BOOK REVIEW

PORTRAIT OF A PROFESSION, *edited by Robin Cook, Q.C.* The centenary book of the New Zealand Law Society. A. H. & A. W. Reed 1969, pp 1-439, Australian price $7.50.

Perhaps because New Zealand is a unitary state the New Zealand Law Society, which is a federation of the law societies of the judicial districts, has always exhibited more homogeneity than the Law Council of Australia. Indeed one might almost suggest that the New Zealand legal profession has demonstrated greater intrinsic unity and strength than any of the law societies of the states in Australia. This is borne out by the fact that, although New Zealand followed South Australia in the enactment of legislation to licence land brokers, the legal profession in New Zealand managed to gain exclusive control over conveyancing in the early part of the century. The failure of the South Australian legal profession to do this seems to be indicative of a weaker status in the community than was achieved by the profession in New Zealand.

It is instructive therefore to have this review of the evolution of the New Zealand Law Society over a period of 100 years. The comparison between Australia and New Zealand is the more interesting in that New Zealand began as a lawless land "in which sinners predominated", whereas, despite the reputation some of the Colonies had as penal settlements, Australia did not attract anything like the same number of ne'er-do-wells and adventurers. It is also interesting to recall that the first legal practitioner in New Zealand was Richard Davies Hanson, who arrived there at the age of 34 in 1840 as the Land Purchase Officer to the New Zealand Company. He was immediately involved in serious conflict with the Crown arising out of the claims of the New Zealand Company to have jurisdiction in virtue of a covenant made by the Company with the Maori chiefs. The first British Governor, Captain Hobson, who proclaimed Queen Victoria's sovereignty over New Zealand in the same year, called Hanson's pretentions "high treason". Almost immediately a legal trial of strength between the Crown and the Government developed when a writ was taken out in the Supreme Court of New South Wales by the Master of a ship for false imprisonment alleged to have been suffered by him in Wellington at the hands of the Magistrate of the New Zealand Company. Hanson went to Sydney and seems to have been very relieved to have been able to settle the claim on payment of £100 in costs.

Once this question of jurisdiction had been resolved, Hanson became the first Crown Prosecutor, and it is through a connection of his that the firm of Treadwell in Wellington claims to be New Zealand's oldest law firm. The role of Crown Prosecutor in New Zealand was no sinecure, and finding himself unpopular Hanson departed for Adelaide, where he practised at the Bar, and became successively Attorney-General, Prime Minister, Chief Justice and Chancellor of the University of Adelaide. This is not the first New Zealand connection with that illustrious academic institution, for Sir John Salmond of the New Zealand Bar was the Bonython Professor for 10 years and did some of his most significant work in Adelaide. It is interesting to recall that he

returned to New Zealand because the University of New Zealand offered him £100 more in salary than he was getting in the University of Adelaide.

There were many other connections between the New Zealand and Australian legal professions during the early colonial period, and one is led to ponder on the value of a common method of entry into the respective professions, based on admission in the United Kingdom. The exclusiveness demonstrated by some of the Australian legal professions respecting admission from New Zealand might be regarded as retrogressive, and the present move on the part of the New Zealand Law Society to achieve automatic reciprocity with the Australian legal profession is no more than an attempt to restore the situation which prevailed in the last century. Such a move would seem to be desirable if one takes an imaginative view of the future of the Pacific area.

The New Zealand judiciary also emerges in this book as a body of consistent quality and abundant personality. Mr. Justice Chapman, who fell out with the authorities in New Zealand and became Colonial Secretary in Van Diemen's land, where he came into conflict with the Government on the question of transportation and returned to the Bench in New Zealand, was only one of the New Zealand judiciary who demonstrated the most remarkable versatility. He wrote and drew the illustrations for the article on wool in the *Encyclopaedia Britannica*. The book describes him as a "paradigm of the early Victorian colonial judge".

Many Australian judges and practitioners have referred to the remarkable case law which has emerged from the Supreme Court in New Zealand. Just as New Zealand has led many parts of the British Commonwealth in social legislation and legal reform, so the New Zealand Supreme Court has often led the common law. It is a pity that this book did not outline some of the areas. It is also perhaps a pity that it did not discuss legal education in New Zealand more fully. Full time legal education has existed in the four New Zealand law schools only in this generation, yet despite this the intellectual quality of the New Zealand judiciary has for a long time been high. Some analysis of the form of legal education which managed, despite almost non-existent resources, to produce a body of remarkably able practitioners, would be instructive.

Since the book is designed mainly for reading by the New Zealand law profession it concentrates on biographical detail and anecdote and is not concerned with the sociological questions that leap to mind as one reads it.

