BOOK REVIEWS

OF MANNERS GENTLE:

ENFORCEMENT STRATEGIES OF AUSTRALIAN BUSINESS REGULATORY AGENCIES

By Peter Grabosky and John Braithwaite

Oxford University Press and The Australian Institute of Criminology, 1986

Of Manners Gentle is a valuable and welcome addition to the literature on business regulation. The authors are to be commended both for the clarity of their presentation and for the breadth of the information amassed on the relationship between the statutory powers available for commercial regulation in Australia and the actual use made of those powers. The reference materials provided on the agencies studied are notable for the variety in the perspectives they canvass and should prove to be of substantial value to those concerned with particular regulatory agencies and their operation and approach.

The study conducted by the authors highlighted a number of issues which warrant substantial concern and suggest the need for further in depth studies. Virtually all the regulatory agencies examined are severely hampered by inadequate funding and lack of staff. While, in part, this reflects general economic trends and problems, the authors suggest that it may also be related to a general lack of political will. This is of particular concern where powerful interests are concerned. Second, enforcement strategies and approaches vary substantially from state to state. Although some of this variability undoubtedly relates to local conditions, it also reflects political attitudes and the authors noted several instances in which enforcement minded regulators were replaced with those who sought a conciliatory and co-operative style. While such variability is inevitable in a federal system, it poses problems of coordination in areas such as Corporate Affairs. For example, the authors note that the State Corporate Affairs Commissions are reluctant to proceed with investigations requested by the National Companies and Securities Commission, and emphasize that in many respects the *'co-operative scheme is co-operative in name only'*. In addition, the jurisdictions of many agencies overlap considerably, and the overlap in jurisdiction and powers provides an opportunity for problem cases to be passed from agency to agency without constructive action being taken. Finally, despite the investigative and enforcement powers provided by much of the regulatory legislation, powers which the authors suggest would be the envy of many police forces in Australia, the dominant enforcement style is non-adversarial and conciliatory. Indeed, with the notable exception of the Trade Practices Commission, the evidence amassed suggested that

enforcement tended to become more conciliatory and less prosecutorial as the size of the business increased. The authors note that, on the whole, regulatory agencies perceive big business to be more law abiding. This is particularly noteworthy when it is considered in relationship to the fact that in 42.7% of the agencies investigated a majority of those responsible for enforcement had been recruited from the industry being regulated, a practice which raises the possibility of capture.

Both the information presented and the style and organization of its presentation suggest this work will become a valuable addition to the libraries of both students and scholars concerned with a wide range of legal areas. For example, the material on the regulation of companies provides background information which is essential to any understanding of the reality of the regulation of companies and corporate affairs in Australia. The dichotomy between the sweeping investigative powers and severe penalties provided in the companies and securities legislation and the lack of resources devoted to enforcement is particularly conspicuous in this area. As a consequence, the authors note, outside of the area of securities trading, investigations are essentially limited to companies which are in liquidation and in which serious wrongdoing has been uncovered by the liquidator. Even within this limited area, backlogs of five or more years are common and in the larger jurisdictions fewer than half the matters warranting investigation are ever investigated. As a general principle, the authors suggests that *'enforcement against living and breathing companies is found to be either too complex or too politically sensitive'.*

Judging from the information presented, information compiled from interviews conducted by the authors with representatives of the agencies concerned, despite the range of powers available the overall enforcement style is characterized by a general conciliatory and cooperative approach. In many areas structurally similar problems are handled very differently according to specific political concerns. For example, supervision and enforcement of food standards is extremely stringent where the products are destined for the export market, whilst little direct supervision occurs in the production and preparation of foodstuffs for the domestic market, and essentially no controls are imposed on imports. In this area in particular, regulatory bodies assiduously avoid publicity which might prejudice the continuing development of export markets and rely heavily upon informal sanctions such as condemning a day's production where appropriate processing temperatures are not maintained. An area in which the collegial and conciliatory style is particularly dominant is in the patchwork of agencies and inspectorates concerned with radioactive materials. As is the case with the agencies concerned with food standards, adverse publicity is avoided as a sanction and the regulators tend to rely upon building an *esprit de corps* as part of the international nuclear club. Even in agencies such as the Trade Practices Commission which adopt a generally prosecutorial style, enforcement patterns suggest that the agency concentrates upon *per se* offences and avoids those which require proof of

substantial lessening of competition. Further, as the authors note, even the substantial pecuniary penalties available are unlikely to have any deterrent effect upon economically rational offenders. Issues such as these raise the possibility that even apparently stringent legislative provisions are primarily cosmetic in purpose and that the appearance of effective regulation is seen as more important than substantive effect.

