THE INDUSTRIAL SAFETY, HEALTH AND WELFARE ACT 1981 (VIC.) — RADICAL ADVANCE OR PASSING PHASE?

W. B. CREIGHTON*

THE CONTEXT

When moving the Second Reading of the Industrial Safety, Health and Welfare Bill[1] in the Legislative Assembly, the then Minister for Labour and Industry (Mr J. H. Ramsay), described the Bill as "the most radical advance in industrial safety and occupational health in Victoria since the Factories and Shops Act replaced the Supervision of Workrooms and Factories Act in 1885".[2] It is hard to disagree with the Minister's claims so far as they go. However, it is very much open to question whether the measure then before the Parliament constituted a *sufficiently* radical advance upon what went before in order to adequately realize the potential of the law as a means of preventing the occurrence of work-related death and injury.

"What went before" was essentially the product of a colonial adaptation of 19th century British factory legislation. It follows that in order properly to understand the current state of health and safety legislation in Victoria (and in all of the other Australian jurisdictions) it is necessary briefly to look at the evolution of British safety legislation,[3] and its subsequent reception in Australia.[4]

* LL.B. (Belf.), Ph.D. (Canb.); Senior Lecturer in Law, University of Melbourne. Some of the material used in this article was also used in a Paper presented to the 1982 Victorian Industrial Safety Convention, and published in P. I. Leehy (ed.), *Proceedings of the Victorian Industrial Safety Convention Vol. 1* (1982), pp. 89-102. I would like to thank Neil Gunningham for commenting upon an earlier version of this article. I remain solely responsible for the end result.

[1] Subsequently the *Industrial Safety, Health and Welfare Act* 1981 (Vic.). Henceforth "I.S.H.W.A.".

[2] Victoria, *Parliamentary Debates*, Legislative Assembly, 13 October 1981, 1337.

[3] Good factual accounts of the evolution of British safety legislation can be found in B. L. Hutchins and A. Harrison, *A History of Factory Legislation* (3rd ed., London, Frank Cass and Co., 1926, re-issued 1966) and M. W. Thomas, *The Early Factory Legislation* (London, Thames, 1948). A useful summary is contained in United Kingdom, *Report of the Committee on Safety and Health at Work* ("The Robens Report") (1972), App. 5. For more critical analyses see: W. G. Carson, "Symbolic and Instrumental Dimensions of Early Factory Legislation: A Case Study in the Social Origins of Criminal Law" in R. Hood (ed.),*Crime, Criminology and Public Policy* (London, Heinemann, 1974), H. P. Marvel, "Factory Regulation: A Reinterpretation of Early English Experience" (1977) 20 *Journ. of Law and Economics*, 379, and W. B. Creighton, *Working Women and the Law* (London, Mansell, 1979) pp. 19-26.

[4] For background information on early Victorian legislation see T. G. Parsons, "Alfred Deakin and the Victorian Factory Act of 1885: A Note" (1972) 14 J.I.R. 206. On the origins of Victorian legislation in general see N. Gunningham, *Safeguarding the Workplace* (to be published in 1984) ch. 4.

The first piece of "factory" legislation to be introduced in Britain was the *Health and Morals of Apprentices Act* 1802 (U.K. 42 Geo III c. 73). This measure was not concerned with safety as such, but rather with the hours and conditions of pauper apprentices in the cotton industry. Even within its own terms it was almost wholly ineffectual, largely because it lacked any meaningful enforcement mechanism.[5] However, the 1802 Act is of great long-term significance in the sense that it marked acceptance of the principle that legislative intervention in order to protect the working conditions of the labouring classes was not only feasible, but appropriate and (in certain cases) necessary.

The scope of the legislation was considerably extended over the course of the next 40 years, whilst in 1833 the process of enforcement was transformed by the appointment of the first salaried factory inspectors. However, it was not until 1844 that the Parliament evinced any direct concern with work-place safety. Section 21 of the *Factories and Labour (Amendment) Act* 1844 (U.K. 7 Vict. c.15) required that certain parts of the machinery in textile factories be "securely fenced", and that such fencing "shall not be removed while the Parts required to be fenced are in motion . . . for any manufacturing process".

This provision established a pattern whereby the legislature laid down stringent, and often highly specific, standards of workplace safety through Acts of Parilament (and/or regulations made thereunder), and then provided for their enforcement through public inspectorates, and prosecution in the courts. This pattern has endured in Britain up to the present time — albeit with some important modifications after 1974.[6] It has also been adopted and maintained in all of the Australian States.[7]

Although this approach might appear to have a great deal to commend it in principle, it has proved to be only a qualified success in practice.[8] This can be attributed to a number of factors: first, the statutory standards

[5] For further discussion of the enforcement of early factory legislation see W. G. Carson, "The Coventionalization of Early Factory Crime" (1979) 7 *Int. Journ. of the Sociology of Law* 37; P. W. Bartrip and P. T. Fenn: "The Coventionalization of Factory Crime — A Re-assessment" (1980) 8 *Int. Journ. of the Sociology of Law* 175 (and Carson, "Early Factory Inspectors and the Viable Class Society — A Rejoinder" (1980) 8 *Int. Journ. of the Sociology of Law* 187); W. G. Carson, "The Institutionalization of Ambiguity: Early British Factory Acts" in G. Geis and E. Stotland (eds), *White-Collar Crime* (Beverly Hills, Sage, 1980), ch. 7; P. W. J. Bartrip, *Safety at Work: the Factory Inspectorate in the Fencing Controversy, 1833-57*, (Oxford Centre for Socio-Legal Studies, Working Paper No. 4, 1979) and P. W. J. Bartrip and P. T. Fenn, "The Administration of Safety: The Enforcement Policy of the Early Factory Inspectorate 1844-1864" (1980) 58 *Public Administration* 87.

[6] See p. 199 infra.

[7] For example, all States retain provision which is clearly modelled upon s. 21 of the British Act of 1844. The resemblance is most marked in N.S.W. (*Factories, Shops and Industries Act* 1962 (N.S.W.)), s. 27(1) and Queensland (*Inspection of Machinery Act* 1951 (Qld), s. 21(1)). See also "I.S.H.W.A.", s. 16(1) (formerly s. 174(1) of the *Labour and Industry Act* 1958, (Vic.); *Industrial Safety Code Regulations* 1975 (S.A.), reg. 27; *Machinery Safety Act* 1974 (W.A.), s. 59 and *Industrial Safety, Health and Welfare (Administrative and General) Regulations* 1979 (Tas.), reg. 171 (1).

[8] For a short description of some of the system's "successes", see the Robens Report, para. 144.

generally represented that degree of interference with the processes of production which was acceptable to the major employer-interests at the time they were introduced, rather than what was absolutely (or even reasonably) necessary adequately to protect the safety of those who were exposed to the risks. Secondly, the inspectorates have always been under-manned and under-resourced,[9] and have tended to adopt an exceedingly conservative approach to enforcement proceedings.[10] They have also been hindered in their activities by a considerable measure of judicial hostility, as witnessed by an occasional refusal to convict in the face of the clearest evidence or (more often) the imposition of only a nominal fine even for the most serious offences. In Victoria in 1981, for example, 94 convictions (out of 128 prosecutions) for failure to guard dangerous machinery resulted in the imposition of an average fine of $207.56, plus average costs of $124.33.[11] This contrasts with an average of $383.01 (plus $96.93 costs) in 1980. The upper limit in respect of these offences in both years was $2000.[12]

Over the years the numbers of Acts and regulations increased, as did the number of inspectorates, government departments and public agencies charged with their enforcement. Often these new Acts and regulations were extremely detailed, and were introduced in response to some short-term perceived need (for example, the introduction of a new technology,

[9] In 1833 in Britain four inspectors were charged with enforcing the law in respect of some 5000 premises. In Victoria in 1983 rather less than 70 inspectors have responsibility for enforcing the *Labour and Industry Act* 1958 (Vic.) and I.S.H.W.A. in respect of more than 20,000 "registered factories", plus countless other "workplaces". (The latter are defined in s. 3 of I.S.H.W.A. so as to include "any building structure site or place where work is or is normally performed by any person for his or his employer's monetary compensation, gain or reward").

[10] For a detailed study of the enforcement of British safety legislation see W. G. Carson, "White Collar Crime and the Enforcement of Factory Legislation" (1970) 10 *Brit. Journ. of Crim.* 383. No comparable studies have been carried out in Australia, but it seems reasonable to assume that the situation is the same as (or worse than) that in Britain. In Victoria in 1981 for example the Department of Labour and Industry Division of Inspection Services carried out 20,458 "safety visits" and 11,780 visits relating to "factory standards". This activity resulted in 151 prosecutions for breaches of statutory safety standards (1 for occupying an unregistered factory, 128 for failing to guard dangerous machinery, and 22 for failing to report an accident). This, despite the fact that 2,235 investigations of industrial accidents "resulted in the detection of 279 breaches of the *Labour and Industry Act* and *Regulations*" (see Department of Labour and Industry, *Annual Report 1981* (1982), p. 22 and Tables IV and V).

[11] Department of Labour and Industry, op. cit., Table IV. The solitary prosecution for occupying an unregistered factory (see note 10) was withdrawn. Convictions were obtained in 14 of the 22 "failure to report" cases, and average fines of $153.57 (plus $40.28 costs) were imposed. The maximum fine which could be imposed for such offences was $1000.

[12] Occasionally the low levels of fines imposed in this area gives rise to some public concern — as in May 1982 when a company was fined a total of $1,700 (plus $337 costs) over the deaths of two teenage boys after they had inhaled trichlorethylene fumes while cleaning a paint-mixing vat. Even a maximum fine of $3,000 ($500 on each of six counts) would hardly seem adequate in a case where the employer had shown what the coroner described as "a complete disregard of safety regulations" (*Age* 31st May 1982). An even more disturbing incident occurred in November 1979 when an engineering firm was fined $40 as a result of the death of a 17 year-old who had been speared through the head by an aluminium bar which was ejected from an unguarded machine (*Age* 30th July 1980).

or recognition of some new health hazard).[13] Having served (well or ill) their short-term purpose, they then tended to linger on long after their original raison d'etre had been overtaken by technological, social or economic change.[14] This resulted in the accumulation of an enormous body of Acts and regulations, many of them out-dated and irrelevant to modern conditions. At the same time, many important problems were not dealt with at all, because for one reason or another they had not attracted the attention of the legislature or an appropriate government department.[15] It also resulted in a plethora of inspectorates, departments and agencies, all having interlocking and overlapping administrative and enforcement responsibilities.[16]

As indicated, this system, with all its virtues and all its vices, was imported wholesale into all of the Australian colonies in the later part of the 19th century, and has lingered on after Federation in very much the same way as in the United Kingdom. This has resulted in a situation where, in Victoria, in 1983, there are at least 31 separate pieces of legislation[17] dealing with various aspects of occupational health and safety, to say nothing of literally dozens of sets of regulations which have been introduced under this legislation.[18] Australia-wide, there are at least 132 different pieces of safety legislation, plus hundreds of sets of regulations.[19] Just as there has been a British-style proliferation of statutory safety standards, so too there has been a proliferation of agencies charged with their enforcement.

By the late 1960s there was widespread recognition in Britain that the

[13] For example the *Factories Act Extension Act* 1864 (U.K.) was introduced in response to a report by a Royal Commission on the *Conditions of Employment of Children and Young Persons* which had highlighted (inter alia) the risks of working with phosphorous in the course of lucifer match making.

[14] For example s. 67 of the *Factories Act* 1961 (U.K.) still prohibits the use of white phosphorous in the manufacture of matches, even though modern manufacturing processes and techniques make such provision largely redundant. Section 185 of the *Labour and Industry Act* 1958 made similar provisions for Victoria. However it was repealed by I.S.H.W.A., and has not been replaced.

[15] In the early seventies it was estimated that between 35 and 40 per cent of the British workforce was not covered by any form of statutory safety provision. See P. Rowe, *Law At Work — Health and Safety* (London, Sweet and Maxwell, 1980) p. 2.

[16] See further Robens Report, op. cit. paras 22-39 and App. 6.

[17] The 31 are: *Industrial Safety, Health and Welfare Act* 1981; *Labour and Industry Act* 1958; *Health Act* 1958; *Abbatoir and Meat Inspection Act* 1973; *Aerial Spraying Control Act* 1966; *Agricultural Chemicals Act* 1958; *Boilers and Pressure Vessels Act* 1970; *Building Control Act* 1981; *Coal Mines Act* 1958; *Construction Safety Act* 1979 (at the time of writing this Act had not been proclaimed and its future is uncertain); *Environment Protection Act* 1970; *Explosives Act* 1960; *Extractive Industries Act* 1966; *Fertilizers Act* 1974; *Gas Act* 1969; *Inflammable Liquids Act* 1966; *Lifts and Cranes Act* 1967; *Liquified Gases Act* 1968; *Local Government Act* 1958; *Marine Act* 1958; *Mines Act* 1958; *Pesticides Act* 1958; *Petroleum Act* 1958; *Petroleum (Submerged Lands) Act* 1967; *Pipelines Act* 1967; *Psychological Practices Act* 1965; *Scaffolding Act* 1971; *Shearers Accommodation Act* 1976; *State Electricity Commission Act* 1958; *Stock Diseases Act* 1968, and *Stock Medicines Act* 1958.

[18] For example, at least 24 sets of regulations under the *Labour and Industry Act*/I.S.H.W.A. are currently in force.

[19] This figure is based upon the contents pages of C.C.H., *Australian Industrial Safety Health and Welfare* (3 Vols.). It can safely be assumed to be a substantial under-estimate (for example, the Reporter lists only 28 pieces of legislation for Victoria).

whole structure of occupational health and safety legislation was in need of a radical overhaul.[20] In May 1970, the Labour Government set up a Committee of Inquiry under the Chairmanship of Lord Robens "to review the provision made for the safety and health of persons in the course of their employment". This committee reported in June 1972. Its findings were accepted by all of the major political parties, and by both sides of industry. In 1974, the Parliament passed a *Health and Safety at Work Act* 1974 (U.K.) (henceforth "H.S.W.A."), which embodies all of the principal recommendations of the Committee.[21] It is not necessary to embark upon a detailed analysis of these recommendations in the present context.[22] Instead it suffices to note that they were directed towards the attainment of two principal objectives:

- the creation of a more unified and integrated system of health and safety legislation, and its administration;
- the creation of what was termed "a more effectively self-regulating system".[23]

Although Robens was accorded a generally favourable reception, it has not been without its critics,[24] and indeed one has gone so far as to describe the entire report as "dangerous nonsense".[25] That is to overstate the matter, but it is true that certain of the assumptions upon which the Committee based its analysis are so suspect as to cast a shadow upon the credibility of the Report as a whole.

Three issues give particular cause for concern. First, there are the related assumptions that "the most important single reason for accidents at work is apathy",[26] and that "the primary responsibility for doing something about the present levels of occupational accidents and disease lies with those who create the risks and those who work with them".[26A] Both of these propositions have a certain superficial attraction, and do indeed possess a measure of validity. However they need to be treated with extreme caution, largely because they appear to subscribe what are some-

[20] An especially trenchent analysis of the traditional system is to be found in J. L. Williams, *Accidents and Ill-Health at Work* (London, Staples Press, 1960). See especially Chs 4-8, 12, 13, and 25-8.

[21] The Bill which actually became law was introduced by the Labour government which assumed office in February 1974. However this Bill was almost identical to one introduced by the Conservative government in January of the same year.

[22] For descriptions and analyses of the Robens Report see W. C. Howells, "The Robens Report" (1972) 1 I.L.J. 185, R. C. Simpson, "Safety and Health at Work: Report of the Robens Committee 1970-72" (1973) 36 M.L.R. 192 and A. D. Woolf, "The Robens Report — the Wrong Approach?" (1973) 2 I.L.J. 88.

[23] Robens Report para. 41.

[24] See for example: P. Kinnersly, *The Hazards of Work: How to Fight Them* (London, Pluto Press, 1973) pp. 228-30; T. Nicols and P. Armstrong, *Safety or Profit?* (Bristol, Falling Wall Press, 1973) pp. 1-12 and 21-31; N. Gunningham and W. B. Creighton, "Industrial Safety Law in Social and Political Perspective" in R. Tomasic (ed.), *Legislation and Society in Australia* (Sydney, George Allen and Unwin, 1980) pp. 148-50 and A. D. Woolf, loc. cit.

[25] A. D. Woolf, quoted by Kinnersly, op. cit. p. 229.

[26] Robens Report, para. 13.