Among the many attractive reminiscences is that respecting the employment of the first girl in a law office in Wellington on the eve of World War I. Her appearance produced such consternation among the law clerks that they seriously considered adopting some more conservative calling. It was only when the War had drawn the men away that girls invaded legal offices en masse and managed to establish themselves as a necessary part of the staff.

The New Zealand Law Society is to be congratulated on attaining its centenary and on its imagination in producing such an attractive record of its membership and achievements over so long a period.

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ASIAN CONTRACT LAW, A SURVEY OF CURRENT PROBLEMS, *General editor: David E. Allan.* Melbourne University Press, 1969, pp. i-xiii, 1-237; Australian price: $9.60.

This interesting study is the work of a group of academic lawyers from ten countries and has been produced under the sponsorship of the Law Association for Asia and the Western Pacific. It is intended, not as an encyclopedic work in the field of contract, but as an "impressionistic" survey and a prelude to further and more specialized research.

The book opens with a brief résumé of the legal history of the countries involved. Then follows a brief summary of the various laws of contract, the countries being divided into those dominated by common law influences (Australia, New Zealand, Singapore, parts of Malaysia and India) and those dominated by civil law influences (Japan, Korea, Iran, Thailand, Indonesia and the Philippines). Thailand and the Philippines, though belonging to the last-named group, also show some common law influences. The indigenous customary law seems to be asserting itself most strongly in Indonesia; accordingly, a whole chapter has been devoted to Indonesian "adat" law.

These general surveys, though necessary to an understanding of more specific problems, often whet the appetite more than they satisfy it; their principal use, perhaps, will be as pointers towards further research. We are told, for instance, without any further elaboration, that in Thailand formalities have been prescribed for five of the twenty-three nominate contracts in the Code. One should also like to know more about the actual content of adat law, the customary law which seems mainly to regulate life in village communities in Indonesia.

The inability of traditional concepts to cope with modern conditions is explored in some detail. The authors demonstrate successfully that Asian countries particularly are faced not only with the world wide problem that the law must keep pace with rapidly changing social conditions, but also with the additional difficulty of having to carry out this task with the help of legal systems which are not home grown and therefore not always well suited to their own societies.

The survey of specific problems, commencing with chapter 8, constitutes the most interesting and, perhaps, most generally useful part of the book. It concentrates on a comparative study of the answers which the various legal systems give to the following modern topics, all of undoubted practical importance: contracts of adhesion, exemption clauses, restrictive trade practices, credit and security, land tenure, carriage of goods and illegality. The authors' treatment of contracts of adhesion, in particular, is a valuable contribution to the understanding of this difficult topic and may well become required reading in Australian law schools.

The various contributors were left free to write about those matters in the law of contract in their own countries which seemed to them most important. In view of this procedure the book exhibits a surprising degree of cohesion. There is no attempt to conceal certain basic convictions which permeate much of this study: there is a generally critical attitude to the existing law, a refusal

to be preoccupied mainly with conceptual problems and a preference instead for pragmatic solutions; there is a willingness to see the law as an expression of the national identity of a country, combined, however, with a desire to promote laws which will assist rather than impede international trade and intercourse; the philosophy of laissez-faire and its concomitant, the principle of freedom of contract, are rejected, and some degree of government intervention is accepted as necessary.

Whether the book will have any far reaching effect in so far as it advocates reform of the law, remains to be seen. That it is of immediate practical and theoretical value cannot be doubted. It should be of great interest to all students of the law of contract in every country this side of the iron and bamboo curtains. To the Australian lawyer it opens up new vistas in co-operative legal research of a regional character. To the Australian comparative lawyer, in particular, it must come as a pleasant surprise to learn that his teaching of the civil law has such direct and practical relevance to the region in which he lives. Congratulations to Professor Allan and his fellow workers for having produced a truly pioneering study. Let us hope that it will be followed by similar and more specialized studies and that eventually this work will be taken up by academic lawyers, not only trained in the methods of comparative law, but also able to give their work its final authenticity through their familiarity with the languages and cultures of their Asian neighbours.

H. K. LUCKE*

LAW IN A CHANGING AMERICA, *edited by Jeoffrey C. Hazard, Jr.,* for the American Assembly—Columbia University, Prentice Hall, Inc., Englewood Cliffs, New Jersey, 1968. U.S. Price $5.95.

