Book reviews

INTRODUCTION TO THE LAW OF EMPLOYMENT, by Alexander Szakats, 2nd ed., Butterworths, Wellington, 1981, LI + 522 pp. (including index). Price $30.00 (limp bound). Reviewed by D. L. Mathieson.*

Dr. Szakats, who retired only recently from a Chair at Otago, is easily our most prodigious writer on industrial law. This is the second edition of a wide-ranging textbook, the first edition of which appeared in 1975. It covers an impressive range of topics which the author elects to call the law of employment. One of the many commendable features of the book is its concern with the everyday practice of industrial relations. Others are the depth of research which is displayed, and the readiness to suggest that the law should respond to today's pressing problems such as the development of a satisfactory regime for recognising redundancy and making redundancy payments, and the pressure exerted on our statutory procedures for settling disputes of interests and rights by the advent of new technology.

But it is doubtful whether Dr. Szakats has a clear conception of the boundaries of his subject. Most of the book relates to individual employment law — the law surrounding the contract of service and the relationship of employer and employee. There are, however, numerous excursions into collective labour law which the title does not lead one to expect. Would it not have been better to delete those parts of the book, where the treatment is necessarily superficial, and to concentrate on the formation, content and termination of contracts of service and all the necessarily allied questions? After all, Dr. Szakats is the editor of *Mazengarb* where the statutory provisions relating to (say) disputes of rights procedure and demarcation disputes are set out at length and commented upon. Had that policy been adopted there would have been space for a more extended and more acute analysis of the contract of service than we actually receive in Parts II, III, V and VI of the book. It would also mean that several chapters could disappear, e.g. much of Part IV dealing with safety, health and welfare requirements, Chapter XXX on Social Welfare, Chapter XXXII on the proposals of the Planning Council for an "active employment policy" and Chapter XXXIII which contains the author's controversial proposals for recasting the role of the Arbitration Court. While in a sense every part of industrial law is related to every other part, the proper role and function of the Arbitration Court is surely only very marginally connected with the contract of employment.

An author writing about any branch of industrial law must cope with several problems. The first and most obvious is that industrial law is rapidly evolving, formidable in its technical detail and largely statutory. Allied with this is the problem of deciding what audience should be addressed. Is it undergraduate

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students, trade union officials, legal practitioners or a combination of all three groups? The preface does not explicitly reveal the choice but in practice it seems that it is the last alternative which has been adopted, with its well known attendant perils. Whatever the intended readership, however, it seems reasonable to expect the author of a textbook to achieve a high level of explanatory power, separating important principles from highly technical details and giving adequate prominence to the former.

Measured against that criterion, parts of *Szakats* must be regarded as falling short. Indeed some passages are regrettably obscure. Some of the passages in Chapter 1, "Preliminary Observations", fall into this category, notably the contrast between contract and status as the basis of the employment relationship at pages 7-8. Some of the obscurity is unnecessary. At page 44, for example, Szakats asks the question: who makes the job offer, employer or employee? Is an offer made when the position is advertised in a newspaper or by some other method? What about notices on factory gates, "Workers Wanted"? Is this an offer? The true answer, it is submitted, is plain: a notice on the works gate seeking workers is always a mere invitation to treat. Szakats, however, maintains the impression that this simply answered question is a near insoluble problem, and actually suggests by implication the incorrect answer at page 47: "Provided that these notices constitute an offer at all, and not are (sic) mere invitations to make offers, the job-seeker in accepting the offer must comply with all these requirements" (namely requirements as to how acceptance must be communicated). Similarly, in discussing the various tests for distinguishing a contract of service from a contract for services, Dr. Szakats tends to confuse by speaking of the "totality test" as though it were a separate test whereas in truth whichever of the distinct but overlapping approaches one applies in attempting to separate the two kinds of contract it is clear that the courts are now committed to the task of examining a contract as a whole, as was recognised by Blair J. in *McMullin Holdings Ltd.* v. *Auckland Clerical Workers' Union*,[1] the passage being quoted at page 35.

