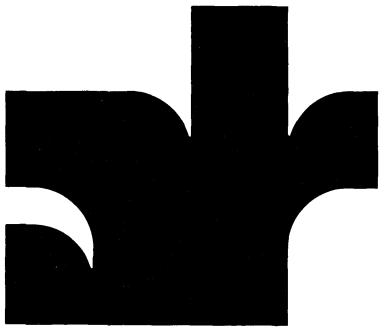

BOOK REVIEW

A J Harding **PUBLIC DUTIES AND PUBLIC LAW** (Clarendon Press Oxford 1989) $90.00 ISBN 0-19-825607-8

This new book on administrative law deals with the recent developments in public law by virtue of which Courts have, in the last thirty years, gone beyond the older authorities in compelling governments and other public authorities to act, and more rarely to act in a given way, or according to a given procedure.

The older law was well summed up by Dixon J in *Swan Hill v Bradbury* (1937) 56 CLR 746 at 758 where he said, in relation to a building application under a by-law: 'So often as he could show that the refusal of approval arose from reasons foreign to the discretion given to the authority, he might by mandamus enforce a reconsideration of his case. But he would never be able to compel the council actually to decide his application in his favour.' That is still in many areas the law today. But Courts have come to realize more strongly the entrenched stubbornness of the bureaucracy, whatever the Courts might say in their judgments. As was pointed out some years ago, there were then twelve landmark cases in this area which had succeeded in the House of Lords. When they went back for reconsideration, the bureaucracy still won eleven of them (the exception was Crichel Down).

Faced with this, Courts all over the common law world have been trying to give the citizen more positive remedies in public law. It is this interesting development in the law which AJ Harding reviews in detail in his book.

His study of the authorities is very good. Unfortunately the book has had what looks to be a four year gestation from thesis to book. This means that while later authorities have been intercalated, some later changes by statutes and rules of court, and suggested changes in law reform reports are missing, or treated in less depth than they require eg in relation to administrative appeals tribunals.

If this book goes to another edition as its merits entitle it to do, I think that some consideration must be given to the other side of the coin when considering the increasing intrusion of courts and tribunals into administrative decision making. Delay and cost are looming more and more as arguments have been raised for confining within narrow limits, the activities

of review bodies, be they courts or tribunals. The decision making process is becoming more complex and lengthy as administrators seek to make their decisions review-proof. There is not yet a true system of precedent in relation to Tribunals. All of these matters need careful consideration, or impatient administrators will incite their political masters to abridge or deny rights of review where they can.

This book is an important contribution to the ongoing debate in public law and should be read by everyone interested in the subject.

The Honourable Acting Justice H Zelling

Rodney A Smolla, **JERRY FALWELL V LARRY FLYNT, THE FIRST AMENDMENT ON TRIAL**, New York, St Martins Press 1988

Professor Rodney Smolla is one of the most perceptive American scholars on the working of his country's defamation laws. Recently, his leadership of a distinguished group for the Annenberg Foundation has produced a blueprint for the reform of American defamation laws which seems likely to be as controversial in its own way as those made by the Australian Law Reform Commission in 1979. In the Annenberg report and now in his new book on one of the most celebrated American cases on defamation and related issues in recent years, he also shows a passionate reverence for the first amendment to the United States Constitution with its entrenchment of the rights of a 'free press'. The 'right to be disgusting' as it can be described, now enshrined in *Falwell v Flynt*, is a landmark decision, almost as outlandish in its content as the case where a Miss Wyoming sued Penthouse Magazine and, for a time, seemed likely to obtain damages in excess of $26,000,000. To Smolla, nevertheless, it is a vindication of high principle, rights which now can inordinately trespass on personal feelings, even the standing of so-called 'public figures', in the cause of free speech. Fortunately, this has no real comparison in Australia and other jurisdictions based on the foundations of English defamation law.