Since 1951, the American Assembly, an independent educational body, has published a series of background books on a wide variety of themes. These have been used as material for national Assembly sessions in New York, attended by invited participants. Each of the thirty-nine books which have so far appeared in this series are, however, also important publications in their own right, presenting views by scholars of repute on basic themes, in easily accessible form. Until comparatively recently the main emphasis of Assembly discussions has been centred on International Affairs (including International Law), economics and U.S. politics. Since 1965, however, the working of the law has also come under detailed scrutiny, "The Courts, the Public and the Law Explosion" appeared in 1965, followed, in 1967, by "Ombudsmen for American Government". The success of these works, and the discussions which followed their release, have led now to the publication of "Law in a Changing America".

This latest volume in the Assembly series consists of a group of twelve essays, prefaced by a wide ranging introduction by the Editor, Professor Jeoffrey C.

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Hazard Jr., of the University of Chicago Law School. In essence, the volume is aimed at provoking interest and discussion on the existing capacity of the law, the legal profession and legal education to meet the new legal problems and new demands on the legal profession created by the many and often rapid changes taking place in modern western societies. The distinguished groups of contributors, including Professor Cavers of Harvard University, Professor Goldstein of Yale and Professor Harry Kalven Jr. of the University of Chicago Law School, in self critical mood, reach a well reasoned consensus that the working of the law in the United States, professional attitudes and legal education generally are being rapidly outstripped by economic and social changes which have not been appreciated fully or have been ignored, in the face of hide-bound traditions and attitudes which still permeate legal thinking.

Prima facie much of the material contained in these often provocative essays seems to be of especial, immediate concern only to prevailing conditions in the United States. There are,however, as almost every essay soon reveals, too many points of similarity between the problems facing the law and lawyers in the United States and Australia for this volume to be ignored in this country. Discussions on the need for specialisation in the legal profession, professional qualifications gained by educationally useless rote learning, problems related to meeting the challenge of other professions and new organisations taking over work traditionally carried on by the legal profession and other issues like these, which are considered in this volume, reveal situations which are uncomfortably parallel to existing conditions in Australia. Indeed, many of the weaknesses in the American legal system exposed in this book exist in Australia in an even more deeply engrained fashion. This is particularly so with respect to legal education, except in a few isolated instances, as tradition-bound curricula fail to prepare law students adequately to come to terms with the social and economic realities of modern life which have already created new dimensions for the working of the law. Too much emphasis on the "received tradition" (as Professor Cavers terms it in his essay on Legal Education in Forward-looking Perspective) of Law Schools as teaching institutions with research activities being "essentially incidential", for example, can make it virtually impossible for new and much needed courses to be developed, by combined research and related teaching programmes.

In the nineteenth century, after a slow beginning, and not infrequent opposition from sections of the legal profession, the operation of English law through the Judicature Acts and other reforms was made finally to come to terms, at least in part, with the economic and social realities of the time. "Law in a changing America" indicates that in the United States, and perhaps even more so in Australia today, new attitudes and a spirit of reform, not unlike those activated in the nineteenth century, are needed again to keep the working of the law, the legal profession and legal education in tune with the needs and demands of modern society.

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DIVORCE, SOCIETY AND THE LAW, *edited by H. A. Finlay, B.A. (Lond.), LL.B. (Tas.).* (A Symposium arranged by the Faculty of Law, Monash University.) Butterworths 1969, pp. 1-127.

Less than two years ago, in a book review, I remarked on the "paucity of the Australian family law library". Since that lament, we have seen published a fine divorce practice book, an up-to-date edition of a standard hornbook and a superb treatise on Australian Divorce Law. Yet I wonder whether the short book under review is not the most impressive contribution of all.

Here at last is an Australian work that examines the law's fitness to resolve marital conflicts. At last a teacher can refer students to challenging and mature materials which are not foreign, not inaccessible and not obscure. To this extent, the importance of this book goes beyond the merit of its content. It is a pioneering work, and merely for conceiving it, its editor deserves much commendation.

How far does the content of the book measure up to the originality of its conception? No doubt reviewers will have to steel themselves to eschew the tired metaphor of the curate's egg. And indeed the quality of the several essays varies. All seven pieces, however, stimulate, and none more so than Mr. Finlay's introductory essay; which is consummately written, compassionate and incisive.

I should put next in order of merit Mr. L. V. Harvey's elegant account of marriage counselling in Australia. The painstaking training of the voluntary workers, as outlined in this essay, should allay any fears of amateur do-goodism.

The two legal writers (Mr. T. A. Pearce and Mr. Justice Barber) make challenging practical suggestions, though perhaps Mr. Pearce's article may be thought by some non-lawyers to dwell on *minutiae*. This would be an unfair criticism. It is refreshing to find a balance in both articles between grand suggestions for reform and trenchant, detailed comment on defects of the present procedures. Lawyers will find both essays wise and earthy.

