# BOOK REVIEWS

## LAWYERS AND THE PUBLIC INTEREST

### A Study in Restrictive Practices

By Michael Zander (London School of Economics and Weidenfeld and Nicholson) xi and 342 pp. U.K. Price: 70/-.

This book is a description of, and an attack on, the restrictive practices by which the two branches of the English legal profession exploit the public. The Australian reader will find a certain satisfaction in the knowledge that many of the worst practices 'couldn't happen here.' In the states where there is a separate Bar he will be less comfortable and some of the criticisms have sufficient relevance to strike home to any lawyer. The arguments are taken from the author's evidence to the Monopolies Commission, which is examining restrictive practices in the professions, and he is to be congratulated for his fearless and self-denying outspokenness, before the Commission and in this book. The book covers all aspects of the two professions' restrictive practices: entry into the professions; transfer from one to the other; the circuit system; the abuses of barristers' clerks, fixed fees and marked briefs, refreshers, and lack of control of barristers' fees; contingent fees, retainers and collective briefs; the special position of Queen's Counsel; monopolies of audience in the higher courts which barristers enjoy; solicitors' monopolies of conveyancing; price fixing and prohibition of competition; restrictions on lawyers working for the poor; the rules against partnerships at the bar and between lawyers and other professional men; and most important and controversial of all, the divided profession, for which the author reserves the best passages in the book.

Mr. Zander's starting point is interesting.

> 'In striking the balance of advantage it is important that mere assertion of benefit is no substitute for evidence. Throughout this book the reader will have to decide whether the restrictive practices discussed are on balance in the public interest. In many cases there is no actual evidence either way—other than theoretical, *a priori* reasoning. In this case it is the case for the defence not the case for the critics that fails. The applicable rule of law provides that restraints of trade are unlawful unless they can be justified as being on balance reasonable and in the public interest. Until recently this principle was enshrined in cases that dealt only with trade or business, but in 1967 the courts applied it for the first time to the restrictive practices of a profession. (*Dickson*

> v. *Pharmaceutical Society of Great Britain* [1968] 3 W.L.R. 286; [1968] 2 All E.R. 686, H.L. (E) ) . . . Speculation or mere argument therefore is not enough to justify a professional restrictive practice; there has to be solid positive evidence.'

With sustained and level-headed criticism, Mr. Zander shows that there is no such evidence to support most of the practices which he finds objectionable. I doubt if any reader will agree with all his points. I thought that his plea for untrained advocates was a little far-fetched and supported by debating points rather than arguments. Mr. Zander, however, would no doubt retort that he saw his job to be to set out all the arguments on all the practices, whether he accepted them or not.

The whole is a sorry tale of self-interest, complacency and lack of social responsibility. In too many statements of the professional bodies there are clear indications of the worst characteristics of the English lawyer: complacency, chauvinism, rationalisation of self-interest, priggishness and a general mindless attachment to the familiar. One is left with the impression that the Inns of Court are as attuned to the demands which can properly be made by the people of England as the College of Heralds. The Law Society, on the other hand, is well aware of what is going on, and is grimly and astutely determined to preserve for its members their privileges and powers of exploitation to the last, vying with the Bar in its snobbery, and spending its members' money on public relations men to wean the public from its longstanding and wellfounded distaste for lawyers. The criticisms of the limitations on legal aid, and the paucity of advice given free to clients, even according to the claims of solicitors themselves, are telling. More individuals are given free legal advice by the "News of the World" Advice Bureau than by all the lawyers in England put together. According to Mr. Zander, the Bar lives in a cloud-cuckoo land, and its arguments are often humbug. He certainly does not (in Mr. L.C.B. Gower's unbeatable phrase) 'pander to the narcissism which goes with our self-complacency and self-deception.' His book may be polemical, but it is a Holy War, and one which Mr. Zander fights more fairly than his opponents.

Everyone who is committed to the improvement of the service lawyers give the public, and that should be all of us, will find much to stimulate as well as to shock him in this book. It is well produced, though I found about two dozen printer's errors, of which only two were of substance: on p. 45, n. 36 says that Juniors of four to ten years standing pay twenty guineas a year to the Bar Council. They in fact pay ten guineas. On p. 90 line 32, the second 'not' has intruded. Perhaps also it is not over pedantic to suggest that 'overly' be allowed only to American writers.