[26A] Robins Report, para. 28.

times described as the "blame the victim" or "careless worker" syndromes — that is, the assumption that worker carelessness or "apathy" is a major cause of work-related injury, and that the way to prevent the occurrence of such injury is to regulate the behaviour of workers. Of course it is true that the *proximate* cause of a significant proportion of work-related injury is "worker-carelessness", but that should not be permitted to obscure the fact that the *true* cause of virtually all such injury is to be found in the nature of the work process. To take the simple example of the worker who removes a guard from a power press, and loses two fingers when her/his hand gets caught in the machine. Clearly the worker has been "careless" in removing the guard. But it is necessary to look beyond that seemingly "careless act", and to consider *why* the worker wanted to remove the guard. Was it because her/his payment system put a premium on taking short-cuts in order to maximise production and thereby to maximize earnings? Was it because the machine did not operate effectively (or even safely) when the guard was in place? It is also necessary to consider why it was that the machine continued to operate when the guard was not in place, and to examine what steps (if any) the employer had taken to ensure that the guard was not removed. Viewed in this light it becomes apparent that *primary* responsibility for the prevention of injury must reside with those who control the work process. In a capitalist economic system, that means the employer. That being so, it is clearly inappropriate to assume that "risk users" and "risk creators" have an equal responsibility for "doing something about the present levels of occupational accidents and disease". That is not to suggest that they do not have a *measure* of joint responsibility, but they cannot be assumed to have an *equal* responsibility unless they have an equal *capacity* for control.

These assumptions as to the nature of the problem of work-related injury and the responsibility for dealing with it are further reflected in Robens' assertion that:

> ". . . there is a greater natural identity of interest between 'the two sides' in relation to safety and health problems than in most other matters. There is no legitimate scope for 'bargaining' on safety and health issues, but much scope for constructive discussion, joint inspection, and participation in working out solutions."[27]

It is quite true that there is "no legitimate scope" for "bargaining" on safety and health issues in the sense that it can never be legitimate to "sell" safety in exchange for some more or less transitory monetary (or other) gain — whether it be termed "dirt money", "condition money", "dislocation allowance" or whatever. It is also true that there is "much scope for constructive discussion, joint inspection, and participation in working out solutions", and that there is *some degree* of commonality of

[27] Robens Report, para. 66.

interest in improving health and safety in the workplace. But it is *not* true that there is no scope for "bargaining" on safety and health issues if that is taken to imply that it is not legitimate for organized labour to seek to treat them as "industrial" issues. In the final analysis there is the same fundamental conflict of interest between capital and labour in relation to occupational health and safety as there is in relation to wages, work discipline, job security and control of the work process itself.[28] That being so, it seems reasonable to suppose that conflict in relation to safety issues should be institutionalized through the same processes as other manifestations of that underlying conflict of interest. That is not to suggest that it has necessarily been institutionalized in that manner in the past, but there is reason to suppose that it is increasingly likely to be dealt with in that manner in the future.[29] Indeed, implementation of the Robens' philosophy must almost inevitably accelerate this process, even if the Committee itself did not entirely appreciate that fact.[30]

The third of Robens' suspect assumptions is that:

> ". . . the traditional concepts of the criminal law are not readily applicable to the majority of infringements which arise under this type of legislation. Relatively few offences are clear-cut, few arise from reckless indifference to the possibility of causing injury, few can be laid without qualification at the door of a particular individual. The typical infringement or combination of infringements arises rather through carelessness, oversight, lack of knowledge or means, inadequate supervision or sheer inefficiency. In such circumstances the process of prosecution and punishment by the criminal courts is largely an irrelevancy . . ."[31]

This prompted one commentator to ask:

> "Now, what on earth can this mean? Why should not dangerous offences be the subject of prosecution if they are committed through 'carelessness, oversight', etc. merely because the dangerous consequences of those offences were not intended or, perhaps, foreseen? Are not factory occupiers deemed to intend the natural and probable consequences of their actions like other citizens? Proof of a guilty mind is not required against motorists prosecuted for careless or dangerous driving; why should a different standard apply to careless or dangerous employing? Why should employers be immune from punshiment if they fail to acquire the knowledge or means to comply with the law, and proceed nevertheless to make their living illegally? How, if it is to be their statutory duty to provide a safe working system, can inadequate super-

[28] There is an extensive literature on the nature of industrial conflict in capitalist societies. See for example, B. Dabscheck and J. Niland, *Industrial Relations in Australia* (Sydney, George Allen and Unwin, 1981), Chs 1 and 2; R. Hyman, *Industrial Relations: A Marxist Introduction* (London, Macmillan, 1975), Ch. 1 and D. Plowman, S. Deery and C. Fisher, *Australian Industrial Relations* (Sydney, McGraw-Hill, 1980), Chs 1 and 2.

[29] See for example W. B. Creighton and E. J. Micallef, "Occupational Health and Safety as an Industrial Relations Issue: The Rank-General Electric Dispute 1981" (1983) 25 J.I.R. 255.

[30] See further Creighton and Micallef, loc. cit., and W. B. Creighton, "Statutory Safety Representatives and Safety Committees: Legal and Industrial Relations Implications" (1982) 24 J.I.R. 337, 353-55, 363-64.

[31] Robens Report para. 261.

> vision or sheer inefficiency constitute either a defence or an excuse? It is precisely for failing to plan and supervise efficiently the safety of their operations that they *should* be prosecuted and punished . . ."[32]

This is one of the most curious passages in the entire Report. It is, for example, hard to reconcile with the Committee's recommendations as to the so-called "statutory declaration of principles":

> ". . . the Act should begin by enunciating the basic and over-riding responsibilities of employers and employees. This central statement should spell out the basic duty of an employer to provide a safe working system including safe premises, a safe working environment, safe equipment, trained and competent personnel, and adequate instruction and supervision. It should also spell out the duty of an employee to observe safety and health provisions and to act with due care for himself and others."[33]

If it is assumed that these "basic duties"[34] are to be enforceable in some way, this seems to be tantamount to a recommendation that employers should be answerable in law for virtually all work-related injuries, since virtually all such injuries can be attributed to a failure to provide "a safe working system including safe premises, a safe working environment, safe equipment, trained and competent personnel, and adequate instruction and supervision"[35] — especially where that duty is not qualified by any criterion of "reasonableness" or "practicability".[36] This appears to be inconsistent with the propositions set out in para. 261 of the Report. It is true that the Committee did not expressly recommend that breach of the basic duty should be an offence, but it is hard to see how para. 129 could be expected to have any significant practical impact if breach of the duties which it envisages does not give use to some form of legal liability.

Where the Committee appears to have gone astray is that they seem to have assumed that the "traditional approach" of laying down standards and enforcing them has failed in the past, and that it must, therefore, fail for the future. That proposition does not bear close scrutiny. First, it cannot necessarily be assumed that the traditional approach *has* failed. It certainly has not been entirely successful in attaining its stated objects, but it does not follow that it has not enjoyed *some* measure of success. In other words, however unsatisfactory the present situation may be, it might have been even more unsatisfactory without such external regulation as has taken place. Secondly, there is clear evidence that the traditional approach has never really been tried, in the sense that there has never been a systematic attempt in either Britain or Australia to "lay down standards and enforce them". That being so, it cannot be assumed that

[32] Woolf, op. cit. p. 91

[33] Robens Report para. 129. This logic is reflected in ss. 2(1) and (2) and 7 of H.S.W.A., and in ss. 11(1) and (2) and 14 of I.S.H.W.A. — see infra.

[34] The implications of the "employee duty" are discussed at p. 212 infra.

[35] See P. I. Powell, M. Hale, J. Martin and M. Simon, *2000 Accidents* (London, National Institute of Industrial Psychology, 1971) para. 167.

[36] See further pp. 209-10 infra.

the traditional approach could not play some positive role in helping to prevent the occurrence of work-related injury to health. There may be room for disagreement as to how significant that contribution could be, relative to the magnitude of the problem, or as to its efficacy, relative to other techniques that may be available. But it cannot be dismissed in the cavalier manner adopted by the Robens Committee.

These criticisms do not impel the conclusion that the Report should be discounted in its entirety, but rather that it should be treated with a degree of caution in certain important respects. Unfortunately uncritical acceptance has generally been the order of the day in both Britain and Australia. In Britain this at least had the effect that legislation was introduced to give effect to all of the Committee's principal recommendations in relation to both "unification and integration" and "more effective self regulation". In Australia the tendency has been to pay lip-service to the philosophy, and then to legislate to give effect to only a very half-hearted version of the Report and/or the H.S.W.A.

In 1972 South Australia passed an *Industrial Safety, Health and Welfare Act* 1972 (S.A.) which was based upon a much-diluted version of the Robens' proposals.[37] Tasmania followed suit in 1977.[38] In 1974 the Departments of Labour Advisory Committee adopted a "Model Act" based upon the Robens' proposals. Also in 1974 the Commonwealth Government adopted a "Code of General Principals in Occupational Safety and Health in Australian Government Employment".[39] This Code is also based on a much-diluted version of the Robens' analysis. It has no legal effect and appears to have had only a marginal practical impact.

In 1979 the New South Wales Government appointed a retired industrial magistrate, Mr T. G. Williams, as a Commission of Inquiry into Occupational Health and Safety. The Commission sat for a period of some 20 months. It received written submissions from more than 170 organizations and individuals, and heard oral evidence from 118 individuals. It also visited Canada, the United States, the United Kingdom, Holland, Germany, Denmark and Sweden "for the purpose of ascertaining current legislation, practices, attitudes and trends".[40] Its Report was submitted to the Minister for Industrial Relations and Technology in June 1981, and was made public in August of the same year. In May 1982 the Government announced that it would introduce legislation based upon the Commission's recommendations before the end of the year. An Occupational Health and Safety Bill was introduced in the State Parliament in December 1982, and in a substantially amended form, became law in March 1983.

[37] For discussion and analysis see Gunningham and Creighton, loc. cit.
[38] For discussion and analysis see N. Gunningham, "The Industrial Safety Health and Welfare Act 1977 — A New Approach?" (1978) 6 *U. Tas. L.R. 1.*
[39] For the text of the Code see C.C.H. *Australian Industrial Safety, Health and Welfare*, para. 55-100.
[40] New South Wales, *Report of the Commission of Inquiry into Occupational Health and Safety* (1981) (The Williams Report) p. vi.

In 1982, the Western Australian Branch of the Australian Labour Party adopted an occupational health and safety policy which is based upon a modified and extended interpretation of Robens. At the time of writing, legislation to give effect to that policy had not yet been introduced. The Queensland Government has not evinced any overt interest in reform in this area.

In Victoria, in March 1975, the then Minister for Labour and Industry set up a tripartite Committee (consisting of representatives of the Department of Labour and Industry, the Victorian Trades Hall Council, the Victorian Chamber of Manufactures and the Victorian Employer's Federation) to inquire into the "adequacy, relevance and suitability" of the provisions of the *Labour and Industry Act* 1958 (Vic.) as a whole. The Committee dealt with those parts of the Act which are concerned with occupational health and safety in its Fourth Report, which was published in March 1978.[41] This Report has been described as "one of the most inept and ill-considered documents to be produced by any public body anywhere in Australia in recent years".[42] It is a sad and muddled affair which simply does not bear sustained critical analysis. It contains a number of glaring factual inaccuracies.[43] It is inconclusive in certain key areas,[44] superficial in others,[45] and internally inconsistent in yet others.[46] On a more positive view, the Committee did recommend the adoption in Victoria of legislation which would be more or less in the Robens tradition — albeit in a highly attenuated form. It is upon that Report that the 1981 Act (I.S.H.W.A.) is based. Regrettably, the Act constitutes an even more ineffectual response to Robens than the Fourth Report.

Although it received the Royal Assent on 5 January 1982,[47] only part of the Act had been proclaimed prior to the election of April 1982.[47A]

[41] The First Report of the Committee for Review dealt with the Victorian wages board system, and formed the basis of the *Industrial Relations Act* 1979 (Vic.) (operative November 1981). The Second Report dealt mainly with shop trading hours, and the Third Report with discriminatory provisions in the *Labour and Industry Act* and wage-fixing in the public sector.

[42] W. B. Creighton, "Government Report Gropes in the Dark" (1979) 4 *Leg. Serv. Bull.* 59, 60.

[43] For example in relation to the origins of British safety legislation. Committee Report pp. 3-4.

[44] Notably in relation to rationalizing the administration of safety legislation. Committee Report pp. 2-3. See further pp. 206-8 infra.

[45] For example the Committee recommended (p. 5) that "something akin" to ss. 1-9 of the British *Health and Safety at Work Act* 1974 (U.K.) should be introduced in Victoria without any detailed consideration of either the practical or conceptual issues involved. See further p. 209 infra.

[46] Most notably, the Committee expressed the view (p. 5) that "Victoria is not yet ready for self-regulation", and then proceeded to recommend the adoption of the two principal measures of "self-regulation" examined by Robens.

[47] This suggests that the Act should properly be termed the "Industrial Safety, Health and Welfare Act 1982". However the government of the day decided to retain the original short title.

[47A] Proclaimed ss. 1, 5-10 on 22nd March 1982.

Since the provisions of the Act fell far short of the formally stated policy[48] of the in-coming government, there was a distinct possibility that the I.S.H.W.A. would be repealed before it ever became fully operative. However the new government appears to have recognised that implementation of its own policy could be a long-term process, and also that the I.S.H.W.A., for all its faults, constituted a significant advance upon what had gone before. Accordingly, most of the rest of the Act was proclaimed with effect from 1st July 1982,[49] on the understanding that in due course it would be replaced by a more far reaching measure intended to give effect to the Government's stated policy. In March 1983, as a preliminary step in the preparation of that legislation, the Ministry of Employment and Training released a Public Discussion Paper on Occupational Health and Safety. It was anticipated that this could pave the way for the presentation of a Bill to Parliament late in 1983.

It is now proposed to examine the principal provisions of the I.S.H.W.A. by reference to Robens' twin objectives of creating a more unified and integrated system of law and administration, and a more effectively self-regulating system. It will then be possible to make an assessment of the substance and probable impact of these provisions in light of the recommendations of the Robens Committee, the H.S.W.A., developments elsewhere in Australia, and the proposals set out in the 1983 Discussion Paper.

THE SUBSTANCE OF THE ACT — CREATING A MORE UNIFIED AND INTEGRATED SYSTEM

Standard-Setting

Robens placed great emphasis upon the need to bring all existing safety legislation together within the framework of a "single comprehensive enactment".[50] The Committee felt that this would enable existing, outmoded standards to be replaced over a period of time with new standards which are more relevant to modern conditions. These standards should be embodied in codes of practice and/or regulations rather than statute — thereby increasing flexibility as to up-dating, enforcement, adaptation to special circumstances, and so on.[51] This philosophy finds expression in sections 15-17 of the H.S.W.A.,[52] which confer extremely wide regu-

[48] The State Conference of the A.L.P. adopted a new "Occupational Safety and Health Policy for Victoria" in September 1981. This Policy formed part of the election platform upon which the Cain government was elected in April 1982.

[49] The only provisions of the Act which have not been proclaimed are ss. 4(2) and 11(3). The former excludes the application of I.S.H.W.A. in respect of workplaces to which the *Construction Safety Act* 1979 (Vic.) applies — but since the 1979 Act has not been proclaimed, it would be inappropriate to exclude the operation of the 1979 Act. Section 11(3) deals with the preparation, etc., of written statements of safety policy by employers, and its operation was postponed largely in response to representations from small business interests who were concerned at the administrative costs involved.

[50] Robens Report para. 97-109, 125-7 and 134-61.

[51] Robens Report para. 142-54.

[52] See also Schedule 3 to the Act which sets out guidelines as to the "Subject-Matter of Health and Safety Regulations".

lation-making powers upon the Secretary of State for Employment (section 15), and which gives the Health and Safety Commission[53] power to issue "approved" Codes of Practice.