The contributions of Dr. G. Goding, Professor M. G. Marwick and Mrs. Concetta Benn, though very stimulating, may well be hard going for lawyers. They appeal most when they are concrete, e.g., Dr. Goding's examples of "marriage dynamics" (page 28). But Dr. Goding and Mrs. Benn are occasionally a little uncharitable to lawyers, and I think unfairly so. Professor Marwick's thesis is, so far as I am concerned, so untenable that I am inclined to think his essay a piece of sophistry. Nevertheless, though his inferences are questionable, his statistics contain much worthwhile information.

Having, I hope, conveyed my admiration for this book, may I be permitted critically to discuss a number of arguments put forward by its various contributors?

If there is any common theme, it is that Australian divorce law, even since 1961, is illiberal. With the possible exception of Mr. Justice Barber, all the contributors seem to favour adoption of the "breakdown" principle, and condemn the "fault" principle. The social scientists also seem to argue:— (a) that easier divorce laws would not increase the divorce rate *and* (b) that it would be no tragedy if they did.

If these contributions represent the mainstream of Australian opinion, I regret that I find myself sailing against its current. Professor Marwick and Mr. Harvey maintain the thesis that Australia has a comparatively low divorce rate. But neither Mr. Harvey's comparison with the U.S.A. nor Professor Marwick's with the Nayar caste of Malabar in south India dissuades me from the view that Australia has a disastrously high divorce rate: the highest in the "Western" world save for U.S.A., Sweden, Denmark and, it appears, "white" South Africa. Professor Marwick confines his statistical analysis to pre-1961 conditions, which may make his observations a bit suspect.

Mr. Justice Barber's castigation of the English Divorce Reform Bill (now, I fear, with some modification, Divorce Reform Act) is a very sound corrective to the call for flexibility inherent in many of the other essays. The social scientists' undisguised contempt for the law's preoccupation with formulae may arise, I suggest, from a misunderstanding of the law's dual function, to solve the immediate problem of two litigants and to provide norms of behaviour. A similar misunderstanding exists of the *McNaghten rules*, which, whether right or wrong, are a good deal more defensible than many psychologists seem to think.

On the other hand, I was delighted to find a few of my own biasses supported. It seems to me that Dr. Goding is being refreshingly realistic when he says that "adultery when it becomes known to the spouse is the most serious threat to the great majority of marriages" (p. 32)—a realism shared by the Germans, who render "adultery" as "*Ehebruch*" (breaking of the marriage). Mr. Harvey makes some pertinent comments on the problems of "transference" for lawyers. His suggestion that lawyers indulge in "know thyself" sessions with other experts (p. 48) is well worthy of consideration. In Oklahoma City, marriage guidance is conducted by a Family Clinic, consisting of doctors, lawyers, ministers and financial experts as well as marriage counsellors. Inter-disciplinary co-operation at this level might well be more explored in Australia.

Dr Goding makes some rather disturbing contrasts between the respectability of marriage counselling among the "middle socio-economic group" and its unpopularity with the "lower socio-economic group" (p. 17). It seems to me that marriage guidance cannot be regarded as having realized its aims until it becomes usual for every man or woman with marital difficulties to refer to councils, as readily as people with physical ailments refer to physicians. Convincing are the suggestions of Mr. Pearce and Mr. Finlay that provisions similar to, and perhaps stronger than, those of the Matrimonial Causes Act. section 14, should be introduced into state maintenance acts.

I have noticed in my recent Family Law classes an astonishingly lively interest in "extra-legal" matter. In this there has been a significant change in attitudes in the last four or five years. *Divorce, Society and the Law* has provided Australian family law teachers—most of whom are keenly in favour of increasing their "extra-legal" content—with ideal material for the purpose. Mr. Finlay is to be greatly commended for producing an excitingly challenging book.

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THE POLICE AND THE PUBLIC, *by D. Chappell and P. R. Wilson.* University of Queensland Press, 1969, pp. i-x, 1-214; Price: $3.95.

This book is based upon a research project "which sought, as its principal aim, to establish objectively and authoritatively both what the Australian public think of the police and what the police think of the public". Much of the book reports the results of "very substantial" surveys carried out among citizens and the police in Australia and New Zealand. There is an historical introduction. Other sections deal with problems of recruitment, training, and promotion, and contain recommendations for improving police-public relations and police efficiency.