*D. Roebuck.*

## THE CONCEPT OF OBSCENITY

By R. G. Fox (Law Book Company, Ltd., 1967.) 193 pp. Price: $4.75.

In any argument about censorship in this country, there are to be found, as likely as not, the threads of two arguments, not one. The two questions that need to be carefully separated are: is the idea of censorship something which ought to be recognised as having a valid and necessary function to perform in society; and, should this particular piece of writing (play, film, drawing or whatever) have been censored? Most of the anti-censorship arguments seem to consist of producing particular examples of prohibition and using them to attack indirectly all restriction; the pro-censorship reply simply chooses different examples. Anything which could act to produce an improvement in the standard of this debate deserves to be greeted with enthusiasm. We all owe a debt, therefore, to Richard Fox for this excellent volume on the basic concept underlying all the laws, the machinery of inspection and prohibition, the hard work of judges, magistrates and Ministers of Customs, the public roar and thunder.

At the outset, it should be emphasized that this is a book about a concept, not a book about censorship. That explains why there is no reference to the laws governing the licensing of theatres, cinemas and public halls, and the extensive powers given thereunder to various public officers to control the performance of plays and films which might be thought to contain elements of obscenity. In the light of Fox's conclusion that obscenity 'does not depend so much upon the internal qualities of the publication as upon the circumstances of the dissemination' and his emphasis on the qualitative differences between the public-nuisance and private-consensual disseminations, one might have thought that the public places of entertainment were a proper matter for discussion. Television, which pours almost uninvited into the home, could be set against the very definite actions involved in a night at the theatre or cinema; but there is very little mention made of the extensive censoring of television material, and the powers under which this is done. But, as I have said, this is a book about a concept. The gaps can be filled by reference to Campbell and Whitmore, *Freedom in Australia* (1966), and there is no doubt that a work which sets out to be a complete and comprehensive survey of all the ramifications of censorship in Australia would be a weighty volume indeed.

Fox starts by grappling (as many have before him) with the definition of the words 'obscenity' and 'indecent,' but in the search for some kind of objective meaning, to grapple with the problem is to realise its unsolvable nature. Once you try to penetrate further than 'what the community standards will allow' (or any of the other relativist synonyms), there is no solid ground. An examination of the subject matter of obscenity (Ch. 2) indicates that there are some types of writing which are amenable to objective criteria and can be classified as pornography. But the obscene is not necessarily the

pornographic, although the converse has always been true. So all we can do is point to an umbral area and say, this much is certain. But objective limits are required at the edges if they are to be of any use, not in the middle. We are left with sifting through what the courts have done to see if we can find any guidelines. The decision in *Crowe* v. *Graham* (1968) 41 A.L.J.R. 402 was given after the publication of this book, and the author has subjected it to a comment (3 *Adelaide L.R.* 392) which encompasses it within the mainstream of his arguments. In that case, the High Court put very strongly the view that the test of obscenity is in what the contemporary community standards will allow, and that the task of determining these standards and their limits is in the hands of judges, not juries. We will not discover objective, verifiable criteria here.

It is clear that the courts are acting as custodians of the *bonos mores* in this area, which has the effect of invalidating a lot of the general discussion on the harm, real or supposed, that might be caused by obscene and indecent works. Before one can argue about harm, one has to be prepared to agree that proven harm is to be the basis for legislative and judicial action. In this area, as in others, we are far from accepting that position. Indeed, the recent examples of obscenity laws being used against excessive violence and the advocacy of drug-addiction have reinforced the custodial position of the courts. If the use of obscenity laws against sexual obscenity develops toward the position that blasphemous libel now holds, as Fox hopes it will, and if the values of the society continue to move in directions which are at the moment perhaps no more than tendencies, we may find ourselves at some time in the future repeating all the current arguments, but in relation to violence.