The Victorian Act does not make any provision for the repeal of pre-existing statutory standards by regulation. Instead it: (i) repeals and (in most instances) re-enacts the safety provisions of the *Labour and Industry Act*; (ii) confers upon the Governor-in-Council a general power to "make regulations for the safety, health and welfare of persons employed in workplaces", and (iii) sets out no less than twenty-seven "particular" matters to which such regulations may relate. These latter include "the prevention or reduction of work injuries and the action to be taken on the occurrence of any work injury"[53A] and "regulating the maintenance, care or use of any workplace or part of any workplace".[54] There is no direct provision relating to codes of practice, apart from a rather cryptic reference in section 6(1)(b)(v), which deals with the functions of the Industrial Safety, Health and Welfare Advisory Council.[55]

Administration

Logically, the rationalization of the substance of safety legislation must be accompanied by the rationalization of its administration. For Robens this was to be achieved through the creation of a national "Authority for Safety and Health at Work", which was to be responsible for:

> "(a) The provision of advice to Ministers, government departments, local authorities, employers, trade unions, and others on safety and health at work.
> (b) Management of the statutory inspection and advisory services, including their supporting scientific and technical research facilities and institutions.
> (c) Administering and keeping under review the statutory and other provisions for safety and health at work. This would include formulating safety and health standards for promulgation either as codes of practice or in the form of statutory provisions (see chapter 5), and for co-operating with industry in monitoring the observance of those standards.
> (d) The acquisition and provision of information, and the promotion and co-ordination of research, education and training for safety and health at work.
> (e) Collaboration with the CBI and other employer-organisations, the TUC and the trade unions, the industry-level safety bodies and the voluntary safety organisations; and participation in the work of international bodies."[56]

In the event, the H.S.W.A. provided for the creation of two new institutions; the Health and Safety Commission and the Health and Safety

[53] See pp. 206-7 infra.
[53A] S. 33 (1)(a).
[54] S. 33(1)(b).
[55] See p. 208 infra.
[56] Robens Report para. 115. See further para. 110-24.

Executive. Broadly speaking, the Commission is responsible for the formulation of policy in the health and safety area and the general oversight of its implementation. The Executive embraces almost all of the pre-existing inspectorates,[57] and is responsible for the day-to-day administration of all health and safety legislation.

Since the I.S.H.W.A. did not envisage the unification of existing statutory provision, it is not surprising to find that it did not envisage the unification of existing administrative structures. In other words, all pre-existing administrative responsibilities remain intact — with the Department of Labour and Industry taking responsibility for the administration of the I.S.H.W.A., as (partial) successor to the *Labour and Industry Act*.

There is also no precise equivalent to the British Health and Safety Commission, although the Act does provide for the establishment of a body which has at least some role to play in the policy formulation process.

The *Industrial Safety Advisory Council Act* 1960 (Vic.) made provision for the establishment of an Industrial Safety Advisory Council. As its name implies, this was a purely advisory body. It had only a nominal budget,[58] and was almost totally ineffectual in practice.

The I.S.H.W.A.[59] reconstitutes the Council with a new name and an expanded membership. It is now known as the Industrial Safety, Health and Welfare Advisory Council, and its membership includes a representative of each of the Department of Labour and Industry, the Health Commission, the Victorian Chamber of Manufactures, the Victorian Employers' Federation, the Victorian Farmers and Graziers Association, the National Safety Council (Victorian Division) and the Safety Institute of Australia (Victorian Division). The Victorian Trades Hall Council can nominate three members, and the Governor-in-Council may appoint up to three "additional members" at his discretion.[60] The Council is chaired by a further appointee who is "a person having a general knowledge of industrial safety, health and welfare".[61]

The newly-constituted Council retains its former functions of inquiring into and reporting to the Minister upon matters referred to it by her/him[62] and making "recommendations"[63] with respect to: (i) methods and pro-

[57] The solitary exception is the Department of Energy, which retains responsibility for the administration of safety standards in the North Sea oil industry. For a study of the practical consequences of this deviation from the "unification" principle see W. G. Carson, *The Other Price of Britain's Oil*, (Oxford, Martin Robertson, 1982), chs. 5, 7 and 8.

[58] In February 1979 the then Chairman of the Council resigned over the refusal of the Hamer government to improve upon its offer to increase the annual budget of the Council from $500 to $1,000 (*Age* 27th February 1979).

[59] Ss. 5(1) and (2).

[60] S. 5(4).

[61] S. 5(2)(a).

[62] S. 6(1)(a).

[63] S. 6(1)(b). S. 5(b) of the 1960 Act referred to "suggestions" rather than "recommendations".

cedures for reducing workplace accidents;[64] (ii) "promoting and encouraging the establishment and employment of safe systems of work in all places";[65] and (iii) the promotion generally of the "safety, health and welfare of persons employed or engaged in or on workplaces".[66] It has also acquired power to make recommendations with respect to "the making or amending of regulations" and "the adoption, approval or rejection, whether wholly or partially, of codes of practice or standards for the purposes of this Act".[67] It must be emphasised that the Council has no power to do anything other than to "inquire", to "report" and to "make recommendations". The Minister may ignore anything the Council says if (s)he so wishes, or (s)he may by-pass it entirely (for example when introducing new regulations).

The effective functioning of the Council is unlikely to be facilitated by section 9(1) of the Act which makes it an offence for any member of the Council, "except for the purpose of the performance of his duties as a member" directly or indirectly to "communicate or divulge to any person any information relating to any matter that comes to his knowledge in consequence of his position as a member of the Council or make use of any information that so comes to his knowledge". Sub-section (2) meanwhile makes it an offence for any member or ex-member of the Council to reveal "any manufacturing, commercial or other trade secret" which "comes to his knowledge in the course of his duty as such member". It may be that there is a need to protect manufacturing, etc., secrets which may be divulged to members of the Council in the course of their duties, and to that extent it is possible to find some justification for sub-section (2). The same cannot be said for sub-section (1). By any criterion this provision is much too widely drawn. It has, for example, the potential to make it an offence for a nominee of the Victorian Chamber of Manufactures or the Victorian Trades Hall Council to report back to the relevant nominating body on her/his activities as a member of the Council.

It is also an interesting reflection on the priorities of Governments and Legislatures in the health and safety field that the maximum fine for breach of section 10 is $5000, whilst the maximum under those provisions of the Act which are more directly concerned with safety is $2000.[68]

A Statement of General Principles

Robens felt that not only should the existing body of substantive rules be brought together within the framework of the enabling Act of Parliament, but that there should also be a statutory declaration of principles setting

[64] S. 6(1)(b)(i). S. 5(b)(i) of the 1960 Act referred only to accidents "to persons engaged in industry".
[65] S. 6(1)(b)(ii).
[66] S. 6(1)(b)(iii). S. 5(b)(iii) of the 1960 Act referred to "the promotion generally of the safety of persons engaged in industry".
[67] Ss. 6(1)(b)(iv) and (v) respectively.
[68] This $2000 upper limit was carried over from the *Labour and Industry Act*.

out the "basic and over-riding responsibilities of employers and employees" in the health and safety area.[69]

These recommendations find expression in sections 2-8 of the H.S.W.A., which impose a series of general duties upon: employers in relation to their employees (section 2); employers and the self-employed in relation to persons other than their employees (section 3); persons having control of premises to persons other than their employees (section 4); persons having control of certain premises in relation to the emission of "noxious or offensive" substances into the atmosphere (section 5); designers, manufacturers, importers, suppliers, erectors and installers of articles or (where appropriate) substances for use at work in relation to the design, etc., of those articles or substances (section 6), and upon employees in relation to themselves, other persons who may be affected by their acts or omissions at work, and their employers (sections 7 and 8).

As indicated,[70] the Victorian Committee for Review recommended that "something akin" to those provisions be introduced in Victoria, and sections 11, 12, 13 and 14 of the I.S.H.W.A. go some way to giving effect to that proposal. The most important of these general provisions is section 11(1), which stipulates that:

> "The occupier of a workplace shall ensure, so far as is reasonably practicable, the safety, health and welfare of persons employed or engaged in or on that workplace."

This is similar to section 2(1) of the British Act, although it is narrower than that provision in at least one major respect. Section 2(1) imposes a duty on the "employer", whilst section 11 refers to the "occupier". It is true that for most workers the "occupier" and the "employer" would be one and the same. But this would not be so in all cases — for example, where work is executed at a location or locations which fall outside the definition of "workplace" in section 3 of the Act,[71] and/or where the "occupier" has only a very transitory relationship with the worker. Obvious examples would include truck drivers, travelling salesmen and saleswomen, home workers and maintenance workers who execute work at a client's place of residence. Of course employers could never be expected to exercise the same degree of control in relation to such workers as to those who work in a factory or office directly "occupied" by their employer, but that is not a good reason for absolving them from *all* responsibility in this context.

Section 2(1) of the British Act has been subject to much criticism on the ground that the employer's duty is limited to doing that which is "reasonably practicable". This concept envisages that the nature and

[69] See supra fn. 33.
[70] See supra fn. 45.
[71] For the definition of "workplace", see supra fn. 9.

degree of "risk" of injury must be weighed against the "cost" (in terms of money, technology, etc.) of eliminating or minimising that risk. If the "cost" is greatly disproportionate to the "risk", then the law says that it is not "reasonably practicable" to expect the employer to guard against that risk.[72] This argument has a certain superficial attraction. However, it lacks validity to the extent that it ignores the fact that the "risk" is borne by the worker whereas the "cost" is borne by the employer (and ultimately the clients or customers of that employer). It also ignores that body of research which suggests that virtually all industrial injury could be avoided by a strict adherence to the requirements of the so-called "common law duty of care"[73] — that is: the obligation to provide a competent staff, adequate material, a proper system and effective supervision.[74] If that is indeed the case, then the employer's duty to provide a safe and healthy workplace should not be qualified by considerations of "reasonable practicability", although self-evidently it must be qualified by considerations of absolute "practicability".[75]

Despite these limitations, the duty imposed by section 11(1) is clearly very wide-ranging. This is borne out by sub-section (2), which gives some examples of the range of matters encompassed by the generality of sub-section (1):[76]

> "(a) the provision and maintenance of plant and systems of work that are so far as is reasonably practicable, safe and without risks to health;
> (b) arrangements for ensuring, so far as is reasonably practicable safety and absence of risks to health in connexion with the use, handling, storage and transport of articles and substances;
> (c) the provision of such information, instruction, training and supervision as is necessary to ensure, so far as is reasonably practicable, the safety and health of persons employed in or on the workplace;
> (d) so far as is reasonably practicable as regards a workplace under his

[72] See *Edwards* v. *National Coal Board* [1949] 1 K.B. 704, 712 (per Asquith L.J.) and *West Bromwich Building Society* v. *Townsend* [1983] I.R.L.R. 147, 151-3 (per McNeill J.).

[73] See Powell et al, loc. cit.

[74] Baldly stated the common law duty of care is extremely far-reaching, and does indeed have the potential to render unlawful virtually all work-related injury. However the apparent breadth of the duty has been greatly modified in practice, first by the application for qualifications as to "reasonable foreseeability" and secondly through the operation of the doctrines of contributory negligence or (rarely) *volenti non fit injuria*. The point for present purposes is that on a strict reading of the *duty* (as opposed to the *standard*) of care, the vast majority of work-related injuries can be attributed to neglect of duty by employers.

[75] Cf. the discussion of the *Occupational Health and Safety Act* 1983 (N.S.W.), pp. 222 infra.

[76] In *West Bromwich Building Society* v. *Townsend* [1983] I.R.L.R. 147, 149, McNeill J. seemed to suggest that the substances of s. 2(2) of H.S.W.A. (which is to all intents and purposes identical to s. 11(2) of I.S.H.W.A.) contained the essence of s. 2, and that s. 2(1) (s. 11(1) in Victoria) was "really a parliamentary 'safety net' designed to catch any, if there be any, alleged breaches of obligations other than the obligations in s. 2(2) . . ." This interpretation is inconsistent with the clear meaning of s. 2(1) (s. 11(1)), which self-evidently extends to a wider range of issues than those specified in sub-s. (2) — see further R. W. Rideout, *Principles of Labour Law*, (3rd ed., London, Sweet and Maxwell, 1979), pp. 342-3.

control, the maintenance of it in a condition that is safe and without risks to health and the provision and maintenance of means of access to and egress from it that are safe and without such risks;

(e) the provision and maintenance of a working environment for persons employed in or on the workplace that is, so far as is reasonably practicable, safe, without risks to health, and adequate as regards facilities and arrangements for their welfare in or on the workplace;

(f) in such cases as are prescribed the appointment of safety supervisors who shall have such duties as are prescribed."

The far reaching character of the section 11(1) duty is also borne out by the decision of the English Court of Appeal in *R.* v. *Swan Hunter Shipbuilders*.[77]

The first defendants were a large firm of shipbuilders. They directly employed a substantial number of tradesmen and unskilled workers, and also engaged a number of contractors. These contractors in turn sub-contracted some of their work to other firms.

In the late 1960s, the defendants became concerned at the danger of explosion resulting from the ignition of pure oxygen which had leaked into the atmosphere in confined, ill-ventilated spaces, such as the lower decks of uncompleted ships. In order to guard against this danger Swan Hunter prepared what was termed a "blue book" of instructions for all users of oxygen and other dangerous substances. Amongst other things the manual required that:

"3. Gas and oxygen supply valves at the cylinder or manifold are shut off at meal and evening stopping times.

4. All gear and hoses are returned to the open deck at evening stopping times. Where this is impracticable all hoses should be disconnected at the cylinder or manifold."

The "blue book" was not distributed to contractors, sub-contractors, or the employees of contractors or sub-contractors.

In September 1976, an explosion occurred on board a vessel which was under construction at the Swan Hunter yard. Eight men were killed. The incident could have been avoided if the employees of a firm of sub-contractors had observed the requirements of the "blue book" (which they had not seen). Swan Hunter were prosecuted under sections 2(2)(a) and (c), 3[78] and 33(1)[79] of the H.S.W.A. They were convicted and fined a total of £3,000. The sub-contractors were also prosecuted, pleaded guilty, and were fined a total of £15,000.

Swan Hunter appealed against conviction and sentence, the sub-contractor against sentence only. Both appeals were dismissed. In other words, the first defendant was found to be under a duty not just to protect

[77] [1982] 1 All E.R. 264.

[78] This provision imposes duties analogous to s. 2(1) (s. 11(1) of I.S.H.W.A.) upon employers and self-employed persons in relation to the health and safety of persons other than their employees.

[79] This is a general provision which makes it an offence to fail to discharge any of the duties set out elsewhere in the Act.

the health and safety of its own employees by providing a safe system of work, but also to "inform and instruct" the sub-contractors as to "the dangers of an oxygen-enriched atmosphere and of the necessity when work ceased for the day to take all oxygen hoses used by them below the topmost completed deck to that deck or to some other safe place which was adequately ventilated, or if that was impracticable, to disconnect all oxygen hoses from the oxygen manifolds".

The Victorian Act does not contain any precise equivalent to section 3 of the British Act, but it is probable that "occupiers" under section 11(1) would still be under the same duty to the employees of sub-contractors who were "employed or engaged in or on that workplace" as they are to their own employees. Viewed in this light section 11(1) and (2) can be seen to have the potential to afford a substantial measure of protection to a substantial proportion of the Victorian workforce.[80]

Section 13(1) is modelled upon section 6 of the British Act and imposes a series of duties upon the designers, manufacturers and importers of articles for use in or on a workplace to ensure, so far as is reasonably practicable, that the article is so designed and constructed as to be safe and without risks to health when properly used. Section 13(2) imposes similar duties upon the erectors and installers of articles for use in or on a workplace, while section 13(3) deals with the manufacture, design and importation of substances for use at work. This is a potentially significant provision in that it constitutes the first general legal recognition in Victoria that those who design, manufacture, import, supply or instal articles or substances for use at work, are under a duty to try to protect the health and safety of those who may be required to use those articles or substances, or to work in proximity to them.

Section 14 is almost identical to section 7 of the H.S.W.A., and imposes a duty upon employees to take reasonable care for their own health and safety at work and that of other persons who may be affected by their acts or omissions, and also to co-operate with their employer in order to enable her/him to perform any duty or requirement imposed upon her/him by the Act or any regulation made thereunder.

Although this provision may appear simply to be the *quid pro quo* for section 11(1); in the opinion of this author, it is open to objection on the ground that it subscribes to the notion that employees have an equal or greater capacity to protect their own health and safety at work as is (or ought to be) possessed by their employers. As indicated,[81] this is not, and cannot be the case given the nature of our economic system. That is not to suggest that employees should not be obliged to co-operate with their employers in helping to create a healthy and safe workplace, but that

[80] For a successful prosecution under the South Australian version of ss. 2(1)/11(1) see *Pyne* v. *Smith* (1979) 21 A.I.L.R. para. 501, cf. *Pyne* v. *Uniroyal* (1979) (Unrep.) (Print No. M13/1979).

[81] See pp. 199-201 supra.

obligation should be enforceable as part of the employee's duty of obedience to lawful reasonable orders which is of the essence of the employment relationship at common law.[82] This is not a matter which can appropriately be regulated in a measure such as the I.S.H.W.A. It may be otherwise if it is considered necessary to make provision for imposing sanctions upon employees who wilfully destroy safety equipment, or interfere with safety procedures to the danger of others. Indeed section 19 of the I.S.H.W.A. does precisely that.[83] But the need to deal with that kind of situation, in no way establishes the case for a generalized duty of "co-operation" or "self-care" such as that embodied in section 14.