The discussion on page 97 speaks in the present tense of the employee's action in tort without mentioning the abolition of the Common Law action by the Accident Compensation Act 1972 which, it is merely said, gives rise to entitlement for compensation. As a further example of obscurity this reviewer regards it as a rule of law admitting of no exceptions that "it is not competent for a worker to waive the benefit of an award by contract or by inconsistent conduct", a proposition asserted at the top of page 99 but immediately qualified by the proposition that "if the remuneration and benefits provided under the contract of service are not less favourable this does not apply". It would be much simpler, instead of erecting an exception which does not exist, to say that where in a wages recovery action the claimant has been paid as much as or more than he would have received under the award, he cannot recover anything. In that event, however, the award still applies and cannot be effectively waived.

There are a number of plain mistakes. It is false to assert, at least in the New

1 [1969] N.Z.L.R. 530.

Zealand context, that labour tribunals "have an unfettered discretion to do what is just and equitable".[2] There is no section 92 of the Judicature Amendment Act 1972.[3] It is not correct that the words "employer" and "employee" denote a "much wider relationship than the words "master" and "servant".[4] These two pairs are simply the modern and obsolescent descriptions of the same relationship. An unqualified preference clause does not, as is asserted on page 352, bring a contract to an end by operation of law for non-compliance with the requirements. If an employer refuses to dismiss when all the conditions precedent are satisfied he will simply be in breach of the relevant award. It is respectfully submitted that it is also erroneous to treat non-membership of a union bound by an instrument as a condition subsequent affecting the contract of employment, in any event saying that contradicts the proposition earlier maintained by Dr. Szakats that the preference clause does not "regulate" the employer-employee relationship.

This reviewer for one was disappointed by the treatment accorded to some well-known storm centres. The discussion of rights dispute procedure[5] is disappointing because it merely narrates the *AHI* case[6] without examining the problems which the Court of Appeal and the Industrial Court in that case bequeathed to us. The discussion of variation by agreement[7] is unsatisfactory: *why* was the variation held valid "without fresh consideration" in *Wallace* v. *Gray Limited*?[8] What is wrong with the simple analysis that, where an employer increases an employee's remuneration but the job content remains the same, the increased wages can be recovered because there *is* consideration, the implied promise to do the same work being consideration for the now higher wage? If that view is not right we are forced to the startling conclusion that an employee who is not paid his promised higher wages cannot sue to recover them when the promise is not kept, because of lack of consideration.

We should have received a clear guide through the complexities of sections 117 and 150. They are the sections dealing with unjustifiable dismissal and victimisation. Unfortunately, the method of attack chosen by Dr. Szakats engenders a sense of mystification. Moreover it is simply not true that "there seems to be a tendency to slide back to the common law concepts of wrongful dismissal and notice."[9] Despite the welter of cases cited, there is no discussion of the perimeters of the duty to warn before dismissing, or of the question whether a dismissal may be substantively justifiable but procedurally so unfair as to make it unjustifiable — but Dr. Szakats is certainly not to be criticised for failing to anticipate the decision of the Court of Appeal in *Auckland City Council* v. *Hennessey*[10] in which it was held that a dismissal may be held unjustifiable where the circumstances are such that justice

2 Page 17.
3 Page 113.
4 Page 11.
5 Pages 325 et seq.
6 (1977) Arb. Ct. 21.
7 Pages 338-339.
8 [1973] I.C.R. 117.
9 Page 404.
10 Unreported, CA 178/81, 29 March 1982.

or fairness requires that an employee be given an opportunity of stating his case before dismissal. The onus of proof issue under section 117 is confused by treating irreconcilable views expressed by the court at different times as reconcilable. The key is not to be found in distinguishing summary from other dismissals, because the court has clearly and correctly regarded non-summary dismissals as potentially unjustifiable, and the onus of proof cannot alter between the two.

