

Emergency Powers, by H. P. Lee, Sydney, Law Book Company Limited, 1984, xl + 334 pp. \$50.

There is no set of provisions in either the Australian Constitution or in those of the constituent states controlling the allocation of legal powers during a national or state emergency. Nor is there a constitutional or overall statutory definition of what constitutes an emergency, or the conditions that must exist before a state of emergency can be declared. However there is little doubt that the civil authorities in Australia possess extraordinarily wide discretionary powers that can be relied upon to preserve the security and fabric of the nation in the event of such an emergency. These powers are scattered in a piecemeal fashion throughout the Constitution, the statute books, the common law and, of course, residual powers remain vested in the prerogative. These varied powers are applicable in different situations according to the type of emergency and to the nature of the required response. The haphazard quality of both the source and the scope of the emergency powers in Australia makes any attempt to present them in a cohesive and systematic way very welcome. When this is done in as thorough and learned a way as Dr Lee has achieved in his book *Emergency Powers* it is even more welcome.

Dr Lee has selected six distinct aspects of emergency powers to analyse; an examination of the Table of Contents reveals how these six areas combine to present a broad overview of the subject. First he examines the defence power under section 51(vi) of the Constitution and its relevance in peacetime as well as its use in war; chapter three looks at the prerogative power in relation to emergencies; chapter four discusses the maintenance of civil order and the mass of public order offences that are available to the authorities; chapter five contains a conspectus of special powers legislation in the various states and includes both special powers in the event of disruption to essential services and in the face of natural catastrophe or nuclear disaster; chapter six looks at the role of the military in assisting the civil authorities in an emergency and finally there is a discussion of judicial review of emergency powers. Dr Lee is concerned throughout with the problem of the maintenance of an equilibrium between the necessity for wide powers in the national interest and the corresponding threat to civil liberties. This concern becomes explicit in this final chapter where the Courts' role in judicial review of abuse of power is examined. This list shows that the book does not limit itself to situations where an emergency has been declared; disruptions to public order as discussed in chapter four can occur at any time and quite apart from any emergency situation. The book's concern is a practical one that presents the law and its interpretation rather than an analysis of its theoretical underpinnings.

Throughout these chapters Dr Lee presents clearly and concisely a mass of statutes, regulations and ordinances, as well as judicial interpretations of their exercise. These are supplemented by both official and unofficial reports. The increased willingness of the Courts to check governmental action through cases such as *Sankey v. Whitlam* and *Re Toohey (Aboriginal Land Commissioner)*; *Ex parte Northern Land Council* is welcomed and the prevailing judicial attitude compared with that in earlier cases such as the *Australian Communist Party Case*. In this respect, however, Dr Lee is too ready to let the judgments speak for themselves; more of his own analysis would have been preferred.

Although Dr Lee states that for very valid reasons he was not undertaking a comparative study of emergency powers, he incorporates some valuable comparative materials from other common law jurisdictions. In a number of areas there is little national authority so recourse to other jurisdictions for comparison and indications as to how the problem has been handled elsewhere can be useful, as demonstrated by the High Court itself in *Toohy's Case*. For example Dr Lee discusses the possibility of a residual legislative power in the prerogative in a time of grave emergency with reference to Pakistani judgments and uses a number of Malaysian cases in the context of preventive detention and review of the prerogative. By definition, emergency situations arise rarely (at least in Australia, although more frequently for reasons that are discussed at page 6 in many emergent nations) and in a context of high tension, where reasoned decision making can be threatened. It can therefore be beneficial if some of these problems have been given prior consideration with factual examples in a non controversial setting, at least to most Australians.

Although, as stated, emergencies are rare, the relevance of Dr Lee's book is demonstrated by developments that have occurred since its completion. These include the amendment of the Public Assemblies Act (N.S.W.) in 1984 and the restrictive interpretation of that Act by the Supreme Court in *Police Commissioner v. Allen*, the development of public interest immunity in *Alister v. R.*, the discussion of review of the prerogative in the *G.C.H.Q. Case*¹ and, of course, the renewed debate about the role of the State in the protection of resources and the threat to individual freedoms in the context of the British miners' strike 1984-5 and the Court hearings it spawned.

There are only minor criticisms of the book which reflect more on the reviewer's prejudices than on its quality. In the introduction reference is made to the growing relevance of international instruments in this field. The International Covenant on Civil and Political Rights is cited, in particular to show that under Article 4 states may derogate from their obligations under the Covenant "in time of public emergency which threatens the life of the nation". However the emergency must be proclaimed and certain rights cannot be abrogated. Some further discussion than just this introductory reference might have been useful, plus a list of other international conventions that might impact upon the handling of an emergency. One other, the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, is discussed in the context of the Bowral siege but there are also others, for example, those relating to hijacking. Further, an apparently increasing form of emergency is that caused by terrorist activities. Mention is made in particular contexts to terrorists, such as the Hilton Hotel bombing or the response of the Canadian Government to the 1970 terrorist events there, but there is no attempt to draw these together so as to determine whether special legislation should be passed to deal with this problem. Some legislation does exist, such as the Public Order (Protection of Persons and Property) Act 1971 and the Crimes (Internationally Protected Persons) Act 1976 but these deal only with specific situations or victims. There are of course major problems in legislating to deal with potential terrorist

¹ *Council of Civil Service Unions v. Minister for the Civil Service* [1984] 3 W.L.R. 1174.

activities, not least the definitional one, but some development and specific discussion of this area indicating the required executive powers and the ensuing problems might have been useful.

The various chapters of the book cover distinct topics. More cross referencing between chapters would have facilitated making the necessary connections. This is especially true where a particular case is discussed in a number of separate places.

Dr Lee is to be commended for providing an orderly presentation of an area of law that is essentially disorderly. This book should not be used only by lawyers; police, public administrators, civil libertarians and others who are concerned with the balance between state powers and individual rights within a democracy during, and again after, an emergency situation will find it invaluable.

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