It can safely be assumed that prosecutions for contravention of section 14 would be few and far between. Judging by British experience they would occur only where the employee concerned has behaved in a particularly irresponsible and dangerous manner. However that does not make the inclusion of this provision any less inappropriate. The really dangerous or foolhardy employee could quite easily be dealt with under section 19,[84] and the unco-operative could be dealt with through the medium of her/his contract of employment. As it stands, section 14 is a clear vindication of earlier criticisms of Robens' simplistic assumptions as to the proper location of responsibility for preventing the occurrence of work-related injuries, and the nature of power relations in a capitalist economic system. At a more mundane level, unscrupulous employers could use threat of prosecution under section 14 as a means of enforcing work-discipline, especially where union organization is either weak or non-existent. It is unlikely that this would occur with great frequency, but there is reason to suppose that it does happen in both Britain and in Victoria.[85]

Powers of the Inspectorates

The powers of entry, etc., conferred upon the inspectorate by section 22 of the I.S.H.W.A. are essentially the same as those they previously possessed under section 186 of the *Labour and Industry Act*. The same is true of the powers to "give directions" and to order the cessation of dangerous processes which are conferred upon the Minister by sections 17 and 18 respectively.[86] The power to "give directions" in relation to the guarding of machinery which was previously conferred upon the inspectorate by section 176A of the 1958 Act is now to be found in section 16(2)-(7) of the I.S.H.W.A.

These latter are potentially useful and important powers, although they

[82] See further E. I. Sykes and D. Yerbury, *Labour Law in Australia*, (2nd ed., Sydney, Butterworths, 1980) Vol. 1, para. 503 and W. B. Creighton, W. J. Ford and R. J. Mitchell, *Labour Law: Materials and Commentary*, (Sydney, Law Book Co., 1983), para. 7.3-7.9.

[83] This provision is effectively identical to s. 8 of H.S.W.A.

[84] It is probable that an individual malefactor could also be fixed with imputed liability under s. 30 — see pp. 216-7 infra.

[85] Personal information of author.

[86] Formerly ss. 174(2) and 177 of the *Labour and Industry Act*.

have been little relied upon in the past, and they stop some considerable way short of the powers to issue "improvement" and "prohibition" notices which are conferred upon the British inspectorate by sections 21 and 22 of the H.S.W.A.

Improvement notices require the person (not necessarily an employer) to whom they are directed, to take specified action within a stated period in order to bring to an end, or to avoid, a contravention of any of the Acts or regulations. Prohibition notices direct the respondent to cease any activity either forthwith or within a stated period where that activity involves a risk of "serious personal injury" to any person. Unlike the powers vested in the Minister under sections 17 and 18 of the I.S.H.W.A., both forms of notice are subject to appeal to an independent tribunal.[87] The operation of these notice procedures is widely acknowledged to have been one of the most successful of the changes brought about by the H.S.W.A. There does appear to have been some concern within the inspectorates that these new procedures constituted an unfortunate break with tradition, but their extensive use in practice suggests that this concern was not widely shared.[88] It may also be supposed that some of the recipients of improvement and prohibition notices did not regard them as an unmixed blessing![89]

Prosecution for offences under the I.S.H.W.A. remains the province of the Department of Labour and Industry, although section 27(3) does make provision for prosecution by authorized officials of associations of employers or employees in certain circumstances.[90]

Civil Liability

It is a well-established common law principle that a worker who had been injured as a result of a breach of one of the duties imposed upon occupiers, etc., under the *Labour and Industry Act* could maintain an action for dam-

[87] H.S.W.A., s. 24.

[88] In 1977 the Factory Inspectorate issued 4,833 improvement notices, 371 deferred prohibition notices and 1,556 immediate prohibition notices. This gives a total of 6,760 notices for the year. Over the same period the seven sets of enforcement authorities (including the factory inspectorate) which operate under the auspices of the Health and Safety Executive issued 9,253 improvement notices, 451 deferred prohibition notices and 2,679 immediate prohibition notices, for a total of 12,383. (See H.S.E., *Health and Safety Statistics 1977* (1980) Table 2.1.) Detailed figures are not available for use of the less comprehensive Victorian notice procedures, but on the evidence available fewer than 10 such notices are issued each year.

[89] Judging by the numbers of appeals lodged under s. 24 there is fairly general acceptance of the notice procedures. Of the 6,760 notices issued by the Factory Inspectorate in 1977 only 48 resulted in an appeal. Of these 38 were withdrawn, 3 were dismissed completely, 3 were dismissed with modification and 4 were upheld. Taking the Inspectorates as a whole there were only 77 appeals, of which 51 were withdrawn, 10 were dismissed completely, 8 were dismissed with modification and 8 were upheld. (H.S.E., op. cit., Table 2.2.) For an example of a successful appeal against an improvement notice see *West Bromwich Building Society* v. *Townsend* [1983] I.R.L.R. 147.

[90] In England and Wales prosecution remains the responsibility of the inspectorates (or the Director of Public Prosecutions). In Scotland prosecution is the province of the Procurator Fiscal (a form of public prosecutor) — see ss. 38 and 39 of H.S.W.A.

ages for breach of statutory duty.[91] They might also be able to maintain an action in negligence[92] and indeed many injured workers claim under both heads.[93] The law in this area is widely regarded as unsatisfactory both in terms of the substantive rules and their practical application, and there is a strong body of opinion to the effect that some alternative means should be found to compensate victims of work-related injury.[94]

In order not to make this confused and unsatisfactory situation even more confused, the British Parliament expressly stipulated that none of the "general duties" provisions of the 1974 Act were to be construed "as conferring a right of action in any civil proceedings".[95] It must be emphasized that this did not take away any existing right of action, it simply ensured that no *new* right of action could arise in consequence of a breach of sections 2-8. The Victorian Act contains no such exclusion.[96] This means that workers (and others) who are injured as a result of breach of sections 11, 13 and 14 could quite probably maintain an action for breach of statutory duty in respect of that injury. Such rights would be *in addition* to any existing rights of action in negligence or breach of statutory duty (for example in respect of a failure to guard dangerous parts of machinery).

This is not to suggest that it is *necessarily* a bad thing to create such additional rights of action. But there is reason to suppose that there has not been adequate consideration of the full implications of doing so in this instance. There is, for example, a danger of great confusion between an action in negligence and an action for breach of statutory duty under section 11(1). The former depends upon a failure to take reasonable steps to avoid a reasonably foreseeable cause of injury, whereas the latter would

[91] Not *all* breaches of *all* statutory duties will found an action in damages. It depends upon whether Parliament can be said to have intended to create a civil cause of action when it laid down the statutory duty. Except where Parliament has used express words to indicate an intention to create or not to create such a cause of action, the matter will depend largely upon the policy-orientation of the court concerned. However it has been clear at least since the decision in *Groves* v. *Lord Wimborne* [1898] 2 Q.B. 402 that such an intention will normally be implied in health and safety legislation. For more detailed discussion of these issues see H. H. Glass, M. H. McHugh and F. M. Douglas, *The Liability of Employers* (2nd ed., Sydney, Law Book Co., 1979), ch. 8.

[92] The action in negligence is generally regarded as standing on all fours with an action in contract for breach of the employer's implied duty of care. Occasionally it is in the interests of a plaintiff to sue in contract rather than in tort — see *Matthews* v. *Kuwait Bechtel Corp.* [1959] 2 Q.B. 57. See also *Toth* v. *Yellow Express Carriers* [1969] 2 N.S.W.R. 425.

[93] The two Heads of liability normally overlap, but not invariably — see for example *Bux* v. *Slough Metals* [1973] 1 W.L.R. 1358.

[94] See for example Australia, *Report of the National Committee of Inquiry on Compensation and Rehabilitation in Australia* (1974) (The Woodhouse Report) especially Vol. I, Part 6; T. G. Ison, *The Forensic Lottery* (London, Staples Press, 1967) passim; G. Calabresi, *The Costs of Accidents* (New Haven, Yale University Press, 1970), passim; P. S. Atiyah, *Accidents, Compensation and the Law* (3rd ed., London, Weidenfeld & Nicholson, 1980), chaps 18-25 and H. Luntz, D. Hambly and R. Hayes, *Torts: Cases and Commentary* (Sydney, Butterworths, 1980), chap. 1 (ss. 1, 2, 3 and 5).

[95] S. 47(1)(a).

[96] The same is true for the South Australian and Tasmanian Acts — cf. s. 22 of the New South Wales *Occupational Health and Safety Act* 1983 (N.S.W.).

depend upon a failure to take "reasonably practicable" steps to "ensure" the "safety, health and welfare" of persons "employed or engaged" at the workplace. There is a tendency[97] to treat the two concepts as one and the same. However it is clear, to this author at least, that they are in fact quite separate. For example, it is quite conceivable that a given process could be found to entail a "reasonably foreseeable" risk of injury, but that it would not be "reasonably practicable" to do anything about it — in other words, the statutory standard could be narrower than the common law duty of care in certain circumstances.[98]

Perhaps the most radical extension of existing civil liabilities could flow from section 13. It is true that the manufacturers, designers, etc., of articles and substances for use at work presently owe *some* duty to the ultimate users of those articles or substances.[99] But the obligations imposed by section 13 seem to be more far-reaching than these existing heads of liability, and could have significant practical implications for both the individual and corporate liability of those involved in the manufacture, design, importation, supply, etc., of articles or substances for use in the workplace. Again, this is not to suggest that such changes should not have been made, but rather that there should have been more careful consideration of their practical consequences than appears to have occurred in this instance.

Imputed Liability

Section 30 of the I.S.H.W.A. is identical to section 194(1A) of the *Labour and Industry Act*, and is intended to do two things. First, for purposes of the Act, it imputes to a corporation "any knowledge consent or intent" of any director or officer of that corporation. This means, for example, that if a director of a company knowingly fails to ensure "so far as is reasonably practicable" the safety, health and welfare of persons employed in a workplace of which the corporation is "occupier" then the corporation is liable for that contravention of section 11(1).

Not only that, but section 30 goes on to stipulate that any person who is "a director or officer" of a corporation which is guilty of an offence against the Act is *also* guilty of that offence unless the director or officer

[97] See for example Rowe, op. cit. pp. 17-18.

[98] In *West Bromwich Building Society* v. *Townsend* [1983] I.R.L.R. 147 McNeill J. suggested (at p. 152) that "s. 2 does not extend the existing common law duty of employers, though giving it statutory force". His Honour may well be right in this assumption in the sense that it is hard to envisage a situation where the elimination of a hazard could be said to be "reasonably practicable" which could not also be said to be "reasonably foreseeable". However, for the reasons set out in the text, it does not follow that the common law and statutory duties are identical. See also the decision of the Divisional Court in *Osborne* v. *Bill Taylor of Huyton Ltd* [1982] I.C.R. 168, 173 (per Ormond L.J.).

[99] This duty was very narrowly defined by the House of Lords in *Davie* v. *New Merton Board Mills* [1959] A.C. 604. The effect of this decision was limited by the *Employers' Liability (Defective Equipment) Act* 1969 (U.K.). None of the Australian States has enacted equivalent legislation, and *Davie's* case remains good law in all jurisdictions. For comment on the British Act see R. A. Hasson, "The Employers' Liability (Compulsory Insurance) Act 1969 — A Broken Reed" (1974) 3 I.L.J. 79.

can prove that the offence was committed without her/his knowledge or consent *and* that (s)he "did not know and could not reasonably have known thereof". In other words, if a corporation is guilty of an offence, so are its "directors" and "officers", unless they can bring themselves within the proviso.[100] Section 194(1A) was first inserted in the *Labour and Industry Act* in 1959, and does not seem to have given rise to any great difficulty in practice. But that state of affairs could not necessarily be expected to continue — especially in light of the very general character of some of the duties created by the I.S.H.W.A. as contrasted with the fairly narrow provisions of the *Labour and Industry Act*.

A further curious feature of this provision is the absence of any definition of "officer" in either section 30 or elsewhere in the Act. The juxtaposition of the term with "director" might seem to imply that it is meant to refer only to fairly senior members of management, but how "senior" is "senior" for these purposes?[101] And what of section 5(1) of the *Companies Act* 1961 (Vic.) which stipulates that in relation to a corporation "officer" includes "a director, secretary, executive officer *or employee* of the corporation"? It is a well-established rule of statutory interpretation that definitions in one Act of Parliament are not determinative of the meaning of that term in other Acts of Parliament, except where expressly incorporated. On the other hand, in the absence of other guidance, courts often treat such definitions as highly persuasive.[102] If they were to adopt that approach in relation to section 30 it could have potentially serious implications for individuals quite a long way down the organizational hierarchy, if not down to the shop-floor itself. It remains to be seen whether the Department of Labour and Industry would trouble to prosecute such individuals in other than extreme circumstances, but the fact that the issue can even arise for discussion is symptomatic of the extremely poor drafting which characterizes the entire Act.

THE SUBSTANCE OF THE ACT — CREATING A MORE EFFECTIVELY SELF REGULATING SYSTEM

General

Although the Robens Committee laid great stress upon the need for a "more effectively self-regulating system", it never actually spelt out what it meant by that term. If, however, it is understood to imply that employers and workers should be jointly involved in the formulation and implementation of health and safety policy in the work-place, and in a broader social context, then certain of the recommendations of the Committee can be seen to have been directed to the attainment of that objective.

[100] Cf. s. 37(1) of the HSWA.

[101] S. 37(1) of the HSWA refers to the neglect of "any director, manager, secretary or other similar officer of the body corporate". Whilst not entirely free from ambiguity, this appears to be a much more sensible approach than that adopted by ISHWA.

[102] See further *Maxwell on Interpretation of Statutes* (12th ed., London, Sweet and Maxwell, 1969) at pp. 64-74.

So far as the "broader social context" is concerned, the two key institutions established under the H.S.W.A. have a tripartite structure (i.e. they are representative of government, employers and unions), and this can be seen as a reflection of a desire to involve employers and workers in the formulation and implementation of health and safety policy at the highest level. The structure of the Victorian Industrial Safety, Health and Welfare Advisory Council[103] also seems to make some gesture towards self-regulation at this more general level, although the powers of the Council are much less extensive than those of the British Health and Safety Commission and Health and Safety Executive.

Turning to the workplace, three of Robens' recommendations appear to be especially important: (i) that employers should be required to prepare formal statements of their policy relating to the health and safety of their workforce, and the arrangements which currently exist for giving effect to that policy;[104] (ii) that the inspectorates should make greater efforts to establish and maintain contact with workpeople and their representatives than had been the case in the past,[105] and (iii) that every employer should be under a duty:

> ". . . to consult with his employees or their representatives at the workplace on measures for promoting safety and health at work, and to provide arrangements for the participation of employees in the development of such measures."[106]

All of these concepts are embodied in the British Act, and in the regulations made under it — the first in section 2(3), the second in section 28(8) and the third in sections 2(4), (6) and (7), together with the Safety Representatives and Safety Committees Regulations 1977.[107] The Victorian Act adopts only the first and third.

Safety Policy

Section 11(3) of the I.S.H.W.A. is almost identical to section 2(3) of the British Act. It requires an "occupier" to prepare and, as often as appropriate, revise, a written statement of his "general policy with respect to the safety and health of persons employed in or on the workplace" *and* "the organization and arrangements for the time being in force for carrying out that policy". He is then obliged to bring the statement and any revision

[103] See pp. 207-8 supra.
[104] Robens Report para. 52-4 and 71-4.
[105] Robens Report para. 213.
[106] Robens Report para. 70. See also para. 59-69 and 71.
[107] S.I. 1977 No. 500. The Regulations are accompanied by a Code of Practice and a set of Guidance Notes. For background and analysis see B. Barrett, "Safety Representatives, Industrial and Relations and Hard Times" (1977) 6 I.L.J. 165; R. Benedictus, *Law at Work — Safety Representatives* (1980), passim, and W. B. Creighton, "Statutory Safety Representatives and Safety Committees: Legal and Industrial Relations Implications" (1982) 24 I.L.J. 337, 340-7. For discussion of the Regulations in operation see C. Codrington and J. S. Henley, "The Industrial Relations of Injury and Death: Safety Representatives in the Construction Industry" (1981) 19 *Brit. Journ. Ind. Rels.* 297 and A. I. Glendon and R. T. Booth, "Worker Participation in occupational health and safety in Britain" (1982) 121 *Int. Lab. Rev.* 399.

of it to the attention of all persons employed in or on the workplace. As indicated earlier, this provision has not been proclaimed.