Some of Dr. Szakats' very scholarly citations seem pointless. This reviewer adheres to the old-fashioned view that a proposition in the text of a book or article should be supported by the references cited in the footnote appended. The simple proposition that the court may "hear and determine demarcation disputes" is not supported by a long list of demarcation disputes cases;[11] it is established simply by reference to section 119 of the Act. To have attempted to show what if any principles emerge from the demarcation disputes heard since 1974 (if indeed the subject belongs to "employment" at all) would have been a task worthier of Dr. Szakats' analytical abilities than the furnishing of this unhelpful list of names of cases.

The index and the table of cases are excellent. For many this book will be invaluable as an aid in the construction of arguments, and as a means of locating relevant decided cases. A lawyer obliged to advise in any area which Dr. Szakats has discussed would be foolish indeed not to pay the most careful attention to whatever he has said on the point. I hope that there will in due course be a third edition, and that Dr. Szakats will see fit to remove the defects which cause this reviewer to temper his admiration with some strong criticism.

AUSTRALIAN CITIZENSHIP LAW, by Michael Pryles. Law Book Company Limited, Sydney, 1981, 271 pp. including appendices and index. A$24.50. Reviewed by K. J. Keith.*

This book is concerned with a basic question which all states must answer: who belongs to the state? Citizenship is a central legal and political institution. It determines, in large part, the right of entry into, and the right to reside in, a country. It is very often determinative of other important political rights. This book is concerned with that basic status. It is not, however, concerned with questions of immigration which are being reserved for a separate book. And it does not address in any extensive way the significance of citizenship in other areas. Dr. Pryles has included an interesting appendix which lists statutes referring to Australian citizens. He has not however made any extensive use of that material in the text. Rather the distinction which he draws at the relevant point[1] is between British subjects

11 See p.133, n.11.

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1 Pages 47-66.

on the one side and aliens on the other. That particular distinction is becoming less and less significant.

Before the law draws such consequences, it must first determine who is entitled to citizenship or British subject status. It must address basic questions. What significance is it going to give to the place of birth? Australia, as a country of migration, obviously is inclined towards granting citizenship to those born in Australia. This also was the Common Law, although important changes are being made at the moment in the United Kingdom citizenship law. The second question which faces the law maker is the significance to be given to the Australian citizenship of the parents of an individual. Should there be a right to citizenship by descent? Many legal systems, in one way or another, answer "yes". They then however go on to address important questions of limitation. So should citizenship be available by descent from the mother as well as from the father? Within the last ten years the Australian (like the New Zealand) statute has extended citizenship by descent to the citizenship of the mother. This change, which gets only a footnote mention in Dr. Pryle's book, is a response to arguments based on sexual equality and equal parental rights and responsibilities. It is also a reflection of the growing body of treaty obligations which Australia, along with other countries, has in the area of human rights and particularly in the area of sexual equality. That body of treaty law is not mentioned. A second question about citizenship by descent relates to its extent through the generations. Under Australian law there appears to be no restraint. It is possible for people who have no real connection with Australia at all, except that one of their forebears was born there, to retain Australian citizenship merely by registration. The question can be asked whether it is appropriate for citizenship to be so very widely available, first because the reality of the connection between such a citizen and the country of citizenship is very slender if it exists at all, and second because of the complications that arise from multiple nationality. New Zealand law, by contrast, does not allow citizenship by descent if the parent in question was a citizen by descent. The third main question faced by the law maker concerns the rules for registration of noncitizens as citizens. In what circumstances should people who do not initially belong to the community be allowed to join it? There again there are obvious connections with the law relating to immigration. Should distinctions be drawn between citizens from one group of countries and another? The law in Australia, as elsewhere in the Commonwealth, long did make such a distinction favouring people who came from Commonwealth countries. That distinction has now been abolished. What are the other relevant considerations? What is the appropriate period of residence? What is the appropriate test for character and absorption into the Australian community?