The authors have come up with a lot of information of general interest, mostly sealed by survey. Some of the matters established "authoritatively" by the authors are as follows. Australasian police are not held in such high regard as the police in Britain. There is more public respect however than some have previously estimated. The vast majority of persons who seek police assistance are satisfied with the assistance given. Police are impolite infrequently. Police underestimate the extent to which they are respected. Police believe they are devoting insufficient time to the prevention and detection of crime, and excessive time to office and clerical duties. More motorists are anti-police than non-motorists. The state of relations between police and teenagers is unsatisfactory. People with a tertiary education have far less respect for the police than those with a secondary or primary education. Police are suspicious of those with a university education. Scarcely any members of the force have a university education. Promotional opportunities are poor. Salaries are low. Morale is not as high as it should be. There is a shortage of manpower. Physical requirements (e.g., height) for entry into the force are unnecessarily demanding and result in the exclusion of too many possible recruits. Educational standards for entry are very low. The South Australian Cadet Training Scheme is the best cadet training scheme in Australasia.

Various recommendations are made for the improvement of police efficiency and police-public relations. These include organized public relations policies, police involvement in the prevention of juvenile delinquency, police participation in some university courses, placing motor traffic duties under the control of a non-police agency as in New Zealand, better promotional opportunities, better pay, greater research collaboration between the police and universities, and the creation of co-ordinated police "research and planning" units to investigate such matters as the use of computers in police work, standardized crime reports and records, and methods of improving relations between police and young people.

The Police and the Public is a useful contribution to expertise upon police in Australasia. It will enjoy a wide reading. However, sadly the contribution made by the authors is more modest than the blurb would have one believe. The book would have been much more useful had more space and thought been devoted to the recommendations. Many of the survey results reported seem of much less importance than providing recommendations for improvement. Most of the authors' recommendations seem sound enough but are hardly extensive or imaginative. There is no discussion of methods of internal or ex-

ternal review of police misconduct. Surely these matters touch very closely upon police-public relations. There is no discussion of the issue whether over-criminalization in such areas as private immorality and censorship prejudices public relations, or of police-public problems arising from the existence of wide powers of arrest, wide vagrancy and "move-on" offences, and unsatisfactory bail laws. There are only references to "outmoded laws", and to problems arising from 6 o'clock closing.

Readers looking for a wide range of ideas will be much more satisfied with *The President's Commission on Law Enforcement and the Administration of Justice, Task Force Report: The Police* (1967).

The Police and the Public suffers from a lack of direction which no doubt accounts in part for the limited scope of the authors' recommendations. First, Chappell and Wilson do not explain what is meant by police-public relations, and do not indicate at all clearly the importance of good police-public relations. (Contrast *Task Force Report: The Police*, chapter 6.) Would there be good public relations if the community had great respect for the police because they handled a dirty job well, and yet failed to co-operate with the police because of risk of injury, or inadequate payment for time spent giving evidence in court? Would there be bad public relations if the police did not enjoy respect but nevertheless the community still reported crimes because of say good neighbourly habits or the instinct of self-preservation? What precisely are good police-public relations supposed to achieve?

Attempts to answer such questions suggest to me an approach different from that used by Chappell and Wilson. Instead of saying: "Public relations are a Good Thing; we shall improve public relations", why not isolate various problems of law enforcement (e.g., police morale, citizen co-operation in notification of crimes) and work from there? Improving public relations may be one method of solving a law enforcement problem, but usually there will be other methods, perhaps of much greater importance. In my view this type of approach would provoke many more useful ideas than an enquiry vaguely aimed at improving police-public relations. The approach I have in mind is similar to that found in *Task Force Report: The Police*, chapter 9, "The Community's Role in Law Enforcement".

This leads me to a further indication of Chappell and Wilson's lack of direction. Several part of the book relate more to police efficiency and organization than to police-public relations. I have in mind particularly the sections upon police recruitment and training, morale, and the creation of research units to investigate such matters as the use of computers and standardized crime reports and records. Admittedly matters of police efficiency and organization are related to public relations, but if this is the orientation of the authors' treatment why is their discussion of problems of police efficiency and organization so incomplete (contrast *Task Force Report: The Police*)? Significantly, in their discussion of matters of police efficiency and organization Chappell and Wilson come closest to the approach which I suggest. Here they are much less concerned with the goodness of good public relations and concentrate more upon overcoming specific law enforcement problems by methods not necessarily directly related to police-public relations. These sections are the strongest in the book.

The Police and the Public would have been much more useful if its general theme had been methods of overcoming important law enforcement problems.