In Britain, "written statements" under section 2(3) of the H.S.W.A. very often consist of little more than pious generalizations. The following is typical:

> "The overall policy of the Company is to ensure, through all practical means of communication that personnel at all levels and in all types of occupation are informed on safety and health matters affecting their employment and have suitable facilities for consultation, for representation to Management and for education and training, agreed within the company to be necessary or desirable to meet the Company's social needs and the specific requirements of the law. The promotion of Health and Safety measures at work is a mutual objective for Management, and all employees of the Company."

However, "statements" can perform a positive function in some circumstances, for example by forcing employers to examine what their policy on health and safety really is. It is also important to appreciate that section 11(3) of the I.S.H.W.A. would require that not only must the "occupier" spell out her/his policy on health and safety, (s)he would also need to set out the "organization and arrangements" currently in force for giving effect to that policy.[108] Logically, this requires that such organization and arrangements must actually exist![109]

Safety Representatives and Safety Committees

This is probably the feature of the British system which has attracted most attention in that country and overseas. Under section 2(4) and (6) of the H.S.W.A., together with the Safety Representatives and Safety Committees Regulations, trade unions have the right to nominate as many safety representatives as they see fit in respect of any given workplace.[110] Those representatives are then entitled to be consulted by their employer on a wide range of safety issues. They have the right to make periodic inspections of the workplace; to investigate potential hazards and dangerous occurrences in the workplace; to investigate complaints on behalf of their members; to represent their members in consultations with members of the inspectorate;[111] to inspect and take copies of certain kinds of documents,[112] and to have paid time off to carry out their duties and to

[108] See further N. Cunningham, "The Williams Report on Health and Safety at Work". A Paper Presented to the Fourth National Conference of the Society of Labour Lawyers (1982), pp. 41-5.

[109] For an exceedingly curious (and inappropriate) use of a "written statement" in court proceedings see *Armour* v. *Skeen* 1977 S.L.T. 71, and the author's comment at (1977) 6 I.L.J. 250.

[110] Defined in reg. 2(1) to include "any place or places where the group or groups of employees he [the safety representative] is appointed to represent are likely to work or which they are likely to frequent in the course of their employment or incidentally to it" — cf. the definition of this term in s. 3 of I.S.H.W.A. (supra fn. 9).

[111] Regs. 4(1), 5 and 6.

[112] Reg. 7.

undergo training to equip them to carry out those duties.[113] They may also require the employer to establish a safety committee, which is to have such functions as may be agreed, and which should be of agreed composition (with union representatives generally constituting at least 50 per cent of membership).[114]

The South Australian Act contains much diluted and almost wholly ineffectual versions of these provisions.[115] Similar provision in the Tasmanian Act[116] appears to have been equally ineffective, although new regulations which were introduced in 1982 may have the effect of breathing new life into this part of the Act.[117] The N.S.W. Act of 1983 also envisages some role for safety committees,[118] whilst section 12 of the Victorian Act makes very similar provision to sections 2(4), (6) and (7) of the H.S.W.A. — with the important qualification that under the I.S.H.W.A. safety representatives are to be elected "by and from the persons employed in or on the workplace" whereas under the British Act they are "appointed" by "recognized trade unions". Section 12 could be activated only through regulations made under section 33(1)(b) of the Act:

> "The Governor in Council may make regulations for the safety, health and welfare of persons engaged in workplaces and in particular for or with respect to —
> (1) requiring . . . the election of safety representatives and the establishment of safety committees and the functions, powers and duties of such . . . representatives and committees for carrying out the objects and purposes of this Act."

This is a fairly wide-ranging provision, and, other than in relation to the role of trade unions, would probably permit the introduction of regulations which go at least as far as the British Safety Representatives and Safety Committees Regulations of 1977.[119] No regulations had been introduced under section 33(1)(b) at the time of writing, and in light of the stated policy of the present Victorian government, it is most unlikely that any such regulations will be introduced in the future.[120]

THE ACT IN PERSPECTIVE

Robens and the 1974 Act (H.S.W.A.)

Clearly the I.S.H.W.A. is very much in the tradition established by the

[113] Regs. 4(2) and 11. For a restrictive interpretation of this entitlement see *White* v. *Pressed Steel Fisher* [1980] I.R.L.R. 176.
[114] Reg. 9 and Guidance Notes, para. 9.
[115] See I.S.H.W.A. 1972 (S.A.), s. 31. See also *Industrial Safety Code Regulations* 1975 (S.A.) reg. 8; *Construction Safety Regulations* 1974 (S.A.), reg. 213A and *Commercial Safety Code Regulations* 1978 (S.A.), reg. 7. See further D. R. Hull, *Occupational Health and Safety and Industrial Democracy* (No Date) (Paper prepared for South Australian Unit for Industrial Democracy), pp. 14-17.
[116] I.S.H.W.A. 1977 (Tas.), s. 34.
[117] *Industrial Safety, Health and Welfare (Employers' Safety Representatives) Regulations* 1982 (Tas.). See also Creighton, op. cit. pp. 348-9.
[118] See infra p. 225.
[119] See further Creighton, op. cit. pp. 349-51.
[120] See further pp. 230-1 infra.

Robens Report and the H.S.W.A. As such, it embodies all of the vices of the Report/Act — as exemplified by the inclusion of an "employee duty" in section 14 as some kind of logical corollary to the "employer duty" in section 11.[121] Unfortunately it is less wholesome in its response to Robens' virtues.

It must be counted a dismal failure in relation to the creation of a more "unified and integrated" system. It makes no attempt whatsoever to unify existing health and safety legislation, or its administration. The institutional structures established by the Act fall far short of those envisaged by Robens and established by the H.S.W.A. — indeed there is no reason to suppose that the Industrial Safety, Health and Welfare Advisory Council will (or could) make any more positive contribution to the promotion of occupational health and safety than its predecessor, the Industrial Safety Advisory Council. The powers of the inspectorates remain exactly as they were before, and there has been no attempt to strengthen the sanctioning process. In addition, the position in relation to civil liability and personal liability is unnecessarily, and improperly, confused.

On the more positive side, the statement of general principles is a welcome innovation. Regrettably, the overall effect is marred by a number of defects in execution — for example the decision to place the section 11(1) duty upon "occupiers" rather than upon "employers".

Also on the positive side, the regulation-making power in section 33(1) is sufficiently broad to permit a measure of constructive innovation through the agency of subordinate legislation. On the other hand the fact that all existing legislative and administrative boundaries remain intact could make it very difficult to do anything very far reaching within the framework of the I.S.H.W.A. It is also unfortunate that the Act is not more explicit in its use of codes of practice.

Potentially, the Act might be seen to constitute a more positive response to the need for a "more effectively self regulating system" than to the need for a more "unified and integrated" system — a somewhat ironic proposition in light of the assertion of the Committee for Review that "Victoria is not yet ready for self-regulation".[122] In the event, this potential remains unrealized. The "written statement" provision has not been proclaimed, and the regulations which are needed in order to activate section 12 have not been (and are not likely to be) introduced.

It is abundantly clear, therefore, that like its namesakes in South Australia and Tasmania, the Victorian I.S.H.W.A. constitutes only a very limp response to the Robens philosophy. What, then, of New South Wales?

New South Wales

Formally at least, the administration of safety legislation in New South Wales was "unified and integrated" in the early 1980s in the sense that

[121] See pp. 212-13 and 209-12 supra.
[122] Committee Report, p. 5. See fn. 41.

all of the major enforcing agencies were brought together within the Department of Industrial Relations and Technology. It appears that this change was largely cosmetic in character, and that each of the merged units still functions as a quite separate entity. It is also reasonable to assume that the process of "unification and integration" is unlikely to be facilitated by the fact that each of the constituent parts remain in physically separate locations. However the mere fact that the gesture has been made means that New South Wales already has the basis for establishing a unified and integrated system of administration. It is to be hoped that the passing of the *Occupational Health and Safety Act* 1983 (N.S.W.) will provide a further stimulus to this process.

The 1983 Act makes at least some attempt to "unify and integrate" existing safety legislation. It tries to do this through the concept of "Associated Occupational Health and Safety Legislation",[123] which is not dissimilar to the British concept of "relevant statutory provisions".[124] Unfortunately section 33 of the 1983 Act is so badly drafted that it is not entirely clear that regulations made under the Act can repeal or vary the "associated" legislation. They are to "prevail" over such provision, but that does not necessarily mean that they can repeal or vary it.

Even allowing for a measure of uncertainty as to the effect of section 33, and for a degree of scepticism about the effectiveness of the process of "integrating" the administration, it is clear that the New South Wales Act constitutes a much more convincing attempt to "unify and integrate" existing safety legislation and its administration than does the I.S.H.W.A.

The New South Wales Act also adopts a more positive approach to the powers of the inspectorates in that section 45(2) permits the making of regulations relating to improvement and prohibition notices. It is unfortunate that these notices can be sanctioned by a maximum fine of only $2000,[125] but even on that basis, this provision constitutes a marked advance upon the I.S.H.W.A.

Levels of fines in general under the New South Wales Act are much higher than under the I.S.H.W.A. The maximum under the latter remains $2000, whilst breach of certain of the "general duties" provisions of the 1983 Act may attract fines of up to $50,000.[126]

The "general duties" provisions themselves seem to go rather further than either the I.S.H.W.A. or the H.S.W.A. They are very closely modelled on the British Act, so that they avoid the I.S.H.W.A.'s confusion as between "occupiers" and "employers".[127] Where they appear to go *further* than the H.S.W.A. is in omitting any reference to "reasonable practicability".[128]

[123] See ss. 32-46 (Part IV, Divisions 1-6 and Part V).
[124] H.S.W.A., ss. 1(2), 15, 50, 53 and Sch. 1.
[125] S. 45(4) — cf. s. 33(3)(b)(i) and (4)(d) of H.S.W.A.
[126] See ss. 15, 16, 17(1), 18 and 21.
[127] See ss. 15-17, cf. ss. 2-4 of H.S.W.A. and s. 11 of I.S.H.W.A.
[128] See pp. 209-10 supra.

For example, section 15(1) requires that "every employer shall ensure the health, safety and welfare at work of all his employees". On its surface this seems to be an exceedingly far reaching provision — indeed it has the potential to render all employers criminally liable for just about all work-related injuries. The courts are generally reluctant to dispense with the *mens rea* requirement in relation to criminal offences, but where Parliament has used clear words, then they will indeed regard certain offences as "absolute" in character.[129] However section 15, together with all of the other substantive provisions of the Act, has to be read subject to section 53:

> "It shall be a defence to any proceedings against a person for an offence against this Act or the regulations for the person to prove that —
> (a) it was not reasonably practicable for him to comply with the provision of this Act or the regulations the breach of which constituted the offence; or
> (b) the commission of the offence was due to causes over which he had no control and against the happening of which it was impracticable for him to make provision."

In some respects para. (a) of this section imports the same criterion of "reasonable practicability" as characterizes the "general duty" provisions of the British and Victorian Acts. However it does at least shift the onus of proving that compliance with the statutory standard was not "reasonably practicable" onto the defendant. The precise effect of paragraph (b) is unclear. It seems to envisage a situation where the defendant had no control over the commission of an offence and where it was "impracticable" for her/him to make the provision for the avoidance of that occurrence. Such occurrences seem to be nothing more than subcategories of those covered by paragraph (a). In other words, paragraph (b) does not appear to add anything to the generality of paragraph (a).

Even allowing for the section 53 defence, it is clear that the "general duties" provisions of the New South Wales Act could have a profound impact upon the law relating to compensation for work-related injury if their breach was to be found to give rise to an action in damages for breach of statutory duty.[130] Presumably this explains why section 22 of the Act goes to some pains to ensure that the law relating to civil liability is not affected by anything contained in sections 15-21. This is consistent with the approach adopted by section 47 of the British Act, but is at variance with the I.S.H.W.A.[131]

The New South Wales Act also adopts a more rational approach to imputed liability than does the I.S.H.W.A.[132] However where the 1983 Act falls into very much the same trap as the I.S.H.W.A., is in relation

[129] See for example *R.* v. *Bush* (1975) 5 A.L.R. 387 and *Cameron* v. *Holt* (1980) 28 A.L.R. 490.
[130] See further Glass, McHugh and Douglas, op. cit. p. 116 and the authorities cited therein.
[131] See pp. 214-16 supra.
[132] S. 50 — cf. s. 30 of I.S.H.W.A.

to institutional structures. Sections 7-14 of the Act make provision for the establishment and functions of the Occupational Health, Safety and Rehabilitation Council of New South Wales. In terms of both composition and functions this body is very similar to the Victorian Industrial Safety, Health and Welfare Advisory Council. It is interesting to note, however, that the Chairman of the Council is to be the Co-ordinator of Occupational Health, Safety and Rehabilitation Services,[133] and that one of the Labour Council New South Wales nominees must be a woman.[134]

Like the I.S.H.W.A., the 1983 Act does not appear to envisage any significant role for codes of practice within the new structure.[135]

For all its faults, it seems clear that the New South Wales Act constitutes a much more serious attempt than the I.S.H.W.A. to create a unified and integrated system of health and safety law and administration. However the picture is rather different when it comes to "self-regulation".

There is no provision whatsoever in relation to statements of safety policy.[136]

There is *some* provision relating to consultation between the inspectorate and representatives of workers in the shape of section 31 of the Act. To this extent the 1983 Act is again in advance of the I.S.H.W.A. But section 31 is drafted in such a manner, and sits so strangely with other provisions of the Act, that it is not at all clear that it can make any truly positive contribution to the creation of a more effectively self regulating system.

What section 31 seems to envisage, is that when an inspector is undertaking an inspection at a place of work "with respect to a matter that may affect the health, safety or welfare of persons employed at the place of work" (s)he must "so far as practicable" consult a representative of either "the persons so employed" or of "an industrial union of employees . . . whose members are engaged at the place of work".[137] The inspector must also, if so requested by a "representative" "take the representative with him during any such inspection".[138]

The Act is entirely silent as to how such "representatives" are to be identified — for example by election by "the persons so employed", or by appointment by a registered union of employees or by election by members of a union of employees. It is also entirely silent as to the rights and duties of such representatives, beyond the right to be consulted by, and to accompany, an inspector. Do they, for example, have the right to be paid time off to carry out their duties? Do they have the right to be

[133] S. 9(1)(a) and (2). The Co-ordinator is the head of the unified health and safety administration.
[134] S. 9(1)(c). Curiously, this requirement does not extend to employer nominees under s. 9(1)(d).
[135] The only reference to codes of practice is to be found in s. 10(h), which enumerates the functions of the Council.
[136] Cf. s. 11(3) of I.S.H.W.A. and para. 4.196-4.202 of the Williams Report.
[137] S. 31(a).
[138] S. 31(b).

paid time off to undergo training in order to equip them to carry out those duties? Do they incur any form of legal liability (civil or criminal) in virtue of their position as "representative"? Can a "representative" be a non-employee? If so, do they have a right of entry upon the workplace in order to carry out their duties?

It may be that the answers to at least some of these questions can be provided through regulations made under Part V of the Act. However it appears that only legislative intervention can clarify the relationship between section 31 "representatives" and "safety committees" as envisaged under sections 23-26.

Section 23(1) stipulates that an occupational health and safety committee is to be established at any place of work where either: (a) more than 20 persons are employed and a majority request the establishment of such a committee, or (b) the Occupational Health, Safety and Rehabilitation Council so directs. Detailed provision as to the composition, establishment and procedure of committees is left to the regulations, but it is clear from section 23(3) that these regulations must make provision for the *election* of some members of the committee by persons employed at the place of work, and for the *appointment* of others by the employer. In other words, it appears that before a safety committee can be established there must first be a ballot to determine whether a majority of employees want such a committee. If the result of that ballot is affirmative, then there is to be an election for worker members of the committee. After that the employer is to be empowered to appoint "other members", presumably as representing the interests of management.

Even more cumbersome is the procedure for dealing with disagreements on health and safety issues. Section 24 seems to envisage that where an employee at a workplace considers that a given machine, process or whatever "is not safe or is a risk to health", (s)he should bring the matter to the attention of the employer. The *committee* must then investigate,[139] and "attempt to resolve any such matter".[140] If the committee is unable to resolve the matter then it "shall request an inspector . . . to undertake an inspection of the place of work for the purpose",[141] and any such inspection "shall be undertaken forthwith after the request made by the occupational health and safety committee".[142]

Once again, these provisions seem to raise more questions than they answer. Is an employer to be *obliged* to refer all "matters" which have been brought to her/his attention to the safety committee? Does an inspector have power to make some kind of binding determination on the subject-matter of the dispute? If so, how does that power relate to the other powers of the inspectorates under the Act? How "forthwith" is

[139] S. 24(1)(b).
[140] S. 24(1)(c).
[141] Ibid.
[142] S. 24(2).