Dr. Pryle's book presents the information, or much of it, which is relevant to the foregoing set of policy questions. He does not, however, for the most part come to grips with these broader questions. One aspect of this failure is that he does not look at the treaties which bear on, and in some cases dictate, those policy choices. So Australia is party to treaties concerning the nationality of married women, statelessness, and racial discrimination; there is also a body of customary international law, however fragmentary, which regulates the grant and incidences of

citizenship. That body of treaty and customary law is part of the context in which a substantial study of citizenship law should proceed.

Another set of questions, to which Dr. Pryles does give rather greater attention, concerns the extent of the powers exercised by the executive, and the remedies and the controls which are available in respect of those powers. So the government, through ministers and officials, has extensive powers in respect of registration, deprivation of citizenship, and the issuance and cancelling of passports. Dr. Pryles makes interesting use of some Canadian material on the grounds for registration. That material raises two questions which might have been pursued. The first goes to the actual definition of the grounds in question: they are not exactly coincident with the Australian ones. The second, which is perhaps the more important, goes to the methods of control. That Canadian material is available because in the area of the grant of citizenship the government in Canada has conceded that independent tribunals have a part to play. There are accordingly available to those affected and to scholars the judgments of citizenship courts interpreting and applying the grounds for the grant of citizenship. But no such procedures are available in Australia. Should they be? Dr. Pryles does indeed give some attention to the possible role of the courts in reviewing the legality of actions taken by the minister, principally on the grounds that they have not followed fair procedures or that they have abused their discretion. He does not however raise the question whether that role might be extended to a statutory right of appeal on the merits. Nor does he give any attention to the possible part that the Australian Ombudsman might play in dealing with complaints in this area.

Much of the law relating to the acquisition of citizenship, especially by way of grant, and a good deal of that concerning passports is very technical. Dr. Pryles has done an admirable job in getting that material together and organizing it. At times, he has perhaps laboured the material somewhat. Thus, is it really necessary for the discussion of the very limited exceptions to the basic rule that birth in Australia confers citizenship to go on for nearly four pages? Again do we really need a six page description of the offences under the Passports Act, particularly given that that statute is appended to the book? The book is very up to date including statutes enacted in its year of publication. It is well printed and presented.

CRIMINAL LAW by Colin Howard. The Law Book Company Ltd., Sydney, Fourth Edition, 1982, lxi and 452pp. (including index), $46.50 hard cover, $32.35 paper. Reviewed by Stephen White.*

The appearance of a fourth edition of Professor Howard's *Criminal Law* is in itself testimony to its worth. But the three main respects in which this edition is fresh are not entirely satisfactory. Two of them involve discussions of fresh law, namely on duress and sexual offences, and the third involves a completely fresh presentation of the Victorian law of theft and related offences.

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To begin with the change in presentation. The authorship of the third edition was shared with Ian Elliott who contributed the section on the new Victorian law of theft. This law was based on and very similar to the English Theft Act of 1968 and came into force in Victoria in 1974. Mr Elliott's section of the book was based on an article which first appeared in the Melbourne University Law Review and, erudite though it remains, his discussion did not fit happily into a textbook where comprehensive exposition of the law must at least accompany, if not precede, conceptual criticism of it. This section has been completely rewritten by Professor Howard but disappointingly. There is now a systematic exposition of the main provisions of the law and a detailed discussion of almost the only issue over which litigation has been taken to appellate courts, namely that of the meaning of dishonesty. But this apart the section consists mainly of paraphrases of the Act together with occasional criticism of its draftsmanship.

Professor Howard criticises the Act's use of superfluous phrases in its definition sections such as "shall be regarded as" and "amounts to" when "is" or "means" would serve equally well. The former expressions, however, indicate that they are not the harbingers of the comprehensive definitions suggested by the latter, but of partial ones only. His criticism would be better directed to the Act's failure to provide comprehensive definitions.