The major portion of the book consists of an analysis of the various Australian laws, Commonwealth and State, governing obscenity and indecency. There is a chapter on the early English law which deals with the necessary background for an understanding of the legislation, and several chapters on important topics that are common to the field in all jurisdictions—undue emphasis, expert evidence, and the various defences among them. One chapter, too brief to be more than a tantalising glimpse, traces the rationales of censoring obscenity by examining the types of harm it is claimed are prevented by such prohibition. More knowledge in this area is vital, especially in relation to children. We know very little of the impact of this type of material on children, and we know even less of the dissemination patterns which lead to children obtaining it.

I hope there will eventually be a second edition of this book, and that Fox will take the opportunity to examine the working of the National Literature Board of Review and determine whether it is

likely to have any effect on the interpretation of this concept. More and more of the censorship in this country is done by administrative bodies. This may produce totally different approaches and guidelines to the question of what the 'community' ought to ban, and will vitally affect any discussion which puts place and method of dissemination in a position of importance. In the meantime, this book is required reading for anyone concerned in any way with the problems raised by censorship and the effect this has on the development of our society.

*N. Reaburn.*

## DIVORCE, SOCIETY AND THE LAW

Edited by H. A. Finlay (Butterworth & Co. (Aust.) Ltd, 1969) 127 pp. Price: $3.50.

The essays which are presented in the symposium, ***Divorce, Society and the Law,*** were originally intended as special lectures for the 1968 class in Family Law at the Monash University Law School. The interest aroused proved to be so great that they were presented as a series of public lectures. These were very well attended, were widely reported in the Melbourne press, and their publication in this volume will enable them to reach a far wider audience. The introduction, written by H. A. Finlay, places the varying contributions in the context of the teaching of Family Law, and its importance to the welfare of society. Family Law is one of those areas of law which most deeply touch and concern the individual member of the community, in his personal and private relationships, and in his interest in the maintainance of one of the cohesive factors of modern society. Because it does concern the individual so deeply, because it involves strongly felt religious viewpoints and considerable environmental pressures, there is often great difficulty in achieving profitable and rational discussion within the community as a whole (as witness some aspects of the recent debate in the United Kingdom on the new matrimonial causes legislation). Because it is an area of law that is concerned with the governing and regulation of those aspects of the individual's private and personal relationships that are most likely to involve basic and elemental emotion, it is important that those who work within this area of the law should have some knowledge of the applicable behavioural sciences. And further, law which regulates the private and social relationships of people should be able to keep step easily with the changing nature of those relationships within society. (Although, do we really have any evidence to suggest that general disregard of a law which has become divorced from the reality of a contemporary situation produces the deleterious effects with respect to the rest of the law, as is all too often claimed?).

The essays cover a wide variety of topics, with a general emphasis on reform of the law. Two are by lawyers. 'The Broken Marriage—is

Modern Divorce the Answer' by Mr. T. A. Pearce, a Victorian practitioner, is an analysis of some aspects of the Matrimonial Causes Act which he would like to see changed or improved. He is particularly critical of the harm that might be caused by publicity, and the use of discretion statements. As quite comprehensive powers exist in the Act concerning the restriction of press publicity, and the availability and use of discretion statements, it is clear that the exercise of discretion by judges is what is being criticized. Although it is not stated, there is a clear link here with one of the reasons leading Mr. Pearce to favour a Family Court. One of the advantages of such a court is that it might be able to avoid an accusatory, adversarial approach to family matters. Is it this approach which leads the judges to exercise their discretion on publication so sparingly, and to allow discretion statements in most cases to lie open on the file? Yet judges do not seem to hesitate to use their powers in other types of cases; are their responses to divorce cases based perhaps on consideration of factors not mentioned by Mr. Pearce—the importance of open public courts, for instance? Could the introduction of Family Courts mean that society was reaching toward a stage where the details of divorce proceedings were of interest only to the parties themselves and the ubiquitous researcher? The effect of this essay is to give rise to a number of points in the law that will have to be subjected to the cold light of further discussion, and illuminated by the production of some empirical facts.