"forthwith" for purposes of an inspection? Finally, how do the procedures set out in section 24 relate to the disputes resolution procedures set out in State and Federal industrial legislation? This latter could give rise to some particularly difficult issues in light of the fact that the provisions of section 24 are mandatory in form — in other words, they envisage that health and safety issues "shall" be dealt with in this manner. This creates a clear potential for conflict between State provision represented by the 1983 Act and Federal provision represented, for example, by the *Conciliation and Arbitration Act* 1904 (Cth), or between two sets of State provisions as represented by the 1983 Act and the *Industrial Arbitration Act* 1940 (N.S.W.).

In addition to this dispute resolution function, occupational health and safety committees are also to have responsibility for "keeping under review the measures taken to ensure the health and safety of persons at the place of work",[143] together with "such other functions as are prescribed".[144]

In order to enable them to discharge their functions, members of safety committees are to have power to: (a) carry out such inspections of the place of work as may be prescribed; (b) obtain such information relating to the place of work as may be prescribed, and (c) do such other things in relation to the place of work as may be prescribed.[145] They are also entitled to be provided with training in order to assist them to exercise their functions, such training being "of such kind and provided by such persons as may be prescribed".[146] There does not appear to be any distinction between "worker elected" and "employer appointed" members of committees for any of these purposes.

Section 26 makes fairly comprehensive provision for the protection of employees against victimisation on the grounds that they: (a) have made a complaint about a health and safety matter; (b) are a member of an occupational health and safety committee, and (c) have exercised any of their functions as such member.

Taken together, these provisions constitute a curious kind of inversion of the British approach. There is provision for the establishment of occupational health and safety committees. It then appears that *members* of these committees, once established, are to have *some* of the powers which are conferred upon safety representatives under the British system. In other words, in Britain safety representatives come first, with safety committees coming along behind if the safety representatives so determine. In New South Wales safety committees come first, and a highly modified kind of safety representative may come along behind. Of course it cannot be assumed that the British provision represents the *only* viable approach to this issue. But, if the purpose of the New South Wales Act

[143] S. 24(1)(a) — cf. s. 2(7) of H.S.W.A. and s. 12(3) of I.S.H.W.A.
[144] S. 24(1)(d).
[145] S. 25(1).
[146] S. 25(2).

is to give effect to the Robens objectives of creating a more effectively self regulating system, then there is a strong case for saying that it should have the same kind of two-tier mechanism as has been adopted in Britain, and as was envisaged by section 12 of the I.S.H.W.A.

Even within its own terms, the New South Wales provision is likely to prove to be a legal and administrative nightmare. The procedure for the establishment of committees is quite unnecessarily cumbersome. The procedures for dealing with health and safety issues within and by committees is laughably inept. And it is totally unclear how "representatives" under section 31 are meant to fit into the occupational health and safety committee structure.

Section 31 does not contain any qualification relating to size of enterprise or directions of the Council, which suggests that its operation is not dependent upon the existence of a section 23 committee. But what is to happen where there *is* such a committee? Are "worker elected" members of that committee automatically to be treated as "representatives" for purposes of section 31? What if a registered union of employees wishes to nominate one of its officials as a representative for purposes of section 31(a)(ii)? Can an "employer appointee" be a "representative"? The possibilities for confusion and conflict are almost endless. No doubt some of these matters could be dealt with through an imaginative use of the regulation-making powers in Part V. But there is a real possibility that the legislative framework established by sections 23-26 and 31, is so inherently unsound that a fundamental reconsideration of the entire structure is required.

In summary, the New South Wales Act is much more impressive than the I.S.H.W.A. in terms of creating a more unified and integrated system of health and safety law and administration, but it falls far short of even the modest standards set by the I.S.H.W.A., in relation to the creation of a more effectively self-regulating system.

Victorian Government Policy

As indicated earlier,[147] the Victorian Ministry of Employment and Training released a public discussion paper in March 1983, which set out detailed proposals for the implementations of government policy on occupational health and safety. The purpose of this exercise was to give interested parties an opportunity to express their views on the proposed legislation so that they could "be taken into account in the final development of the legislation which will be introduced into Parliament during the 1983 Spring Session".[148] This suggests that the legislation which is eventually presented to Parliament may be quite different from that outlined in the discussion paper. It is also important to bear in mind that the government's

[147] See p. 205 supra.
[148] Occupational Health and Safety Public Discussion Paper (March, 1983), Foreword.

room for manoeuvre is significantly circumscribed by the fact that it does not control the Upper House of the State Parliament.

In the circumstances, there appears to be little point in embarking upon a detailed analysis of the contents of the discussion paper at this juncture. Indeed, by their very nature they are not susceptible to the kind of examination to which the provisions of an Act of Parilament could appropriately be subjected. However, the paper does envisage a sufficiently radical departure from both the I.S.H.W.A. and legislative provision elsewhere in Australia, for it to merit at least some further consideration in the present context.

Very broadly, the proposals set out in the paper can be said to constitute a more full-blooded response to Robens and the H.S.W.A. than has hitherto been adopted in any of the Australian jurisdictions. It is, however, Robens with modifications — first, in that there is a sustained attempt to avoid some of the conceptual confusions which characterize the Robens analysis,[149] and secondly in that the paper places reliance upon a number of concepts which did not commend themselves to Robens — notably in relation to the role of licensing schemes.

As to standard-setting, the paper sticks very closely to the British approach. This means that all existing health and safety legislation is to be grouped together within the framework of the one enactment. These provisions could then be modified, replaced or complemented by new standards over a period of time.[150] They could also be accompanied, where appropriate, by approved codes of practice.[151]

The administration of health and safety legislation would also be rationalized along British lines. A Health and Safety Commission would be responsible for the formulation of standards, and the general oversight of policy,[152] whilst the existing administering authorities would be brought together as part of an Occupational Health and Safety Administration, located within the Ministry of Employment and Training.[153]

There would be a "statement of general principles" similar to that contained in the British Act and in the I.S.H.W.A., with two important modifications. First, it appears that the generality of the duties would not be qualified by reference to considerations of "reasonable practicality". In this respect, the Victorian proposals would be more in line with the New South Wales Act, than with existing provision in Britain and Victoria. Secondly, it seems that there is to be no "correlative" duty on employees such as that embodied in section 14 of the I.S.H.W.A. Presumably, this

[149] See pp. 199-203 supra.
[150] Discussion Paper, para. 5.1.
[151] Ibid., para. 3.2(b).
[152] Like the existing Council, the Commission would consist of representatives of employers and employees, together with a number of "neutrals", and a representative of the Ministry of Employment and Training (Discussion Paper, para. 3.1). The powers and functions of the Commission are set out at para. 3.2-3.3.
[153] Discussion Paper, para. 2.6-2.7.

reflects a disquiet at Robens' assumptions as to the equal capacity of capital and labour to effect improvements in the health and safety area.[154]

The paper does not make any reference to the question of civil liability. In view of the breadth of the proposed "general duties", it clearly ought to do so. It may be that it is intended that breach of these provisions could found an action for breach of statutory duty. It may even be that that would not be a bad thing. But in light of the fact that to do so would be radically to extend the scope of existing common law entitlements, it is not a change which ought to be effected by default.

Section 6 of the paper envisages a major re-structuring of existing provision relating to penalties,[155] and also that the inspectorate should have the same power to issue improvement and prohibition notices as their British counterparts.[156] There is also to be provision for imputing corporate liability to "senior officers" of corporations. *Ex facie* the scope of this proposal is narrower than section 30 of the I.S.H.W.A.[157]

Thus far, the approach to unification and integration which is adopted by the discussion paper is fairly consistent with the Robens philosophy, subject to certain modifications in relation to the general duties. However in one major respect the paper deviates quite markedly from the Robens/H.S.W.A. approach to unification and integration. That is in relation to the role of licensing as a means of promoting health and safety at the workplace.

Robens felt that there was only a very limited role for general licensing provision in this context:

> "In the first place there is seldom much practical value in general licensing criteria applicable to a wide variety of circumstances. If they are to have real significance, licensing criteria must be related to needs and circumstances which can be closely defined. Secondly, the administration of licensing systems is expensive in manpower, and can easily become excessively bureaucratic when applied to large numbers of undertakings or individuals. Finally, too much reliance on licensing might tend to encourage the notion that the primary responsibility for exercising control lies with the licensing authorities rather than with those who create the risks."[158]

Instead, it was felt that licensing should be used mainly for "the control of high-hazard installations such as bulk storages of intrinsically dangerous chemicals" or for "particularly hazardous activities such as demolition work".[159]

The Victorian government evidently takes a different view:

> "The Government will establish an integrated licensing system, eventually covering every workplace in Victoria. Initially, existing schemes

[154] See pp. 200-1 supra.
[155] Discussion Paper, para. 6.1.
[156] Ibid., para. 6.2.
[157] Ibid. para. 6.1 — cf. pp. 216-7 supra.
[158] Robens Report para. 281.
[159] Robens Report para. 282.

> will be rationalised and then the new system will be introduced in stages. Employers will be required to furnish full details of layout and design of workplaces, technologies, processes and materials used and the nature of particular hazards and how these are to be controlled. Assistance in the form of guidelines will be given to employers to help them comply with the new requirements."[160]

There is much to be said for the proposition that licensing can play an "important and constructive role" in "preventing unsafe work processes and exposure to unsafe substances".[161] However the dangers adverted to by Robens are not without substance, and it is most important that care be taken to guard against them.

So far as "self-regulation" is concerned, the approach adopted by the discussion paper is very much in accord with the provisions of the H.S.W.A. and the 1977 regulations. To some extent this means that it is consistent with section 12 of the I.S.H.W.A., except that the paper, like the British legislation, proposes to limit the right to appoint safety representatives to trade unions.[162] It is also proposed that safety representatives in Victoria should have two significant powers which are additional to those vested in their British counterparts.

The first is the power to issue "provisional improvement and prohibition notices" — with the inspectorate having the right to make a binding arbitration in the event of dispute as to the issue, or content, of the notice.[163] In other words, safety representatives are to have a limited right to "stop the job" in face of a perceived safety hazard. Presumably this reflects a desire both to promote the health and safety of workers in the workplace, and also to institutionalize industrial conflict over health and safety issues.

The second additional power which is proposed for Victorian safety representatives is the right to "obtain, with the formal consent of their union, an authorisation from the Minister enabling them to initiate prosecutions in respect of breaches of the Act or regulations".[164] The *Labour and Industry Act* contained a not dissimilar provision for a number of years,[165] and this was carried over as section 27(3) of the I.S.H.W.A. So far as can be ascertained, this provision has never been used in practice. It seems unlikely that it would be extensively relied upon under the proposed legislation, except perhaps where the Administration did not have the time or the resources to take proceedings on its own behalf.

The proposals relating to statements of safety policy are very similar to sections 11(3) of the I.S.H.W.A. and 2(3) of the H.S.W.A., except that

[160] Discussion Paper, para. 2.9.
[161] Ibid., para. 2.8.
[162] Ibid., para. 2.4-2.5.
[163] Ibid., para. 5.7(f) and 6.2 — cf. ss. 24(1)(b) and (c) and (2) of the New South Wales Act.
[164] Ibid., para. 5.7(h).
[165] S. 191(1)(a)(iv). This provision was originally inserted in the Act by the *Labour and Industry Act* 1965.

"Safety Committees, where established, shall draw up such policies".[166] In other words it is no longer to be left to the employer alone to determine the content of safety policy, or to have oversight of its implementation.

Taken as a whole, the proposals set out in the discussion paper entail a much more radical approach to the problem of work-related injury and death than has hitherto been adopted in any of the Australian jurisdictions. As such, it envisages a much more "radical advance" than the I.S.H.W.A. Nevertheless, the I.S.H.W.A. was an important part of a long-term evolutionary process. In its own way it was indeed a "radical advance". It is probable that it was also a "passing phase".

[166] Discussion Paper, para. 5.3(a).

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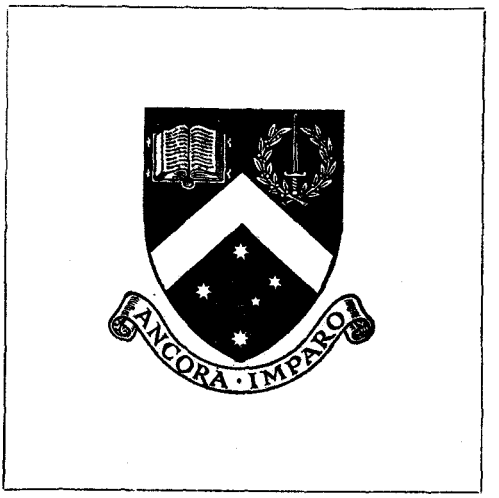

BOOK SUPPLEMENT

VOLUME 9 (Numbers 3 and 4)

ISSN 0311—3140

Distributors: THE LAW BOOK COMPANY LIMITED

BOOK REVIEWS

An Introduction to the Securities Industry Codes, by R. BAXT, H. A. J. FORD, G. J. SAMUELS and C. M. MAXWELL, (2nd ed., Sydney, Butterworths, 1982), pp. xxvi and 316.

The regulation of any securities industry could never be considered uncomplicated and straightforward in even the ideal legal system. When such regulation is accomplished in a federal system by consensus of the participating governments in a way that integrates governmental regulation with self-regulation by the industry, the resultant system requires a degree of familiarity with legal and economic concepts of some complexity in order to achieve proper understanding of its workings. This book, though attempting merely an introduction to the Securities Industry Codes, is largely successful in explaining clearly the basic scheme of regulation of the security industry in Australia. In order to do this, the authors have related the constitutional background and political compromises which lead to the current legislation and discussed the economic policies and practical compromises which necessitated the continuation of stock exchange self-regulation. Examination of the details of the current scheme, of necessity, proceeds only upon appreciation of this background.

This book, as is mentioned in the introduction, "is devoted to that part of the law relevant to the securities industry which is to be found in the *Secuities Industry Act 1980 (Cth.)*, the *State Securities Industry Codes*, the *Securities Industry Regulation* and the case law in the background of that legislation". In focussing on this area, the authors have paid particular attention to regulation of the stock exchanges. The book's coverage of the regulatory scheme begins with an explanation of the Powers of the National Companies and Securities Commission and the State Corporate Affairs Commissions and proceeds to a review of licensing requirements of dealers and advisers, etc., the relationship of broker to client including the stockbrokers' rights and duties, the internal regulation of various Australian stock exchanges, and account and audit requirements of dealers. Additionally, certain prohibited or regulated transactions form a final subject area comprised of non-disclosure or misstatements in dealing in securities, shortselling, false trading, fraudulent dealing, and insider trading.

To the authors' credit, the discussion of the specific legal povisions of the *Securities Industry Code (Cth.)* and related legal concepts is prefaced by a chapter describing the ordinary transactional procedures in the Australian stock exchanges. Further, useful charts are included in an attempt to illustrate the operations of disclosure requirements of interested parties and interposed shareholders. Likewise, a chart of the possible liabilities for statements related to securities is included as a visual aid to facilitate understanding of the text.

Although this text is, in parts, little more than a commentary on provisions of the *Securities Industry Code (Cth.)*, this is due primarily to lack of case law elucidating certain sections. The common law, where appropriate, is included in the text. As with most books using joint authors, however, such case law is given different emphasis from chapter to chapter, being referred to infrequently in some chapters, while being related extensively in other chapters to support or raise issues of varying degrees of immediacy. Nonetheless, the presence of relevant decisions and explanation of their effect in a manner which is familiar to frequent readers of Professors Ford and Baxt, places those with legal and non-legal backgrounds in a similar position to appreciate the relevant common law in the area.

Although the stated scope of this text is the *Securities Industry Codes*, perhaps one

major criticism relates more to the choice of subject rather than the attempt to cover it. Due to the selection of the *Securities Industries Code (Cth.)* as the central theme of the discussion of the securities industry, several related areas of securities regulation located in the other related legislation (e.g. *Companies Codes* themselves) are not examined in great detail. Although such provisions are discussed in certain areas, an integrated discussion of all securities problems without regard to the statutory source might prove ever more useful. Although the failure to have all securities related law comprehensively dealt with in one enactment no doubt has its reason, the resultant compartmentalization of the overall regulation into different statutes must be considered somewhat inconvenient. This book generally tends to continue the divisions of the subject by reference to statutory source, but fortunately it includes sufficient cross reference and discussion of securities problems dealt with in related statutes to overcome any serious complaint other than as a matter of emphasis and degree.