Nor are Professor Howard's reasons for not examining the intricacies of the law convincing. These are that the English case law is forbiddingly complex and academic commentary on it exquisitely subtle and that the Victorian courts have departed from it on the one major occasion when they had a chance to do so. Now it must be admitted that the English courts handling of the Act is far from impressive but I fail to see how Professor Howard's reasons make unnecessary an explanation of the complexities that case law and commentary reveal and it is exactly to Professor Howard's keen intelligence and trenchant wit that one would hopefully look for suggestions about their resolution, whether in accordance with English case law or otherwise. The fact that two substantial commentaries on the English[1] and one on the Victorian[2] law already exist does not mean there is no room for more. Indeed the dearth of Victorian case law on the subject in itself calls for explanation. Supermarkets and self-service petrol stations have proved a popular forum in England for generating issues fit for the consideration of appellate courts and it is hardly credible that the facts of some of the English cases have not been reenacted in Victoria. Why is it that the experience of administering such similar legislation has been so different in England and Victoria? An attempt to answer this question would have done great service to those contemplating the adoption of similar legislation elsewhere. In the preface to the third edition of the book Professor Howard remarked on Mr. Elliott's "dedication to the study of statutory theft" being "an inspiration to all who observe it". Whatever it is that

1 J. C. Smith *The Law of Theft* (4 ed., Butterworths, London 1979); Edward Griew *The Theft Act 1968 and 1978* (3 ed., Sweet & Maxwell, London, 1978); this is not to mention the characteristically individual treatment of the subject in Glanville Williams *Textbook of Criminal Law* (Stevens, London, 1978).

2 M. W. Weinberg and C. R. Williams *The Australian Law of Theft* (Law Book Company Ltd., Sydney, 1977).

that observation of Mr Elliott's endeavours inspires, it is not, on the evidence presented here, emulation. One has the impression that Professor Howard is rather bored by the topic.

The other section of the book that has required considerable revision is that on duress. That this is so is very much a sign of the times. It is difficult to believe that before 1880 people were hardly ever subjected to duress but those who first drafted Criminal Codes for English and Australasian jurisdictions commented on how the dearth of authority on the topic made it impossible to be sure of the limits of the defence. In the third edition of his book Professor Howard noted seven Australian decisions on the Common Law defence, the earliest of which was in 1954, and two on the Code defences of compulsion. Since 1977 five more Australian cases have been reported, and since the publication of this fourth edition two more have been noted from Tasmania.[3] Although *D.P.P. for Northern Ireland* v. *Lynch*[4] had been decided shortly before the publication of the third edition it was then too early to say if the decision indicated the direction the Australian courts would take. *Abbott* v. *The Queen*[5] had not yet been reported. Now it appears likely that the position as stated in these two cases will be adopted in Australia and the hope, expressed in the third edition, that Smith J.'s statement of the law in *Hurley*[6] would be generally adopted seems likely to be fulfilled. Professor Howard's criticisms of the law of duress and compulsion and his suggestions for its development are compelling though one wonders at the wisdom of allowing duress to operate as a qualified defence only when so many are advocating the abolition of the qualified defence of provocation.

Duress is at present a prime example of how codification of the criminal law can impede desirable developments that are possible under the Common Law. The Common Law defence of duress has now moved beyond the frozen limits of the compulsion defences in Codes. One omission from Professor Howard's treatment of the Codes is any discussion of whether secondary parties to an offence can plead compulsion if as actual perpetrators of it they could not and whether the defence allowed to secondary parties is one of compulsion under the Code or duress at Common Law. The extraordinary Canadian decision of *Pacquette*[7] holding that under the Canadian Code the defence available was one of duress at Common Law was reported only after the appearance of the third edition. It is surprising that Professor Howard does not discuss whether its reasoning could or would be applied in Australia.

Finally there is the new law on sexual offences. The reforms in South Australia were noticed in the third edition. Now reforms in Victoria fall to be noted. Though the law is said to be stated as on 30 June 1981 it is a pity that Professor Howard did not stretch a point and mention the reforms in New South Wales, which

3 John B. Blackwood "Compulsion in the Code States: Recent Developments" (1981) 5 Crim. L.J. 89.
4 [1975] A.C. 653.
5 [1977] A.C. 755.
6 [1967] V.R. 526.
7 (1976) 30 C.C.C. (2d.) 417.

received the Royal Assent on 15 May 1981 but which did not actually come into force until 14 July of that year, for their complete abolition of the offence of rape coupled with their complete removal of a husband's immunity from liability for offences committed against his wife make these by far the most radical of all the Australian reforms.