There would have been less emphasis upon police-public relations, but the authors' surveys would still have provided a useful background (except that the surveys would probably require modification to suit the different aims of the research project). My feeling is that these two social scientists have been a bit too preoccupied with the possible beauty of their surveys and survey methodology.

The book is splendidly produced. The Dai Nippon Printing Co. (International) Ltd. of Hong Kong, and Cyrelle, the designer, are to be warmly congratulated. However, inevitably it must seem, I refer again to *Task Force Report: The Police*, which is bigger, cheaper ($U.S.1.50) and, apart from a paper cover, even better produced.

Those readers who want more than Chappell and Wilson's study (a gallop around the Australasian Police stables?) should write to the Superintendent of Documents, U.S. Government Printing Office, Washington D.C. 20402.

BRENT FISSE*

ESSAYS IN AUSTRALIAN FEDERATION, *edited by A. W. Martin.* Melbourne University Press 1969, pp. i-xii, 1-206.

Essays in Australian Federation is the third volume in the series *Studies in Australian Federation* and the first of what is promised to be a series of essays on all aspects of the history of federation in Australia. If the proposed series maintains the high quality of the volume under review it will be a valuable aid to the understanding of how and why the Australian colonies were moved to federate and why the Constitution assumed the form it did. While not wishing to detract from the inherent value of these essays, it is felt that a series of essays, such as this is proposed to be, is no substitute for the as yet unwritten "History" of the federation movement. Perhaps these essays will act as a catalyst and a complete "History" will be written before the centenary of the Constitution.

Each of the six essays in the volume under review examines, in depth, aspects of the history of the federation movement and the constitution making process which have never been studied before. Geoffrey Serle examines the Victorian "campaign" for federation in the 1880's which culminated in the Conference in Melbourne in 1890. He traces the reactions of the other colonies particularly, New South Wales, to the Victorian proposals, showing the issues and the, at times, triviality of the issues which slowed the federation movement. B. K. de Garis looks at the attitude of the Colonial Office to the federation of the Australian colonies and the role it played in the drafting of the Constitution Bill. Three of the essays deal with aspects of the campaign for federation in New South Wales and South Australia.

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The essay which will be of most interest to the lawyer is by J. A. LaNauze, entitled *A Little Bit of Lawyer's Language. The History of "Absolutely Free" 1890-1900.* This essay is, in a sense, complementary to the excellent lawyer's history of section 92 in the Convention Debates by Professor F. R. Beasley, where Professor Beasley examined what the founding fathers meant to be the scope and operation of section 92[1]. LaNauze has a different objective: his aim is to examine the authorship and history of the phrase "absolutely free". In pursuing his enquiry he draws on a wider range of sources than the Convention Debates and reaches the conclusion that George Reid's oft quoted opinion that the phrase "absolutely free" is "a little bit of a lawyer's language which comes in here very well" is far from true and that Barton's less well known retort "It is the language of three lawyers" more nearly represents the truth. If lawyers did not actually invent the phrase, they most certainly fostered and defended it.

LaNauze suggests that there is a strong possibility that Griffith was the inventor of the troublesome phrase and that the explanation of its ready acceptance by him, and the other members of the 1891 Convention, is to be found in the contemporary meaning of free trade which was not incompatible with the presence of customs houses and customs duties at the borders. Free trade meant the absence of tariff protection and a revenue tariff could be a free trade tariff provided that the imports taxed were not, and could not be, produced in the country concerned, or that equal excise duties were imposed on similar goods produced there. "Absolute" free trade meant no duties at all.

What emerges from LaNauze's account of the history of the phrase "absolutely free" is the remarkable tenacity with which the "constitutional" lawyers defended it from the attacks of laymen, solicitors like Turner and Glynn and one lone "constitutional" lawyer, Isaacs (supported by Griffith who was not a member of the Convention after 1891). The attackers of the phrase were concerned that it might prohibit state laws such as those providing for the internal regulation of trade by licenses, the prevention of the importing of disease into a State, the control of liquor and differential railway rates. It was not until June 1897 that Griffith, probably after considering Isaacs' objections, had doubts about the phrase and suggested it should be replaced by a negative, "the free course of trade and commerce is not to be restricted or interfered with by any taxes, charges or imports". Both Barton and O'Connor, later in the same year, foreshadowed amendments to this effect, but when the phrase came to be discussed at the last session of the Convention in 1898, both had apparently forgotten their earlier doubts about the suitability of the phrase, Barton confessing himself unable to see any difficulties in the interpretation of the phrase. LaNauze suggests that the explanation for this lapse of memory is to be found in the fact that the debate took place at midnight, Barton had been working day and night and the objections Isaacs was pressing were obscure, long and irritating to a tired man.