As a final point, *An Introduction to the Securities Industries Code*, though of a high standard in substance, includes far too many typographical errors. Although some errors relate to obvious transpositions, certain references to subsections in the Securities Industry Code proved inaccurate. Naturally, this would lead to no real difficulty upon reference to the statute, but nonetheless such errors are inconvenient and potentially troublesome. Nevertheless, this text should prove quite useful for both legal practitioners and related professions as an introductory text providing a basic understanding of Australian securities regulation.

PAUL E. VON NESSEN*

Psychology in Legal Contexts: Applications and Limitations, edited by SALLY LLOYD-BOSTOCK, (London, Macmillan Press Limited, 1981), pp. xix and 246.

Law and psychology have a common interest, at both a theoretical and practical level, in how people perceive events, how they react to them, and how their behaviour may be changed. However, in this country, apart from a certain overlapping of law and psychology in the criminological and child welfare fields, psychological learning has not played an important role in shaping law reform proposals. The Australian Law Reform Commission is showing the way, to some extent, by its examination of the psychological assumptions behind the laws of evidence in the course of dealing with its reference on the law of evidence in Federal and Territorial courts. By and large, however, law reformers appear to believe that their own intuition gives them sufficient access to the possible contributions of psychology. This is an attitude also prevalent in England.

In order to stimulate more interest in the relevance of psychology to law in that country, and to promote further interdisciplinary research, a three day conference on law and psychology was held in Oxford in September 1978 under the auspices of the Social Science Research Council's Centre for Socio-Legal Studies at Oxford University. The papers presented at that conference make up the present work. Under the editorship of Sally Lloyd-Bostock, the work is divided into five parts. These deal with the reliability of witness evidence; interrogations and confessions; the psychologist as an expert witness; the characteristics of legal language; and the application of psychology in areas of substantive law. The last section includes papers on decision making in child welfare; the nature and control of family violence; legal and psychological views of gambling; the rationality of traffic offending; and proposals for reform of the sexual laws. There are fourteen papers in all.

* Lecturer in Law, Monash University.

Interestingly enough one of the recurring themes in the papers is an apparent ambivalence on the part of psychologists concerning whether their discipline has an effective contribution to make to the practise of law. While they had no doubt that legal procedures gave rise to problems which fell within their province, some of the psychologists hesitated about how far their conclusions could be generalised. This might be a mark of the scientist's reserve and a protective reaction against the over-selling of psychiatry and its broken rehabilitative promises, but the insights of psychologists, however qualified, provide a valuable antidote to a legislator's misplaced confidence in the validity of his own opinion and serve to promote a re-examination of the premises upon which the law itself is built. The opening chapters on the psychology of human testimony and its reliability do this well, while the concluding five chapters highlight the danger of the law becoming useless or worse than useless if based upon a misunderstanding of the causes of the behaviour it seeks to control.

The lawyers and psychologists whose papers appear in this book have managed to write with clarity and a refreshing freedom from the jargon which so often restricts interdisciplinary communication. One of the papers—Wright's, "Is Legal Jargon a Restrictive Practice?"—expressly deals with the psychological studies on effective communication and this obviously has been taken to heart by the editor and her contributors.

RICHARD G. FOX*

Child Support in America, by H. D. KRAUSE, (Charlottesville, Michie Company, 1981), pp. xv and 700.

One of the most remarkable facets of modern life is that, notwithstanding intensive sex education, liberalization of abortion law and freely available contraception, the rate of ex-nuptial births in Western countries has continued to grow. In the United States of America almost half-a-million children are born outside marriage each year. One-half of all black children are illegitimate!

Not until the last decade did common law countries begin to concern themselves with the disabilities suffered by this sizeable group of underprivileged children. In many countries, however, including England and Australia, the law's response was to pass hasty, ill-considered, poorly drafted and ineffective legislation. The *Status of Children Act* which prevails in Victoria must be one of the worst pieces of legislation in the world, totally belying its purported object, to abolish all discrimination against children born outside marriage. The English legislation is little better.

In the United States, however, the Supreme Court abandoned its traditional reluctance to enter into domestic issues, and has considered the status of ex-nuptial children in more than 20 cases during the last ten years. Although there have been some illiberal decisions, on the whole, the Court has struck down most of the discriminatory state provisions that were in issue, and has guided both legislatures and courts towards the abolition of discriminatory laws and practices.

Much of the impetus for this development came from an academic lawyer, Professor Harry Krause, who has occupied himself with the problems of ex-nuptial children for most of his professional life. His 1971 work, "Illegitimacy: Law and Social Policy", has been often cited in the courts. It would hardly be too much to say that 6 million ex-nuptial American children owe more to Krause than to any other person.

His latest work explores the developments of the last decade, and paves the way for further amelioration of the lot of ex-nuptial children. Krause rightly points out that pious professions of equality are of no value. The child born outside marriage

* Reader in Law, Monash University.

must necessarily be treated differently, for he is usually incapable of attaining the most vital need and right of a child—identity with its two progenitors—without some suasion.

Krause directs Part II of this work to a study of the way in which ascertainment of paternity can be more easily attained. There is detailed discussion of the efficacy of blood testing (backed up by a scientific exposition of the various tests in one of the Appendices) and a particularly striking *cri-de-coeur* for more intelligent application of probability theory in the use of exclusionary evidence. As Krause points out, even the sophistication of latest blood testing has not produced a positive test of identification.

The meat of the book, however, consists of a detailed analysis of a remarkable piece of legislation, which is probably unknown to many readers—the *Social Security Act*, Title IV—D, passed in 1975. This provision requires the States to chase putative fathers (even if the mothers are *not* receiving State Welfare benefits). Initially received with much scepticism, the programme has been remarkably successful, proving that, with a determined effort, blood *can* be obtained from stones. The corollary is that mothers must be very strongly pressured into revealing the facts of the conception, and the identity of the possible father. Unashamedly, the Act deprives uncooperative mothers of welfare benefits.

Krause convincingly argues that the philosophy of these measures is soundly based. Apart from the political motives, he is surely right in pointing out that the benefits of remedial legislation will accrue to the children themselves only if vigorous and determined efforts are made to find their fathers.

This stimulating and informative book is enhanced by an excellent series of appendices. In one of these the English provisions on blood testing are described and applauded.

Non-American readers may find themselves somewhat exasperated by the widespread use of acronyms.

J. NEVILLE TURNER*

Crime, Proof and Punishment, Essays in Memory of Sir Rupert Cross, edited by C. F. H. TAPPER, (London, Butterworths, 1981), pp. xxvi and 336.

This book was originally planned as a *Festschrift* to be published upon the occasion of Sir Ruper Cross's seventieth birthday. Sadly, Sir Rupert died in September 1980 at the age of 68. The book now stands as a fitting honour to his memory.

The book comprises thirteen essays dealing with various themes raised by Sir Rupert's work in the fields of criminal law, criminology, jurisprudence and the law of evidence. The essays were all specially solicited by the editor from among Sir Rupert's close academic colleagues and friends. Thus all but one of the contributors is or was a member of the Universities of Oxford or Cambridge. It is a measure of the very great strength of the Law Schools of these two Universities that between them they could produce twelve first rate contributions from within a comparatively limited number of fields.

The standard of contribution is uniformly excellent. In "The House of Lords in Attempting the Impossible" Professor H. L. A. Hart considers the defence of impossibility as developed by the English courts. This is, perhaps, well travelled territory, but Professor Hart's critique is excellent. Few areas of substantive criminal law present greater intellectual puzzles than that relating to the liability of secondary parties. In "Secondary Participation and Inchoate Offences" Professor J. C. Smith

* Senior Lecturer in Law, Monash University.

examines the rules of secondary participation in relation to the offences of incitement, conspiracy and attempt. A. J. Ashworth presents a thoughtful re-examination of some thorny perennial problems relating to the notion of *mens rea* in his essay "The Elasticity of *Mens Rea*". In "Statutory Interpretation, Prostitution and the Rule of Law" Professor Glanville Williams criticizes modern trends in statutory interpretation by focusing on the decision of the Court of Appeal in *Smith* v. *Hughes* [1960] 2 All E.R. 859, [1960] 1 W.L.R. 830. In "Contract and Crime" Professor G. H. Treitel examines the role played by criminal law in the regulation of contractual relationships. In "The Ultimate Justification" Professor N. D. Walker re-examines the denunciatory theory of punishment. Sir Leon Radzinowicz and Roger Hood in "The American Volte-Face in Sentencing Thought and Practice" examine developments in penal thought and in sentencing structure in the United States. D. J. Galligan examines similar issues at a philosophical level in "The Return to Retribution in Penal Theory". In "The Primacy of Oral Evidence" Professor Tony Honoré examines the primacy accorded oral evidence in the Anglo-American law of Evidence, and compares it with the approaches taken by the roman law and by modern continental systems. Professor R. M. Dworkin in "Principle, Policy, Procedure" considers the competition between the aim of ensuring accuracy in judicial decision making and considerations of cost effectiveness. In "Illegally Obtained Evidence and *R.* v. *Sang* P. G. Polyviou critically examines the decision of the House of Lords in *R.* v. *Sang* [1979] 2 All E.R. 1222. In "Privilege and Public Interest" A. A. S. Zuckerman considers the proper scope to be accorded to the doctrine of public interest privilege. Finally, in "The Meaning of Section 1(f)(i) of the *Criminal Evidence Act* 1898" the editor, C. F. H. Tapper, examines the English equivalent of s. 399(5) of the *Crimes Act* 1958 (Vic.). A particularly valuable feature of Mr Tapper's essay is its detailed historical account of the background to the 1898 Act.

The book also contains a memorial address delivered by Professor Tony Honoré, and a bibliography of Professor Cross's publications. Professor Honoré's address is of particular interest, both to those who would seek to understand something of the nature of Rupert Cross as a man and those who, having known him, remember him fondly. All who, like the present writer, were privileged to be taught by Professor Cross quickly came to regard him with unqualified respect and admiration. Ranking equally with his intellectual gifts were personal qualities of charm, kindliness and humour coupled with tremendous determination and courage. These personal qualities manifested themselves particularly in the way in which he coped with near lifelong blindness, yet, despite this apparent handicap, wrote and achieved so much. Typical of the man's approach to work and to life was the way he would in seminars introduce the problems of implied hearsay by inviting consideration of the implications that could be drawn from a passer by stating he heard Cross say he could hear the sound of pink elephants galloping through the All Souls quadrangle. Professor Honoré concluded his memorial address with the words "May we one day see his like". The present reviewer can do no more than agree.

C. R. WILLIAMS*

Cases and Materials on Review of Administrative Action, by S. D. HOTOP, (2nd ed., Sydney, Law Book Co., 1983), pp. xxxiii and 1219.

This is the second edition of Hotop's book on *Cases and Materials on Administrative Law*. With the continual expansion of this area of law it is not surprising that this

* Reader in Law, Monash University.

new edition is a great deal longer than the first edition. The book is intended primarily to be used in the teaching of Administrative Law in Universities and other tertiary instituions. With this primary objective in mind the book provides a comprehensive selection of the cases and other source materials embodying the principles governing the review of administrative action.

The book is divided into eleven chapters. Chapter one covers the classification of governmental powers. The second chapter deals with delegated legislation and is divided into three sections. The first section sets out the Report of the Committee on Ministers Powers. The second section deals with parliamentary supervision, and the final section with judicial review—the doctrine of ultra vires. This latter section is the main part of the chapter and is subdivided into the heads of judicial review. Chapter three contains a very detailed and comprehensive coverage of denial of natural justice. The fourth chapter deals with the doctrine of ultra vires being subdivided into simple ultra vires and extended ultra vires. Jurisdictional error is contained in chapter five and sets out the traditional concept of jurisdictional error, and the concept of extended jurisdictional error or excess of jurisdiction. The next chapter deals with the error of law on the face of the record. Chapter seven examines the judicial remedies available and the statutory restrictions of judicial review is contained in chapter eight. As with the first edition Hotop gives an extensive coverage in chapter nine to the statutory additions to judicial review which includes the *Administrative Decisions (Judicial Review) Act* 1977 (Cwth.) and the Victorian *Administrative Law Act* 1978. Hotop has omitted to include the amendment to the *Administrative Law Act* (Vict.) dealing with Residential Tenancies nor does he deal with the commencement date of the Act and the bodies to which the Act relates. The Ombudsman and the Commonwealth Administrative Appeals Tribunal are dealt with in chapter ten. The final chapter contains the *Freedom of Information Act* 1982 (Cwth.).

Hotop has included excellent notes either at the beginning or the end of extracts of cases, reports and statutes. He also refers the reader to the relevant textual or other materials that may be relevant to the topic. This is most useful to a student stuyding the subject, in that it provides a starting point for the location of the relevant law and debate concerning that law.

The advantage of this book to both teachers and students of Administrative Law is that it contains the most recent decisions in this area of the law together with the relevant legisltation. The author has also compiled a table of cases and statutes, a detailed table of contents and a comprehensive index.

T. L. BRYANT*

"The Law of Torts", by JOHN G. FLEMING, (6th edition, Sydney, The Law Book Co. Ltd., 1983), pp. lii and 702.

Six years have now passed since the fifth edition of this standard text was published. The author relies on the "unremitting flow of case law, statutes and reform proposals" in that time to justify publication of the sixth edition, which purports to state the law to September 1982. Despite the rapid accumulation of case law during the six years, particularly in the field of negligence, the structure of the law has not changed significantly and this is reflected in the structure of the book, which has not altered since the previous edition. No chapters or substantive subject areas have been either added or deleted. The variation from the fifth edition appears to be mainly by way of

* Lecturer in Law, Monash University.

"updating" or incorporation of more recent materials into both text and footnotes, with minor revision of the text where it is rendered necessary.

There can be few lawyers or law students unfamiliar with Professor Fleming's work and most will have their own ideas as to its usefulness for the various purposes to which texts are put. Because of the similarity of the sixth edition to the fifth, this review does not perform the function of introducing a totally unfamiliar work. What follows is an admittedly subjective comment on the substance, approach, and usefulness of the book.

Professor Fleming considers that a "respectable academic text" should be concerned with "*whence, whither*, and most important, with *why*". The sixth edition, in fulfillment of this aim, continues to carry out the design of its predecessors—that is, to provide a functional, rather than rule-oriented analysis of tort law. This concern with the effect and operation of legal rules rather than with the "mechanistic problems of the internal consistency of decisions within a framework of precedent" has two consequences.

First, the text itself cannot be relied upon as a source of summary statements of legal rules. This feature seems to be inherent in the author's approach, as the emphasis is moved from identifying the rules to discussing principles and policy which are not necessarily derived from case law. If the functional analysis is to be taken to any depth there is no room left for detailed statement of rules because of the book's wide coverage. The footnotes include comprehensive case references and accurate (if carefully construed) sufficient to enable research into and discovery of such rules as may exist.

Secondly, this approach is combined with the author's other stated aim of taking "Australia as it *point d'appui*" while fixing "its horizon over other Commonwealth jurisdictions, especially England and Canada, in the belief that the common core of ideas about torts makes a larger perspective at once possible and rewarding". As a result the text fails to distinguish the varying relevance or application of rules and policies in different jurisdictions. This task is of course complicated by Australia's multiple State jurisdictions.

These two factors have their main impact on the usefulness of the book as a student text. Torts is almost invariably taught early in the law course in Australia to students in the process of learning the basis and methods of legal reasoning. The functional analysis and reliance on Commonwealth (especially Canadian) case law can be merely confusing or at worst misleading. In other words it is necessary for the student to have mastered the rules of tort law before a functional analysis can be satisfactory. Thus the work is not much assistance in the actual learning of tort law, but is of much greater help in gaining an appreciation of its operation and a critical approach to its doctrines. I suggest it should not be used as a student text without some explanation to the beginner of its aim of functional and comparative analysis as opposed to stating the law. Nevertheless the book is at present without a serious competition as a text for Australian students.

From a wider perspective and viewing the book as an "academic text" it is difficult to fault its scope or structure. Professor Fleming perceives some interesting trends in tort law. He sees in recent case law further evidence of the "loss of confidence in the law of torts as an ideal system of accident compensation" and believes that the "tort system is disintegrating under the combined pressure of no-fault policies, overt or hidden, and the inordinate cost burden thereby imposed on the public". While the issue of no-fault accident compensation is no longer novel in Australia the inclusion of a three stage plan for such a scheme in the Labor Party policy suggests this may be an area for legislative change if the cost and other problems can be overcome.