No two of these reforms are identical and Professor Howard says very little about how these experiments are likely to work out in practice. A discussion of the ungainly South Australian rape-in-marriage legislation in particular would have been especially interesting from the pen of a member of the South Australian Criminal Law and Penal Methods Reform Committee whose proposals on this topic were rejected by the South Australian Government. Professor Howard's comment that the legislation is the only legislation in Australia to give full recognition to the facts of life within marriage suggests that he now approves of the change which formerly he opposed. In fact the legislation does not give the full recognition Professor Howard claims for it. If it did it would put liability for rape of a spouse on the same footing as that for non-spousal rape. The South Australian Government wanted to do this but was forced to compromise and hedge liability for spousal rape with restrictions that do not apply to rape generally. Furthermore because these restrictions apply both where the spouses are living together and where they are living apart the position of the separated wife has been made worse in South Australia than it is either at Common Law or in those Code and other jurisdictions where statute has permitted liability for rape of a separated wife. Nor is it true to say, as Professor Howard does, that the South Australian legislation awaits judicial interpretation. By the end of 1980 there had been at least two completed prosecutions for spousal rape, the second of which certainly raised issues about the meaning of the new legislation.[8] Like his new section on the Victorian law of theft this section of the book will also disappoint those interested in law reform.

Though the book does not match Smith and Hogan's *Criminal Law* for sustained analytical rigour, the book remains a useful and interesting work. It is unfair to suggest, as a reviewer in Law Talk has done,[9] that it claims to expound Australian and New Zealand law and then to criticise it for its inadequate treatment of the latter. While he has said that he hopes that his book has a general appeal, as indeed it must to any but the most parochial of lawyers, Professor Howard has never claimed that his book is a text on both Australian and New Zealand law. Nevertheless some New Zealand cases are cited and discussed. Given their inclusion it is surprising that *Kaitamaki*[10] is not mentioned by way of contrast with the Australian decisions which hold that withdrawal of consent by a woman after penetration by a man cannot turn an act of sexual intercourse into rape. The common origins and similarity of the New Zealand Crimes Act and the Australian Criminal Codes would make it relatively easy to extend the book so as to give a proper coverage of the criminal law in New Zealand where students are in sore

8 Duncan Chappel and Peter Sallman "Rape in Marriage Legislation in South Australia: Anatomy of a Reform" (1982) 14 Australian Journal of Forensic Sciences 51.
9 See Law Talk No. 147, 16 April 1982, 6.
10 [1980] 1 N.Z.L.R. 59.

need of a decent textbook on the subject. The first two editions of the book passed under the title *Australian Criminal Law*. The dropping of "Australian" from the title in the third edition was indicative of its author's belief in the book's wider relevance. The publishers would do students and lawyers in New Zealand great service by persuading Professor Howard to make the fifth edition a book on Australasian criminal law.

TRADE ASSOCIATIONS, FAIRNESS AND COMPETITION by Warren Pengilley. Monash Studies in Law, The Law Book Company Ltd., Sydney, 1981, xxvii + 247 pp. including index. Reviewed by R. B. McLuskie.*

Trade associations are an integral part of New Zealand's life. They range from the big federations, Federated Farmers, the Manufacturers' Federation, the Retailers' Federation, to a host of smaller ones which do not so regularly feature in the news media. In *Trade Associations, Fairness and Competition,* Warren Pengilley, a member of the Australian Trade Practices Commission, is more concerned with associations which more correctly fit the popular concept of an association whose immediate purpose is to protect the business and trading interests of its members. These also grow thickly on New Zealand soil and indeed feature in cases before the Commerce Commission and its predecessor, the Trade Practices Tribunal. The New Zealand Stock and Station Agents Association, the New Zealand Association of Bakers, the Hotel Association of New Zealand, the Fencing Materials Association, the New Zealand Master Grocers' Federation, are examples of trade associations focussed on particular products or very specific industries.

