lawyers in the regulation of economic activity, and the three remaining contributions are confined to this area. Professor Harding deals with the topic of the regulation of economic activity in general terms; Professor Brunt deals with competition policy; and Dr Isaac deals with the question of industrial relations.

Professor Harding draws a distinction between the contributions which lawyers and economists may make to policy-making and the formulation and implementation of regulatory arrangements. He illustrates his point by an examination of the roles of the two groups in relation to securities regulation and consumer protection. Perhaps slightly unfairly, he sets the economists against each other in his examination of securities legislation, and this fascinating debate somewhat blurs his related point that lawyers in such areas are called upon to make judgments in areas where a comprehension simply of the facts at issue requires considerable technical sophistication. With eminent fairness, however, he notes that economists may also engage in sophomoric mathematical gymnastics masquerading as good economics; the fact remains that the broad area of economic regulation is one in which lawyers play a major role and for which they are, in general, inadequately prepared. Professor Harding's discussion of consumerism—which one might broaden to the whole area of environmentalism—underlines his previous point about the technical inadequacy of legal training, and makes a related point about the dangers of legal domination—and, particularly, legal activism—in areas where the lawyer lacks technical expertise. Particularly, it emerges that the lawyer bent on a hard-nosed and activist approach to issues of consumerism and environmentalism may well turn out to be a rather peculiar type of social reformer who makes certain types of consumer goods and services—including recreational goods and services—more expensive and less accessible to lower income groups than before his crusading intervention. Professor Harding goes on to distinguish important concepts which arise in the debate concerning the relative roles of lawyers and economists—concepts such as "equality", "efficiency" and "the public interest" and goes on to draw important distinctions between the roles which lawyers and economists might play in the regulatory process. If, in his conclusion, he aspires to a "Brandeisian" synthesis, he may perhaps be forgiven a lapse from pragmatism into idealism.

Professor Brunt offers a comprehensive and diplomatic overview of the role of lawyers in the promotion of competition—particularly diplomatic and sympathetic in as much as this is a field in which lawyers play an important, indeed probably predominant, role, and for which they are singularly badly trained. It might have been useful had the

editors noted at the beginning of Professor Brunt's paper that regulation with respect to the promotion of competition is at sharp variance with the objectives of much of the rest of regulation—such as that discussed in Professor Harding's paper—which are precisely to restrain or prohibit competition. They might also have noted that Professor Brunt does not deal for one reason or another, with the monopoly power of trade unions or of enterprises in the public sector. Professor Brunt offers a useful overview and classification of methods of controlling monopoly and restrictive practices in the private business sector and goes on to examine the relative roles of lawyers and economists in this policy area. The conclusion—again expressed with eminent diplomacy—is that the resolution of economic issues ought not to be left to courts of law, but entrusted to bodies that can exercise a discretion based on considerations that can hardly be the subject of evidence of the ordinary kind, and the commentary and discussion on her paper raise again the issue of the training of lawyers for a role in an essentially technical field.

In our new industrial state characterised by powerful economic groupings, the resolution of conflicts between these groupings—which we know as the field of industrial relations—with the public interest timorously and often residually defined, is an area of immense importance, and it is to this area that Dr Isaac addressed himself in the last major contribution to the seminar. He traces the development of the remarkable compulsory arbitration system in Australia, and the role of the eminently civilised Higgins doctrine. What emerges clearly in this contribution is the fact that economic technicalities, although important to industrial relations in an academic sense, ultimately pall before the issue of power at the factory door, and that the role of the lawyer or judge—a role which is broadly accepted by both parties to industrial disputes—may offer modern, technologically interdependent society a way of containing and institutionalising conflict, and of creating a forum in which the public interest can find formal expression, and, hopefully, influence the outcome. It is perhaps unfortunate that neither the major paper, nor the observations of commentators and discussants, deal with what, in the opinion of this reviewer, is the major problem in industrial relations, the question of the resolution of conflict in the public sector. Where conflict exists in the private sector, there is a market sanction to which employer and employee are ultimately subject. That sanction does not exist in the public sector, and the problem is exacerbated by the nature of the essential services which characterise much of the public sector. In such cases, the articulation of the nature of the public interest is crucial, and the history of conciliation and arbitration in this area is not encouraging—the absence of sanctions providing inevitable scope for compromise at the public expense.