Mr. Justice Barber, of the Victorian Supreme Court, examines the background and legislative history of the present law, looks at some suggestions for further reform, including the English Divorce Reform Bill of 1967 (as it then was), and finally advocates the establishment of Family Courts. He stresses the need to accompany this with a thorough-going revision of all laws relating to maintainance, property rights and care of children, and the enacting of a new uniform code covering all these areas. The introduction of a Family Court is one of the general themes of the whole book, and it is a pity that there is not a detailed discussion of such a proposal. Much information on these courts can be found in the United States journals, but some examination of their work, and assessment of their effectiveness, from an Australian point of view would have been a welcome addition to the other studies.

For the lawyer, the most useful parts of the book will be the essays covering the behavioural science aspects of the problem. 'The Psychology of Marriage Breakdown' by Dr. Goding, and 'Marriage Counselling' by Mr. L. H. Harvey convey an interesting and informative insight into the types of problems that can lead to marital breakdown (including that most prevalent of modern diseases, failure in communication), and the ways in which marriage counselling can act to avert, or take advantage of, crisis. Professor Marwick ('The Comparative Sociology of Divorce') and Mrs. Benn ('Marriage Breakdown and

the Individual') place the problem of divorce and separation in the wider social context. Professor Marwick has drawn conclusions from his comparison of Australian divorce rates with those of other countries and cultures which suggest that we have not yet had to deal with the full implications of the changes in social patterns which affect divorce rates. Particularly pertinent is the thought that a rate somewhere between twelve and fifteen divorces per ten thousand population might be the necessary consequence of modern forms of social organization. Mrs. Benn, by detailing the aftermath of marriage breakdown in terms of economic deprivation, potential for delinquency in children, and so on, makes it quite clear that the questions posed go wider than mere reform of the grounds for divorce or changes in court procedure —the problem is one with wide social implications and must be attacked on a number of fronts.

This book is vital reading for any student or practitioner concerned with the subject of family law in its social context. It is often difficult for lawyers and law students to track down the results of social science investigations into matters that directly affect the law. With the publication of 'Divorce, Society and the Law' this task is made immeasurably easier.

*N. Reaburn.*

## AN INTRODUCTION TO AUSTRALIAN CONSTITUTIONAL LAW

By P. H. Lane (Law Book Company, Ltd., 1967) 131 pp. Price: $2.00.

## AUSTRALIAN FEDERAL GOVERNMENT

By P. E. Joske (Butterworth & Co. (Aust.) Ltd., 1967) 240 pp. Price: $7.75.

## AUSTRALIAN FEDERALISM IN THE COURTS

By G. Sawer (M.U.P., 1968) vii + 262 pp. Price: $6.50.

The authors of these three books on the Australian Federal Constitution need no introduction to anyone familiar with Australian legal literature. Professor Lane is the author of one of the standard student texts on the subject, and it is a little difficult to see the purpose of the concise *Introduction to Australian Constitutional Law*. It is certainly not an introductory book for students about to start a course in this subject. It is far too basic and elementary, and I refuse to believe that even first year students could be so ignorant of the structure of government in this country that they would need a book which commences by telling them that there are two systems of government, State and Federal, and indicating several of the most easily seen consequences of this. If this is not a book for law-students, is it a book for the non-lawyer man in the street, or perhaps for a third form civics class? And if it is one of these, will it be a satisfactory introduction? I fear not. Although it is its very elementariness that

makes it unsuitable for the law-student, it is not simple enough for someone who has no knowledge whatsoever of the areas it covers. The style in which it is written is straightforward and direct, but a large number of technical terms are used which are not explained—there is no definition of 'Constitution' for example. I would have thought that an introduction of this nature, written for people coming completely unprepared to the subject, could not afford to make assumptions about knowledge and would have started right at the beginning with basic definitions.