Pengilley acknowledges that, while the businessman can probably describe fairly accurately his ideas of what constitutes a "trade association", the law has been able to do this only imperfectly. He points out that some cases cited in his study involve quasi-judicial bodies established by statute rather than a trade association established without statutory blessing. However, the study basically deals with the latter class of trade association. As is evident from New Zealand experience, both organisations may be classified as "trade associations". Thus where the principles established in relation to the former are relevant, there is no reason, states Pengilley, for thinking that courts would generally not apply such reasoning to the latter. This may appear to be a large claim especially when one considers the variety of organisations which may be quite properly held to fall within this wider concept of trade association. In New Zealand a "trade association" could range from the New Zealand Football Association, a sporting organisation, to a producer board endowed with considerable statutory powers over, say, the meat, wool, or dairy trades. But it would be hard to argue in practical terms against the exclusion of these large statutory bodies from the definition of trade association. Therefore any study which ignores them must lack completeness. Mr Pengilley acknowledges that he is concerned mainly with

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the non-statutory association. A good New Zealand example of the type of organisation he is referring to and one which has been engaged in appearances before the Commerce Commission is the New Zealand Stock and Station Agents' Association. Apart from acting as a pressure group at government level on behalf of stock and station agents, it has also acted to regulate the business of stock and station agents to the end that its member representatives had agreed on and circulated to all members collective pricing agreements relating to the scale of fees members should charge for services. The practice met with the disapproval of the Commerce Commission so that now the rates are quite clearly stated to be maxima.

An association such as this is one which is the focus of Mr Pengilley's book. And indeed it is here that his drawing together of cases and statutory references together with an informed commentary gives this book its value. It is less apposite to statutory organisations and also to professional groups which are in most cases given a statutory licensing framework in this country.

The book, after considering the nature of trade associations and the problems raised by their activities, then considers the general law on the rights of admission to a trade association and the impact of the Commonwealth Trade Practices Act 1974 on the question of rights of admission. Expulsion is then considered from the viewpoint of the general law, and the Trade Practices Act. The author also discusses certain trade association activities including that very familiar one in New Zealand, recommended prices.

This is a book about trade associations, their nature and functions, and the legal framework within which they can act and includes attention to some aspects of administrative and constitutional law. For a variety of reasons, perhaps greater flexibility concerning membership and less emphasis on discipline, there is not a great body of New Zealand case law on admission and expulsion. Nor does the New Zealand Commerce Act 1975 or previously the Trade Practices Act 1958 go perhaps as far as the Australian legislation where the general law has been significantly affected by the Trade Practices Act in such matters as admission rights and related matters arising from the "exclusionary provision" in the Act.

The author notes:[1]

> The conclusion one reaches as to the effect of the "exclusionary provision" per se ban in the Act is that the sections imposing such ban may well have their weaknesses. It is for individual trade associations to assess their chances of a favourable court decision on the point of law if they are engaging in arrangements which may be only arguably outside the prohibitions of the section . . . However, even if a trade association escapes the exclusionary provision per se ban it still has not escaped the *Trade Practices Act*. The association will still have to consider . . . [t]hat even if the exclusionary provision sections are escaped, it is a different question entirely as to whether the second leg of s. 45 (the prohibition on arrangements which substantially lessen competition) will be escaped.

The author quite rightly notes that trade associations do occupy a position

1 Pages 35-36.

where they can greatly influence the competitive ability of those in the relevant industry. A denial of membership may be a severe economic blow to the competitor or potential competitor. He considers the obligations of trade associations under competition law to non-members as well as their obligations to admit members. In each of these areas he acknowledges that some conjecture is necessary. There are no Australian court decisions on the subject at all and the only real guidance comes from United States decisions and decisions of the Australian Trade Practices Commission and Tribunal.