The judicial rationale of negligence has progressed substantially over the years since the previous edition. Fleming refers quite extensively to the landmark decision of *Anns* v. *Merton London Borough Council* [1978] A.C. 728, as well as including brief references to more recent decisions in which the House of Lords has shown itself to be willing to approach policy issues directly, such as *McLouglin* v. *O'Brian* [1982] 2

W.L.R. 982 (nervous shock) and *Junior Books Ltd* v. *Veitchi Co. Ltd* [1982] 3 W.L.R. 477 (economic loss). This judicial approach lends itself to functional analysis as it concentrates on policy factors (which such analysis highlights) which cannot now be ignored in determining the scope and boundaries of the tort. For example, extension of liability in negligence to cases of solely economic loss requires the court to state some proximity criterion other than accompanying physical damage (whether to person or property) as a basis for allowing recovery. No one approach prevails at present but this interesting area is undergoing rapid development.

Professor Fleming considers that "the impact of *Hedley Byrne* in sanctioning the incursion of torts into the area of economic loss, with resultant blurring of the frontier between tort and contract" is being continued through the *Junior Books* case and others on the area of economic loss. It is becoming clearer that the courts will not now deny a plaintiff a remedy in tort merely because a concurrent remedy for breach of contract may be available.

In conclusion, the sixth edition is an updated, not otherwise altered, version of the fifth, and if Fleming on Torts is a work you like and find useful, you can rest assured the sixth edition will also fulfill the same role.

BETH GAZE*

Ewe Law of Property, by A. K. P. KLUDZE, (London, Sweet & Maxwell, 1973), pp. xxxv and 324.

This book by Dr A. K. P. Kludze, a Senior Lecturer in Law at the University of Ghana, Legon, is the sixth in the series by the Restatement of African Law Project—a project initiated and partially financed by the University of London School of Oriental and African Studies.

The value of the book lies not only in the fact that it is the pioneering work on the property law of the Ewe-speaking people of Ghana, but also for the other reason that it restates in simple but critical terms the fundamental ideas and principles on which Ghanaian customary law of property as a whole rests. Dr Kludze, in his primary endeavour to record the principles of Ewe customary law, provides his readers with adequate information on the proper Ghanaian customary law of property as it exists among some of the ethnic societies of Ghana.

The methodology adopted by the writer in the achievement of his ultimate purpose in the book is remarkable. At the beginning of the chapters which treat the substantive property laws of the Ewe, Dr Kludze restates the basic principles, and sometimes, the unverified sweeping generalizations made about Ghanaian customary law of property by some earlier writers. He then sets out to determine the proper geograhpical and historical limits of the application of these principles so far as the various ethnic groups of Ghana are concerned. The final purpose is achieved by an elaborate analysis of the basic tenets of the Ewe law of property. Thus a reader would discover that this book is not a mere restatement of the Ewe law of property, but also a rich source of information on the law of the major traditional societies of Ghana.

The learned writer's use of judicial decisions and dicta at various but appropriate stages of this work, adds a lot of flavour to the unique purpose of this book. The judicial decisions and dicta not only express the social objectives of the peoples of Ghana so far as property acquisition and its use are concerned, but also reveal how erroneous the once held view that customary law is "age-old, immutable and firmly fixed in the very bones of the people" is. They throw into the open the plastic

* Tutor in Law, Monash University.

characteristic of customs as capable of rapidly adapting and moulding the lives of the peoples who rely on them to changing conditions of their social environment. Since customary law is the expression of the accepted and regular practices of a people at a particular place and at a particular time, it follows, therefore, that if the practices change, the law also changes. This phenomenon is illuminatingly analysed at the appropriate stages of this book.

One could go on listing the qualities of this book. In conclusion, I would say, this comprehensive book, based on adequate legal research, may be of invaluable assistance to a wide variety of readers thirsty for knowledge and understanding of Ghanian customary law of property. Researchers in Ghanaian customary law of property, lecturers and students of the indigenous African law would, no doubt, find this book an indispensable tool.

I. K. ADZOXORNU*

An Introduction to Law, by D. P. DERHAM, F. K. H. MAHER and P. L. WALLER, (4th ed., Sydney, Law Book Co., 1983), pp. xi and 201.

The increasing popularity in recent years of Commercial and Legal Studies as a final year subject in Australian secondary schools has been responsible for a corresponding increase in the number of publications of introductory law books. Most of these books are also designed as preliminary reading in the first year law subject Legal Process. It is not without some prescience that an intending teacher of either of these subjects must choose, for his or her students, a book from what could be described today as a plethora of introductory law books. A good starting point for the teacher is age and experience. *An Introduction to Law* was first published in 1966 and has already provided invaluable guidance to both students and teachers for seventeen years. Another advantage is that the book has been fully updated to 1983 and now serves as a useful source of current information to the student.

The book begins by outlining various methods of describing a legal system. The authors suggest that the method which views legal systems as collections of institutions functioning within defined geographical areas, is the most helpful for the beginner to take. The authoritative sources of our law are then discussed with the key distinction between legislation and common law introduced. Part I is then concluded by an extremely helpful and concise discussion of the legal profession, with special reference to topics such as legal education, law reform and an updated section on legal aid.

Part II of the book concentrates on the divisions of law and the main division introduced after the distinction between common law and civil law systems, is that between public law and private law (p. 56). While this latter distinction serves as a useful starting point for a further breakdown of the categories of law (e.g. public law is broken down into constitutional, administrative, criminal law etc. and private law into contracts, torts, property law etc.), the student should not be misled into believing that a strict division exists between public law and private law in Australia today. On the contrary, it is often quite difficult to draw a precise line between the two, especially in areas concerning law and economics. On the other hand, the distinction between criminal and civil law (p. 63) could have been more pronounced as the student should be made aware that a strong division between these two areas still exists today. As G. Williams has pointed out, in *Learning the Law* (10th ed., London, Stevens, 1978), one of the layman's most inveterate errors is to assume that most of the law is concerned with criminal law.

* Post-graduate Student, Monash University.

Part III of the book contains five comprehensive chapters on the "Fashioning of the Law". A clear analysis is given of the role and theory of precedent, the hierarchy of courts, the differing judicial approaches to the interpretation of legislation, the importance of the distinction between questions of fact and questions of law and the various types of reasoning by lawyers. Reference is also made to the Federal Parliament's recent direction to the judiciary regarding the adoption of the mischief or purpose approach in the interpretation of legislation. The possible implications of this direction are considered by the authors who themselves believe that a purposive approach is usually preferable in an age when social reform legislation is so vast and important. Finally, recent cases in the area of negligent misstatements are included (p. 151) together with a discussion of the implications of *Viro* v. *The Queen* (1978) 141 C.L.R. 88 on the hierarchy of authority and the doctrine of binding precedent in Australia (pp. 19, 107).

It was claimed in (1968) 6 M.U.L.R. 350, at 352 that one would have expected frequent recourse in Part III to cases which would not only illustrate the points being made, but also add to the liveliness of the text. It was alleged that sparing use was made of material cases such as *Donoghue* v. *Stevenson* [1932] A.C. 562 and *Grant* v. *Australian Mills* [1936] A.C. 85 perhaps because the writers assumed that most of their audience will be reading the book in conjunction with the corresponding cases and materials in the coursebook. This certainly presents no problem in the current edition. One is able to read the whole of *An Introduction to Law* without the need to consult the corresponding casebook. It is perfectly self-explanatory and all the more complex propositions are exemplified by neat examples. The case of *Donoghue* v. *Stevenson* itself is used as an example of the complexities facing lawyers who have to predict the exact limits of application of a general proposition of law to future cases (p. 105).

The concluding chapter of the book grapples with the question What then is Law? This is perhaps the most ambitious chapter of the book. For it is only with accumulated study of the law does one realize that the question is unanswerable. The student embarking on a law course may well expect a neat answer. The task of explaining to the beginner the complexity of the question and the insolubility of the answer in a clear and comprehensible manner is performed admirably. Nine possible non-exhaustive definitions of law are given (at p. 162). It is recognized that none of them will satisfy all inquirers but that all of them have something important to say about the law. The example of a small community with a sample economic structure is used to illustrate the social function of law. This model is reminiscent of H. L. A. Hart's kingdom of Rex I in the *The Concept of Law* (Clarendon, O.U.P., 1961) and the notion of obligation which is "attached to" the people in the small community (p. 166) is identical to the obligation and "internal attitude" towards rules which the people in Rex II's kingdom possess in *The Concept of Law*. The latter book is a leading authority on the theory of positive law in western jurisprudence. But the merit in this concluding chapter is that it leaves the reader to make up his or her own mind. The initial analogy with positivism is made only to help describe the function of law in society. A balance between positivism and natural law is achieved by the authors' conclusion that the greatest of the primary aims of a legal system is to advance mankind's eternal search for justice (p. 171).

In conclusion, *An Introduction to Law* is written in a clear and analytical fashion and for this reason is particularly recommended for those who are learning the law for the first time. The merit of the book lies in the very fact that it is merely an organized exposition of the law. This means that the student can both refer to and absorb the basic principles and techniques set out in the book and from there develop his or her own capacity to review and criticize the law.

S. B. MCNICOL*

* Lecturer in Law, Monash University.

The Economics of Consumer Protection: A Critique of the Chicago School Case Against Intervention, by A. J. DUGGAN, (Adelaide, Adelaide Law Review Association, 1982), pp. xii and 151.

Consumer Protection Law in Australia, by J. L. GOLDRING and L. W. MAHER, (2nd ed., Sydney, Butterworths, 1983), pp. xxx and 413.

Sales and Consumer Law in Australia and New Zealand, by K. C. T. SUTTON, (3rd ed., Sydney, Law Book Co., 1983), pp. lxx and 658.

These three works together provide ample illustration of the wide range of subject matter and approach that can be accommodated under the banner "Consumer Law". It is indeed this potential diversity that leads those working in the general area to the basic conundrum of what approach to take—is consumer law or consumer protection to be viewed merely as an outgrowth of various existing legal doctrines or as a separate subject, capable of independent conceptual and substantive development.

Professor Sutton's book perhaps represents the former approach to consumer law. In fact *Sales and Consumer Law in Australia and New Zealand* is the third edition of his work on sale of goods. The eight years since the publication of his second edition has seen a massive growth in federal and state statutory intervention on behalf of consumers, hence the addition of "consumer" to the title; similarly the coverage of services by much of the same legislation has led to the deletion of "goods" from the title.

Nonetheless, this text remain primarily a text on sales of goods, supplemented and expanded by reference to consumer protection legislation. The introduction of references to Part V of the Trade Practices Act is made in the existing organization of the book along the lines of the Sales of Goods Act, in the course of references to implied conditions, description, and sales by sample. Other ramifications of the Trade Practices Act as well as state legislation are dealt with in the grabbag "Part VI—General", together with auction sales, exemptions and export sales. This discussion of general consumer protection legislation occupies sixty-five pages, about 10% of the book; it is supplemented by an appendix surveying three pieces of Victorian legislation and one New South Wales enactment that occurred after the book went to press.

This edition of Professor Sutton's book is over one hundred pages longer than the previous edition, and much of this expansion can be attributed to the introduction of the Trade Practices Act and state consumer protection legislation. In general, the book remains a thorough, organized tour of the common law and statutory rules governing sales, covering the nature and formation of the contract of sale, the terms of the contract, its effects, performance, remedies, and the above mentioned "general". The approach taken to this edition is one of revision and supplementation, rather than rewriting. This is appropriate in areas where change has been slow or incremental—however in areas where recent developments have been significant, such as fundamental breach and exemption clauses and the effect of the House of Lords decision in *Photo Production Ltd* v. *Securicor Transport Ltd* [1980] A.C. 287, more substantial revision might have been indicated.

Taking a completely different approach to some of the same material is the second edition of Goldring and Maher. Contractual aspects of sales of goods are relegated to one 55-page chapter emphasizing remedies and the remainder of the 400-plus page text considers such diverse topics as manufacturers' liability, food and drug product standards, occupational, general proscription of deceptive practices, control of specific practices (door-to-door and pyramid sales etc.), consumer credit, and consumer complaints: This edition follows much the same format as the 1979 edition although the

positions of the chapters on contractual remedies and manufacturers' liability have been reversed, and a brief chapter on consumer credit has been added.

Whereas Sutton's book may be unashamedly classified as an academic text, with all of the accompanying aspirations to thoroughness and comprehensiveness, the second edition of Goldring and Maher is less easily pigeon-holed. It attempts to provide an overview of relevant statutory and common law rules respecting consumer transactions, and succeeds in doing so in a coherent fashion. Given the length of the book and the range of topics covered, the coverage of each topic cannot hope to be complete and comprehensive. This book will be an invaluable source to students and practitioners looking for an organized overview of the law, particularly the welter consumer protection statutes that have proliferated. However, having gained access to the particular rule or concept through this book, a student or practitioner faced with a particularly thorny problem will be forced to consult other sources (such as Sutton's text) for a truly in-depth treatment of a particular topic.

Goldring and Maher is particularly well suited as a "find-it" book. It embraces the seemingly irreversible trend to numbered paragraphs and bold-faced paragraph headings, a development which assists the reader in locating the precisely relevant portion of the text. There are also a number of helpful tables which organize state legislation on a comparative basis.

This is not to say that the authors are solely concerned with the nuts and bolts of rules and legislation, as in the limited space available, they display an awareness of the policy basis of consumer protection legislation, both in general and with respect to specific enactments. Unfortunately for this reviewer, the overview approach of the book is also characteristic of the opening chapter, "Consumers, Consumerism and the Law" which tackles some of these conceptual and policy issues. This is perhaps the least successful chapters of the book, not just because of the overview approach (which might lead to an accusation of superficiality) but because the various economic, political and social policy issues are not considered in an organized and coherent fashion. What one is left with, after reading the opening chapter is less an overview of issues in consumer protection than a pastiche of disparate questions. It is the only let-down in an otherwise lucid, well-organized text.

The policy mantle is picked up to much better effect in the recent tract by Duggan, *The Economics of Consumer Protection: a Critique of the Chicago School Case Against Intervention*. In recent years, lawyers involved as academics or policy-makers have increasingly seen the role of the law in a wide number of fields, from torts to trade practices, from criminal law to consumer protection, subject to analysis and commentary by economists who purport to explain the operation of legal rules in economic terms or use economic analysis to argue as to which laws should be passed. All too often this latter approach takes the form of welfare economics criticizing the enactment of laws which interfere in the marketplace to achieve some economic, social or political objective, usually on the basis that the laws impede the efficiency of the market in the allocation of resources. Inasmuch as the economists' arguments are drawn from tightly-defined economic models, they are frequently quite attractive to the lawyer, as well as bewildering.

In this valuable little book, Duggan dissects the economic arguments that have been brought to bear by one group of economists (usually called, for want of a better word, "the Chicago school") against the intervention of the legislation designed to protect consumers. Through the examination of the basic premises of economic analysis, the reader is provided with a guide to basic economic concepts and their underlying value premises. Then, through a discussion of the rationale of consumer protection legislation and a critique of the arguments brought to bear against it, one views the limitations of the economic case against intervention and the problems of applying economic theory to a real-world situation.

The aim of the book is not to denigrate the role of economics in legal policy analysis, for as the author points out, economic analysis can make one more aware of the costs and benefits involved in regulation. Furthermore, as Duggan demonstrates

in his arguments, the efforts of lawyers to meet an economic critique on economic or non-economic grounds can only result in a more rigorous and detailed development of the policy reasons why legislative intervention is necessary, and ultimately in more intelligently framed legislation. The literature on economic analysis and legal policy-making in Australia is small, but growing, and in *The Economics of Consumer Protection*, an important contribution is made.

TIMOTHY PINOS*

* Lecturer in Law, Monash University.

BOOK NOTE

Cases and Statutes on Evidence, by P. B. CARTER, (London, Sweet and Maxwell Ltd., 1981), pp. lviii and 864.

This book was originally intended as a new edition of that venerable standby of English students, Cockle's *Cases and Statutes on Evidence*. While Cockle was traditionally a short and highly concise book, Mr Carter's work runs to almost 850 pages and contains extracts from some 300 cases together with summaries of many more. The book also contains extracts from a large number of statutes and rules. The source material is accompanied by some introductory text in respect of each chapter and commentary on many of the cases. In some respect the text is disappointing since it tends to be superficial. The host of theoretical and academic problems the law of evidence gives rise to are touched upon quite lightly. The book is strongly biased in favour of the English reader, although some cases from other jurisdictions are included. Because of its strong English bias the book cannot be recommended for Australian students. It is, however, a book which might make a useful supplement to the libraries of practitioners. The two Australian casebooks in Evidence, Waight and Williams, *Cases and Materials on Evidence* (Law Book Co., 1980) and Edwards, *Cases on Evidence in Australia* (3rd ed., Law Book Co., 1981) obviously reflect on Australian bias, and Mr Carter's book contains extracts from many English decisions not contained in either of these books.

C. R. WILLIAMS, Reader in Law, Monash University.