The history of the phrase "absolutely free", both before and after 1901, demonstrates the perils facing the draftsmen of any future Australian Bill of Rights. While it appears that in 1891 there was agreement as to the meaning of the phrase, LaNauze quotes from *Notes* on the Draft Constitution written by Griffith in 1897 where Griffith suggested a doubt whether the words were "in

1. (1948-50) 1 *Annual Law Review* 97, 273, 433.

their modern sense" apt. Of course not even Griffith or any of the delegates to the Federation Convention realized what the words would mean today.

This is an attractive, well produced book. All the essays are well written and easy to read and are recommended to any student or layman who is interested in the federation movement. Melbourne University Press has unfortunately followed its usual practice of putting all the footnotes together at the end of the book. The reviewer finds it very irritating to be constantly searching at the end of a book for a footnote which, when found, is of no interest at all.

M. C. DOYLE*

POLICE KILLINGS IN AUSTRALIA, *by R. W. Harding.* Penguin 1970, pp. 1-266.

Police Killings in Australia has a rather dramatic cover showing an armed policeman obviously ready and apparently willing to add another chapter to the book *Police Killings in Australia: Second Series*, foretold by the author at p.10.

However, the title, and the cover also, are a little imprecise, for of the seventeen killings dealt with in detail, only ten were actually at the hands of the police. Of the rest, one was a N.S.W. railway patrolman (an occupation which the author assimilates to that of a policeman[1]); two were night patrolmen, who are for the purposes of the law in the same category as private citizens, and four were simply private citizens.

Moreover the geographical incidence of the seventeen cases is restricted almost exclusively to N.S.W. with nine, and Victoria with seven. Only one other case, *McGuinness* in Western Australia, is discussed. This is in fact consistent with the findings of a recent survey, *Police and the Public*[2], based on a three year study of police-public attitudes. The authors conclude that from the point of view of public relations, training, and attitudes towards the public, the South Australian police force is the best in Australia. They comment unfavourably on the lack of co-operation from police in N.S.W., Victoria, Western Australia and the Australian Capital Territory. This may well be evidence of a not-surprising correlation between police-public attitudes and occurrences of unjustified exercise of police power, though to be fair, one should point out that N.S.W. and Victoria have higher crime rates, and more violent crimes than other States. Situations calling for the legitimate use of some degree of force must therefore arise more often.

The book seeks to examine first the law relating to powers of policemen to kill in the execution of their duty, and then to test "whether, when police kill

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1. See pp.108-9 n. 35. It is not clear that these men have the same group standards and group coherence which have caused trouble in cases of police killings *stricto sensu*.

2. D. Chappell and P. R. Wilson (1969).

citizens, they do so in circumstances permitted by the law" (p.14). In his examination the author deals also with the related problems of police investigation of such cases, and subsequent inquest practice and procedure, and with the law as it is applied to people in a semi-official capacity, and to private citizens, who have found it necessary to kill in the pursuance of "police powers". His conclusion is a fairly drastic one, for he found

> "systematic abuse of the rules relating to deaths caused in arrest situations, at least in so far as those rules concerned police" (p.9).

The author's examination of the law—Chapter 2, entitled "Types of Homicide and the Rules Governing Arrest Rights" pp.19-52—is full; in fact in some places unnecessarily so. This discussion of the felony-murder rule (pp.50-52) is quite irrelevant to the thesis of the book, and only serves to confuse what is in any case an area of law marked by technical and unsatisfactory distinctions. No consistent attempt is made, since the book is in the main concerned with abuse of existing rules and not their desirability, to criticize existing laws or suggest reform: reform which, as the complexity of Chapter 2 suggests, is long overdue.

The bulk of the book investigates in great detail seventeen cases of homicide pursuant to arrest or detention rights. The author covers both a wide range of factual material and a variety of issues, about police reliability, the adequacy of investigatory and inquest procedures, and in a few cases (pp.163, 196) the desirability of the law itself.

The aim of this examination is not, although the occasionally tendentious statements made might suggest the contrary, to condemn the conduct of particular policemen but to suggest adequate procedures for the investigation of cases that do arise. One may not always agree with the handling of particular cases, but Harding fairly clearly establishes that existing investigatory procedures are inadequate to cover cases of abuse of the rules by police. In this context, eleven cases are examined, if one includes *Wedge*, the N.S.W. Railway police killing. Of these, three are conceded to have been clearly justified and legitimate exercises of police power, and the subject of properly conducted and fairly presented inquests (*Brabec, Cameron-Best, Jones*), whilst the chief criticism in *Delaney* (pp.167-171) seems to be that the police action was not illegal but rather premature.