Smolla tells the story of the case with spirited, never flagging expertise, good touches of irony, essential studies of the two antagonists, the Reverend Jerry Falwell of the 'Moral Majority', Larry Flynt, the legendary, crippled publisher of Hustler magazine, the paragon of another world whose down market publication does not grace the shelves of Supermarkets and Drug Stores in Falwell's venerable home state of Virginia. But it is more than this. It is a tale of conflict between perceived 'good' and presumed 'evil', a clash in which the 'devil' incarnate in whatever form tests the core beliefs on American concepts of free speech and emerges victorious in the judgment of the United States Supreme Court; an acknowledgement it seems of the philosophical intent that the marketplace for ideas extends even to the protection of 'sleaze', no less to be welcomed because of this in terms of principle.

Stripped of the rhetoric which surrounds the First Amendment, the case in part as it dealt with purported defamation might have been disposed of conventionally in ways acknowledged elsewhere. A mock advertisement in Hustler magazine, simulating a real series for Campari and its 'first time' drinkers recalling this event, was transformed to activities of a different kind, portraying the leader of the Moral Majority as having a 'first' relationship with his mother at a tender age in an 'outhouse' behind their

home. It was pure invention as a tiny band of type at the bottom of the 'advertisement' revealed. Like Blesserhasset, the London Stockbroker whose possible association with an advertisement for 'Yo-Yos' was essentially laughed out of court, the Reverend Falwell could well have been non-suited on similar grounds; in context the 'advertisement' was unbelievable.

But Falwell did not solely rest his claim on this. He sought recompense for invasion of his privacy; the emotional shock he claimed to have suffered in having the mock advertisement brought to his attention; a ground increasingly favoured in the United States as an alternative or supplement to defamation in circumstances like this. Here again, perhaps more surprisingly, the Supreme Court upheld the transcendental operation of the First Amendment and left the plaintiff to return to Virginia without a cent from Larry Flynt.

The story, as Smolla relates it, is good reading in its own right, told with a zest rarely equalled in publications of this type. A description of the bizarre circumstances of Flynt's pre-trial examination, with the defendant chained to a prison hospital bed, is brilliantly told. Along the way, the exposition of the tactics of counsel, the description of the final hearing in the Supreme Court and much more provide valuable insights on the way American lawyers and courts go about their business. But there is more to it than this, some vital lessons for those in Australia and elsewhere who sometimes look perhaps too fondly at the working of the First Amendment, although the author may not have intended this. As much as anything the unfolding of the case from the moments of conception, as Smolla relates it, exposes the almost labyrinthine practices which now surround the working of American defamation law.

With the intrinsic importance of showing 'malice' or patent neglect before a 'public figure' can now recover in defamation in the United States, the surrounds of such litigation and notably pre-trial discovery has become a pre-eminent feature of these processes. Those in the Australian media who sometimes look across the Pacific for their solace in suggesting recasting defamation law in this country might perhaps have more qualms when they see how this operates in practice. The pre-trial discovery allowed of the innermost workings of the media, its private memos and more, the probing of the personal attitudes and thinking of reporters and news executives has often been a heavy but necessary price to pay for maintaining a semblance of balance between freedom of expression and the limited rights now accorded to 'public figures' under American defamation law. In its own fashion, it has not only helped to price out litigation in this context, with the costs of perusing thousands of documents and interviewing journalists and others, placing even the use of contingent legal fees in jeopardy, it has also helped to make litigation in this field as much subject to chance as it is elsewhere.

As the Annenberg and other reports on American defamation law have shown, the law on this on the other side of the Pacific is as much in need of reform as it is in Australia. It is no more satisfactory for the media than the private litigants who seek in some fashion or another to vindicate their reputations by traditional defamation law or other remedies, as the former American commander in Vietnam, General Westmoreland, found in his protracted and ultimately too costly litigation against the Columbia Broadcasting System. The efforts of the Star Chamber later transposed into the common law to provide the foundation of much of our modern

defamation law is now more than overdue for reform wherever it operates. Smolla's book helps strongly to confirm this; albeit even in the context of only one case. It also provides a salutary lesson in showing how not to proceed in changing defamation laws for those who seek a reasonable balance between vindicating freedom of expression and the protection of individuals from media exploitation, whether they are in public life or not.

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