The limitation of resources and the general lack of political will suggested by the authors raise real questions concerning the political intent behind the regulation of Australian business by governments at all levels. While they have provided a valuable addition to the literature on business regulation and enforcement strategies, many questions remain unanswered, including the degree to which the enforcement strategies adopted are the product of the general inadequacy of the resources provided. While the authors note that their data provides compelling support for predictions based upon *'Black's general theory of law that the greater the relational distance between regulator and regulatee and the less powerful the regulatee, the greater the tendency to use formal sanctions'*, much work remains to be done. It is to be hoped that future research in this area will analyse the relationship between the political considerations in regulation, particularly as regards the apparent conflict between the regulatory powers formally provided and the regulatory resources actually available, and the regulatory style adopted. Despite limitations such as these, limitations which are inevitable in a ground-breaking study such as that engaged in by the authors, *Of Manners Gentle* is a valuable addition to the literature on business enforcement strategies on both a local and an international level, and suggests the development of a uniquely Australian regulatory style which warrants further study.

SS Berns

NEW ESSAYS ON THE AUSTRALIAN CRIMINAL CODES

By Robin S O'Regan

The Law Book Company Ltd, 1988 xxii, 125 pp, price: $27.50.

When Professor Robin S O'Regan's first book, *Essays on the Australian Criminal Code*, was published in 1979, it was well received and soon became a companion text for students studying Law in the Code States of Australia. This was due in part to Professor O'Regan's concentration on those aspects of criminal responsibility under the Codes that had largely been ignored by other academic writers. On reading the preface of his latest book one finds it brief and straight to the point. The author states that the topics covered in this particular text 'are chosen for

their practical importance rather than theoretical'. This is true with the exception of the final chapter which traces historically the migration of the Griffith Code from Queensland to other parts of the world.

The main focus of the book is on the Criminal Codes of Queensland, Western Australia and, to a lesser extent, the Northern Territory and Papua New Guinea, all of which have codes based on that prepared by Samuel Griffith in 1897. This aspect makes the book of less relevance to other Australian jurisdictions such as Tasmania.

Chapter one focuses on the extra-territorial jurisdiction of the courts. This is of practical relevance in this age of modern travel and more particularly so in a federated country like Australia where the laws of one state may be substantially different from that of another. Professor O'Regan illustrates the point by examining Sections 12 and 13 of the Queensland Code.

Chapter two deals with Double Punishment and Double Jeopardy, contained in Sections 16 and 17 of the Queensland Code. Professor O'Regan does well in this chapter by steering the reader through the maze of cases that have developed in Queensland and Papua New Guinea on this matter.

A question that often arises when interpreting Code provisions is to what extent it is permissible to resort to the common law as an aid in interpretation. Chapter three of the book details the common law defence of timely countermand or withdrawal. The analysis reinforces the proposition that resort is permissible only where an inconsistency will not result. At common law a party to a crime may escape liability by relying on the defence of timely countermand or withdrawal it if can be shown that, prior to the committal of the offence, he withdrew from it in a manner effective to undo his previous involvement. The Queensland complicity provisions are discussed in light of relevant case law. The position of the defence in Tasmania is considered in a special section, with the writer concluding that in Tasmania, like Queensland, given the format of the complicity provisions, the defence has no independent operation. Further, Section 8 of the Tasmanian Code (there is no Queensland counterpart), which specifically preserves common law defences not altered by or inconsistent with the Code, cannot be used to incorporate this defence into Tasmania, because of its inconsistency with Sections 3, 4 and 5.

Chapter four of the book, entitled Sudden or Extraordinary Emergency, deals with Section 25 of the Queensland Code. The Section appears to have little independent operation because other defences such as compulsion, provocation and self-defence may apply to many of the common circumstances in which necessity or stress cause a person to act. However, O'Regan believes that the Section may have more operation if it is used conjunctively with Section 24 (Mistake), if an accused honestly and

reasonably believes there to be a sudden or extraordinary emergency. He concludes that the latter part of the Section that requires the accused's act be such 'that an ordinary person possessing ordinary power of self-control could not reasonably be expected to act otherwise', would be satisfied, for example, in a case where mountaineers roped together slip and the man at the top holding all their weight has to cut the rope and let the others fall to their death in order to save himself.

Chapter five contains some very relevant comments on Immature Age and the capacity of children to commit crimes. What is interesting about this chapter is its heavy reliance on Papua New Guinean case law to show that capacity must be assessed according to the particular customs of the community in which the accused child lives. O'Regan suggests that the approach in Papua New Guinea could be relevant in Australia in determinations involving Aborigines 'who have retained and continue to live by conventions of their native land' (p66). It is perhaps unfortunate in his discussion of the third paragraph of Section 29 (Tas; S18(3)), which he refers to as a 'useless anomaly', that Professor O'Regan does not consider the recent amendment made to Section 18(3) of the Tasmanian Code by the *Criminal Code Amendment (Sexual Offences) Act* (1987), which has lowered the age at which males are presumed conclusively to be incapable of having sexual intercourse from 14 to 7 years (in Queensland it remains 14 years). He does, though, make some interesting comments about the role of children as parties to sexual offences and in attempted sexual crimes.