The cases of *McGuiness* and *Agnew* both have some unusual features, but it is difficult to see what other verdict any tribunal or jury could have reached. In *McGuinness* the only serious conflict was over whether the deceased actually had been arrested when he escaped; a fairly technical though still important point. In *Agnew* the independent corroborating evidence was such that no other verdict was possible, but the inadequacy of police investigation of the crucial question of the entry wound the author rightly calls "scandalous" (pp.179, 183).

This leaves five cases which either raise grave doubts as to the propriety of police action, or at least demonstrate the inadequacy of existing coronial procedures. These are *O'Sullivan*, a case of alleged police bashing of a detainee, causing death; *Tatar* and *Wedge*, where it has been alleged that evidence of felony was fabricated to justify subsequent police action; *Tiverdale*, where all the police concerned in the actual incident agreed that the deceased was shot

whilst fleeing, but changed their story when expert evidence showed that he had in fact been standing submissively against his car; and *Flock*, a rather unusual case where, as the author claims, police corruption in other aspects had an important bearing on the case (pp.138-140). All these cases are characterized by unexplained inconsistencies or strange gaps in the evidence, and by lax or even apparently partial coronial inquests. The case of *Tiverdale*, significantly the only one where even internal disciplinary action was taken, was, as the author says, "particularly outrageous" (p.216).

The examination of these five cases alone, together with some of the more straightforward examples of use of police power (such as *Brabec*) justify to a large extent, the author's claim about investigation and inquest, and, though to a lesser extent, about abuse of the rules. The concern of course is not with the question of guilt as such, but with whether or not guilt should have been ascertained before an impartial tribunal with full access to the facts: in other words, whether there was a *prima facie* case requiring the policeman concerned to stand trial.

This being so, the treatment of the other six cases (*Norman* and *Tobrady*, both involving night patrolmen, and *Doherty, Harrison, Nelson* and *Emery*, involving private citizens) is not quite consistent with the theme of the rest of the book. *Tobrady* was admittedly a case of death by misadventure without any negligence. *Doherty* gave rise to the well-known case of *R.* v. *Turner*[3] where the defendant's conviction was quashed on appeal. *Ex hypothesi* it was not a case of abuse of the legal rules. The other three private citizen cases are really illustrations of the unwillingness of magistrates, in these sorts of situations, to commit for trial where there may be a *prima facie* case, but where it is thought that no jury would be likely to convict. As Harding points out, this is unsatisfactory policy and incorrect law (the case of *Emery* is a particularly bad example), but the decision is at least made by an independent magistrate rather than a member of the potential defendant's peer group, as is too often the case with the police killings. *Norman* on the other hand, seems to fall into the same unsatisfactory class as the five police cases listed above.

After completing his analysis of the cases, Harding attempts both to summarize and to suggest reform in his final chapter. This highlights perhaps the greatest weakness in the book, a lack of method or systematic analysis. If less time had been spent in the minute discussion of cases and the suggestion of alternatives, there may have been more space for the discussion of such questions as whether the same criminal standards should apply to a policeman exercising his duty, as to a private citizen; when policemen and others should have a right to kill a suspected criminal or escapee, the desirability of the common law distinction between felony and misdemeanour, and possible alternatives, and the larger question of whether homicide is ever justified at the hands at least of private citizens, in the protection of property only. As it is, the major suggestion made is for the setting up of a "police ombudsman" with extensive powers of obtaining discovery of documents, compelling testimony, and so on; and with independent authority to decide upon and recommend prosecution in cases of alleged abuse of police powers. Certainly the author demonstrates that the coronial system is entirely inadequate to handle these cases, since a policeman

3. [1962] V.R. 30.

usually assists the coroner in the presentation of evidence which is anyway gathered by the police, together with the allowing of lax and unsatisfactory procedures—the use, for example, of non-contemporaneous written accounts by police witnesses, and the "spinelessness", as the author calls it, of coroners generally. Harding's suggestion thus seems to have considerable merit, although convincing Governments and Police authorities of this would perhaps be a difficult matter. Three arguments against such independent review of police action are considered, and given due weight (pp. 244-246). The chances are that in other hands they would be given undue weight.

Police Killings in Australia, then, is quite interesting, though far from faultless, survey of some aspects of the Police power in some parts of Australia. One might hope that no *Second Series* needs to be written, but more realistically, that if and when the need arises, more attention will be paid to analysis of basic issues, rather than the reworking of incidental facts.

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