A few common threads may perhaps be drawn together from the seminar as a whole. First, it seems clear that in times of change, and perhaps indeed at all times, lawyers and judges are cast in roles for which they have no particular technical training and in which some technical capacity is essential to a full comprehension of the issues involved. Two questions arise from this point: first, should lawyers and

judges be left to occupy such a wide field? and, secondly, if they should be so left, should they be differently trained? The first question leads to a case for a more specific definition of the roles of technical people and lawyers in areas where technical knowledge is of importance, and, perhaps, also to a recognition of the fact that, rightly or wrongly, in a society of large groupings, the final arbitration or judgment of lawyers is considered acceptable where that of technical people, even if they can agree, might not be. But if lawyers and judges are to continue to occupy a wider role, then the virtually unanimous sentiment throughout the seminar in favour of wider interdisciplinary studies in law becomes of the highest importance. Such widening could start at the undergraduate level, but one imagines that its full professional manifestation might occur at the graduate level. This issue of expertise has to be faced by lawyers and judges. There is enough evidence around of short-run and legalistic—albeit well-intentioned—determination of issues by lawyers and judges where the ultimate, long-run, outcome redounded to the sharp disadvantage of the short-run beneficiaries. School integration, public housing, and rent control are three areas where—particularly in the United States—inexpert and legalistic determination of issues in the short-run appears to have contributed to social deterioration rather than social improvement. This leads us directly into a second and more contentious theme running throughout the seminar—the extent to which lawyers and judges should be active or passive in relation to social and economic change.

Mr Evans strongly advocates a more activist role for lawyers and judges in Australia, while Professor Sawer counsels caution. It certainly seems that lawyers and judges cannot have it both ways; they cannot be both respected arbiters and committed partisans. It seems to me that members of the profession have a perfect right to take a partisan and activist view of a social and economic issue, but must draw a firm line between personal partisanship and professional objectivity. The profession has much to lose if its traditional disinterestedness and objectivity are, and are seen to be, substantially eroded. If lawyers and judges seek to add to partisanship a cloying trendyism, then the substantial role which they are presently permitted without, in general, technical expertise in particular fields of application, should and almost certainly would be substantially truncated. Surely the role of lawyers and judges, as professionals, is to preside over rather than make social and economic change, and to ensure that that change occurs within the rule of law and takes place within a context of stability and reason. One might add, perhaps not too unkindly, that there is a reprehensible asymmetry in the view that lawyers and judges should play a more activist role. It is invariably intended that such activism is appropriate where it is in accord with the value judgments of those who seek to push lawyers and judges into a new role. One wonders how such people would react if lawyers and judges were to be activist in opposing, within their professional role, social and economic changes with which they were in disagreement.

A final issue, closely related to the question of the appropriate degree of involvement by lawyers and judges in social and economic change, is

the extent to which judges should be essentially political appointments. On this matter, the reviewer is in total sympathy with the demurrer expressed by Professor Mathews—that the appointment of political judges "would seem to be especially damaging to the concept of judicial impartiality, and likely to bring the party political system into the judicial branch of government in a way that has been tried, and found wanting, in the U.S.A." (page 97). The line between the judiciary and legislature breaks down in the case of politically appointed and activist judges, and it is difficult to envisage the survival of the judiciary in any long-run battle with the legislature. It neither should nor could win. The tragedy would be that the crucially important, disinterested, objective, interpretive role would also have been lost.

In conclusion, I would like to express my enthusiasm for and appreciation of the task undertaken by the editors and the manner in which it has been carried out. The book is, one hopes, the first in a series of important, bridge-building operations between professionals with distinct, but interdependent roles. Through the channels of communication developed across such bridges the opportunity exists to develop and elaborate the crucial concepts—the public interest (in terms of income or welfare more broadly defined? in the short run or long run?) equality (of opportunity or of result? in the short run or long run? in what relation to absolute, as distinct from relative measures of welfare?) and, ultimately, justice itself—of issue determination in the monitoring, regulation and interpretation of social and economic change.

J. CUTT*

Conflicts in Matrimonial Law: Cases and Text by MICHAEL PRYLES, LL.B. (Melb.), LL.M., S.J.D. (S.M.U.); Senior Lecturer in Law, Monash University. (Butterworths, 1975), pp. i-xii, 1-148. Recommended retail price $7.00 (ISBN: 0 409 45563 6).

As the author indicates in his Preface, this work is a collection of cases and materials on the private international law aspects of marriage and divorce. The separate treatment of these topics of the conflict of laws has been made necessary by the passage of the Family Law Act 1975 (Cth) which has wrought considerable changes in the conflicts rules, as well as in the domestic law, relating to matrimonial causes. Dr Pryles deals very fully and competently with the whole subject matter, often raising penetrating questions about, and giving new insights into, the meaning of the common law authorities and the Family Law Act. This reviewer was particularly impressed with the discussion of the classification of marriages as either void or voidable (page 92) and alarmed by the thought that the rule in *Travers* v. *Holley*[1] applies to the Family Law Act (page 112).

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[1] [1953] P. 246.