Chapter six outlines Sections 271-2 of the Griffith Code which draws a distinction between self defence against unprovoked assaults and provoked assaults, the latter affording less protection to the accused. The complicated inter-relationship between these Sections and Section 268, which defines provocation, and Section 269, which states that provocation is a defence to assault, is handled well by O'Regan, who sets them out with specific sub-headings. He points out that these sections do not cover tribal fighting and anticipatory defensive action. But it is his discussion of the requirement in Section 272 that the accused must, before defending himself, decline further conflict and quit or retreat, that reminds the Tasmanian reader of the difficulty that used to be encountered in this State in the interpretation and practical application of the defence prior to the repeal of Sections 46-9 by the *Criminal Code Amendment (Self Defence) Act* (1987). Such difficulties centred around ascertaining if the accused or the victim had instigated the assault, the requirement that the belief in the necessity to defend oneself be based on reasonable grounds, determining whether the defendant retreated and determining how to adequately direct a jury in light of the complex provisions. O'Regan believes that the Queensland provisions 'complicate a simple inquiry: whether the accused in taking the defensive action he did, acted reasonably (p 95) and that the new Tasmanian provision (Section 46) contains ... [a] simple and precise test [that] has much to comment it' (p 95

fn 89). The analysis here would have been enriched further had the author considered why the Tasmanian Parliament amended Section 46.

Chapter seven briefly focuses on Section 31(3) of the Queensland Code and suggests that the provision has little independent operation, given the existence of Sections 271-3 of the Code (self defence).

The final chapter describes the migration of the Griffith Code to Western Australia, Papua New Guinea, North and South Nigeria, Israel, Cyprus, Fiji, the mid-Eastern States of Africa and recently to the Northern Territory. This chapter, which details the modifications made in certain countries due to policy considerations, also covers the reluctance of Australian courts to rely on case-law from these other countries in interpreting sections of the Code.

In conclusion, *New Essays on the Australian Criminal Codes* is well written and informative. The book is a valuable reference source on those Sections of the Criminal Codes discussed. One minor criticism may be that the topics addressed in the first book were not updated in this text. Certainly, the defence of intoxication ought to have been reconsidered in light of the decision in *R v O'Connor* (1980) 146 CLR 64, and similarly the defence of mistake following *R v He Kaw Teh* (1985) 157 CLR 523, should be reconsidered. Perhaps Professor O'Regan is saving his discussion of these and other areas for his third text on the Australian Criminal Codes.

Gaye Lansdell

STUDYING LAW

By Christopher Enright

Branxton Press, 2d ed, Sydney, 1987

Since the early 1970's there has been a steady, but marked, increase in the number of books on the market which provide an introduction to law or the study of law. This growth may be due, for example, to the availability and seeming popularity of legal studies courses. It may arise from citizens' awareness of the necessity to understand the law to survive in today's world or simply result from students' needs for theoretical and practical information about the law which will enable them to pursue careers in law and other related disciplines. Whatever the reasons for the

increase, however, these introductory law texts are as diverse in approach and content as the audiences for whom they are produced. Despite this rather recent proliferation of materials, *Studying Law* by Christopher Enright is a welcome contribution: it offers a sound, basic foundation for students studying law as part of a law degree or other tertiary level educational qualification in Australia and New Zealand.

There has been an increasing recognition of the need and desirability for University legal educators to provide law students with more than a theoretical knowledge of the law. Law students must be able to undertake the rigours of legal training. They must be encouraged and guided to develop study and examination skills, become proficient in legal research and writing, and be able to read, comprehend, translate, discuss and apply their theoretical learning. Many of these skills and techniques have not been adequately addressed in the introductory legal literature. Some texts which do adopt a more practically oriented approach to the study of law, however, often ignore, overlook or neglect the more analytical or theoretical dimensions of law which any programme of legal education must include.

Attempts to actively marry theoretical and practical approaches in the production of introductory legal texts often prove unsuccessful, perhaps because of the seemingly innate difficulties in balancing and incorporating such apparently inconsistent or incompatible educational aims. Nevertheless, in the preface to the first edition of *Studying Law*, Enright outlines his attempt to integrate these approaches. By dividing the content of the book into four main types of materials - information, theory, criticism, and technique - Enright tries to bridge any gap which might appear if the introductory study of law is undertaken in a compartmentalized fashion. His underlying educational philosophy, that the learning process is a 'constant interplay between being told and finding out, between instruction and practice, and between counsel and doing'[1], is evident throughout *Studying Law*.