On the other hand, *Australian Federal Government* is a book that can be given to the student as introductory reading for a course in Constitutional Law. In a two-hundred page outline, Mr. Justice Joske spans the Legislative, Executive and Judicial arms of government, looks at the financial, industrial and commerce powers, and briefly indicates some areas which he regards as developing spheres of power. The extent of the examination varies from topic to topic, with greatest emphasis lying on those areas with which the author is no doubt most familiar—namely, the Legislature, the nature of the Constitution, the financial and industrial powers. Here, the book functions as a useful and exciting precursor of more detailed consideration. The other parts are, even for an introduction, too brief. Two and a half pages on the judicial power, for instance, cannot hope to give any indication of the complexities and subtleties of this area of the law. Similarly with the chapter on developing spheres of power: to cover subjects like defence, external affairs and acquisition of property in a couple of pages each is likely to give rise to the belief that they are clear-cut matters with no uncertain areas and no difficulties. This is compounded by the fact that, with one or two exceptions, there are no warnings to indicate any unanswered questions or unresolved difficulties that are not mentioned or discussed.

There are two further related criticisms which must be made. In his Foreword, the late Prime Minister, Mr. Holt, says: ' "Australian Federal Government" is not so much a legal textbook as a product of (the author's) long experience at the Bar, in national politics and as a member of the judiciary.' But the book does not go outside the confines which normally apply to legal textbooks, and to that extent it can be said to be a failure. It is becoming more and more important that Constitutional Law is studied in a way that does not separate it from those political and historical aspects that are so entwined in the development of its doctrines. Because of Mr. Justice Joske's experience in politics and law he would seem eminently suited to going some way toward placing the law in its context, but he has not done so. There are parts of this work which are shot through with indirect indications of first-hand knowledge of

the practices and procedures being described; it is a pity that nowhere is this knowledge brought to the surface.

Perhaps it is not done because of the attitude which he brings to his task. Unless it is part of an intentional policy to avoid leading the book into areas of law that can be regarded as contentious, and to bypass those controversies that revolve about the Constitution, there are some disquieting implications, concerning both the general and the particular. Can it be demonstrated that the ballot box is an effective way to remedy particular complaints or abuses? How can the Constitution be an instrument which is sufficient to protect the freedom of citizens when it is admitted that all the guarantees that are not economic in nature have been cut down by the Courts, in most cases to nothing? How close an examination can be borne by the 'new federalism,' composed as it is of 'happy co-operation' between an increasingly powerful central government and States striving to maintain significant independent revenues? And why, in the cursory discussion of the Brown and Fitzpatrick affair, is no mention made of the Report of the 1908 Select Committee on Parliamentary Privilege, and the failure to act on its recommendations?

At the end of his chapter on the Judicial power, Mr. Justice Joske remarks that '. . . the High Court has kept itself aloof from politics and shown responsibility.' To discover if this is really the case, we must turn to Professor Sawer's book, *Australian Federalism in the Courts*. This is the first volume of what promises to be a most important series; Studies in Australian Federation. It indicates not only a very definite link between the political attitudes of the judges and the positions taken on constitutional doctrines in particular cases, but that this link is of a nature not simply explained (and certainly not in terms of straight party politics) nor easily measured in statistical patterns the way the American jurimetricians measure the ideological positions of their judges. Whether the existence of this link (even if only in marginal form) shows a lack of responsibility is another question. Professor Sawer would seem to think that the irresponsibility lies in the fact that not enough attention has been paid to 'political considerations' and the consequent impeding of the ability of the Constitution to develop in a way that reflects the dynamics of the political development. His conclusions point to increasing use of extra-constitutional methods to achieve the ends of government.

What this book seeks to do is examine the development of Australian federalism seen from the viewpoint, principally, of the High Court. It looks at the Courts, their organization and procedure (including the political and historical pressures that led to certain developments in preference to others), the backgrounds of the judges, and the style of decision-making favoured by the High Court. It traces the way that

federalism has been approached as a legal principle, and the treatment of separation of powers as a fundamental constitutional doctrine. Professor Sawer brings to this task the erudition and perceptive quality that have made him our foremost commentator on the legal and political scene. The book is a worthy addition to any library.

*N. Reaburn.*

## BOOKS RECEIVED

*Asian Contract Law*—A Survey of Current Problems. Edited by David E. Allan, Mary E. Hiscock and Derek Roebuck. Melbourne University Press.

Joske, P. E.: *Matrimonial Causes*, 5th ed. Butterworth & Co.