The chapters on common law and legislation, for example, are supplemented by diagrams, flowcharts, layouts, a sample case and several examples of statutes. Thus, the reader's understanding of the legal process, cases and statutory interpretation is developed through reference to these visual learning aids. The appropriate use of tables readily introduces the reader to abbreviations of the titles of journals and law reports as well as commonly used legal words and phrases. Each chapter concludes with references to further readings on topics covered within it, which is essential in any introductory reading materials in law. The use of the second person form of address, which often facilitates learning at introductory levels, creates a sense of immediacy and intimacy between the reader and author. Thus the overall impression given by *Studying*

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[1] Enright, C, *Studying Law*, Branxton Press, 2d ed, Sydney, Preface to First Edition.

the reader and author. Thus the overall impression given by *Studying Law* is that law is something of interest which can be enjoyed and, more importantly, can be mastered.

The content of the book covers four main subjects: the legal system; common law, legislation and other sources of law; study and examination technique; and the nature of law.

The first outlines various government and legal institutions and their associated personnel. The second, which encompasses the bulk of the text in seven chapters, provides a basic introduction to common law and legislation and incorporates useful advice on reading cases and interpreting statutes. The main contribution of the book is in Enright's lucid and thorough discussion of these sources of law, which includes a chapter on executive instruments and segments on other sources of law which are not commonly encountered in basic introductory materials (eg Maori Law, Aboriginal Law, Industrial Awards, European Economic Community Law, etc). Unfortunately, although the division between primary and secondary sources is adopted in the discussion of legal sources, it is not employed consistently throughout the text. This slight detail can be easily remedied, however, by minor adjustments to chapter headings and organisation.

The third subject of study focuses on the practical skills involved in 'traditional' and computerised legal research, and study and examination technique. The author's awareness of the number of factors which must be considered when students assess their study and examination patterns is reflected in the sound advice offered in the chapter devoted to study and examination skills.

The final chapter of the text discusses law from a theoretical perspective. Although the complexity of the phenomenon of law is mentioned in passing in the first chapter of the book, no guidance is given about the parameters of the study. Even though some teachers disagree about the appropriate timing for discussions of the nature of law in an introductory law programme, students' understanding of the scope of their study may improve if they are given a glimpse of the nature of their undertaking early in their course.

In the preface to the first edition, Enright notes that *Studying Law* is merely a beginning in the long process of legal education. Although he acknowledges that teachers may wish to consult other materials to supplement his text, unfortunately the index and structure of the book make its use as a companion resource somewhat difficult. The index is sketchy and the table of contents is perhaps unnecessarily brief: for example, references to the discussion of the reception of law in Australia or the Australia Acts is not readily accessible through use of the index or table of contents.

Nevertheless, within the confines that Enright sets for himself, *Studying Law* is a useful, educative text for students wishing to learn about the law: it incorporates a theoretical perspective in a 'hands on' learning framework and it conveys basic introductory information about the law while developing students' critical legal faculties. Thus it does reflect that learning is in fact a constant process which integrates information and action.

MJ Le Brun.

BOOKS RECEIVED

Carter Dr J *etal* (Eds), *Journal of Contract Law*, Butterworths Pty Ltd, $69.00 (introductory issue - three issues per volume) $86.00 for subsequent volumes.

Chisholm R, *Preventing Accidents to Children*, Allen & Unwin, Australia, $14.95 (limp).

Enright C, *Studying Law*, Branxton Press, Sydney, $27.00.

Finn PD (Ed), *Equity and Commercial Relationships*, The Law Book Co Ltd, $54.00.

Galligan B, *Politics of the High Court*, University of Queensland Press, $24.95.

Garner BA, *A Dictionary of Modern Legal Usage*, Oxford University Press, $65.00.

Greig DW and Davis JLR, *Supplement to The Law of Contract*, The Law Book Co Ltd, $12.50 (limp).

Loveday P and McNab P (Eds), *Australia's Seventh State*, The Law Society of the Northern Territory and the North Australia Research Unit, the Australian National University, $12.50.

Sykes EI, *Australian Private International Law*, The Law Book Co Ltd, $95.00 (hard cover) $69.50 (limp).

Teh G and Dwyer B, *Introduction to Property Law*, Butterworths Pty Limited, $29.00 (limp).

Thomas, Hon Mr Justice T, *Judicial Ethics in Australia*, The Law Book Co Ltd, $25.00 (hard cover).

Tilbury M, Noone M and Kercher B, *Remedies: Commentary and Materials*, The Law Book Co Ltd, $79.50 (hard cover) $59.50 (limp).

Inclusion in this section does not preclude review in a subsequent issue.