He compares British and American attitudes to competition law and finds a parallel with American and Australian attitudes. A. D. Neale[2] is quoted as follows:[3]

> In general the possession of power by established authorities arouses a much lesser degree of anxiety or resentment in Britain, where the emphasis is much more on the use of power.
> Whereas American institutions often appear to be designed to hamper the exercise of power, ours are designed on the whole to facilitate it, though great importance is attached to protecting minorities against its abuse and elaborate safeguards are adopted to this end.

Pengilley concludes that it would be surprising, if Australian court decisions relating to trade associations (as a form of "established authority") did not reflect to some extent the above view. "It must be remembered in applying United States precedent that Australian and United States statutory and constitutional laws vary quite dramatically".[4] He adds that competition cases in the United States are brought under a wide variety of statutes with no equivalent in Australia and in a constitutional context which is not applicable there. So that while principles can be extracted from United States determinations, it is relevant to consider in each case what United States statute or constitutional position is relevant and whether these aspects affect the application of the decision to Australia.

Just as important in this context, however, is something Mr Pengilley had adverted to earlier and this is the economic and sociological background which shaped United States attitudes to competition policy and anti-trust law. This is not the place to examine the historical forces which mobilised to strike down the 19th century combinations and monopolies in steel, railroads, oil, chemicals etc. in the United States. The reaction by states and federal legislatures and the courts while often ineffectual was nevertheless based on a strongly felt premise that competition and free play of market forces was good and anything that prevented it bad.

On the other hand in New Zealand and perhaps to a lesser extent in Australia very differing considerations have helped shape legislation. The New Zealand Commerce Act 1975 acknowledges that competition may not be the answer, a realistic attitude understandable in a country where one machine in some circum-

2 *The Antitrust Laws of the U.S.A.* (2 ed., Cambridge University Press, Cambridge, 1970).
3 Ibid. 478.
4 Page 3.

stances can turn out sufficient of a product to supply the country's needs, where the need to husband resources may in some cases be paramount over the waste of capital and other resources which could result from free market competition. The intrusion of the state into industry and commerce in a variety of enterprises, the role of statutory producer and marketing boards, the operation of import and exchange controls all with apparently sound reasons certainly makes less relevant much anti-trust precedent from the United States.

As the Right Honourable Sir Kenneth Diplock noted in a lecture at the University of Chicago Law School in 1964:[5]

> If what I have to say has any relevance to the administration of antitrust law in the United States, it must be considered against the background of the differing historical approaches in the United States and the United Kingdom not only to restrictions upon competition in trade but also to the scope of the judicial function. At the date at which you were passing the Sherman Act to outlaw every conspiracy in restraint of trade, the House of Lords as the supreme judicial tribunal of the United Kingdom was developing the common law so as to render lawful, though not necessarily enforceable, all such conspiracies so long as they were prompted by the self-interest of the conspirators. During the lean years between the wars . . . restriction of competition became fashionable in the United Kingdom . . .
> The second difference in historical approach lies in our concepts of the judicial function. A written constitution based on the separation of powers . . . has the paradoxical consequence that the Supreme Court's function . . . tends to become one of determining public policy, which in the United Kingdom we should regard as a function of the legislature or of the executive subject to the legislature's control.

A number of New Zealand Trade Practices Appeal Authority decisions are quoted: *Re The Wellington Fencing Materials Association*[6]*; Re The New Zealand Master Grocers' Federation*[7]*; Re The New Zealand Council of Registered Hairdressers (Inc.)*[8].

There is discussion of *Stininato* v. *Auckland Boxing Association (Inc.)*.[9] In predicting that even trade associations not having a monopoly power to control livelihoods may in future feel the overview of the courts, Mr Pengilley cites *Stininato* where the New Zealand Court of Appeal based its jurisdiction not only on the basis that a person's livelihood was involved but also on the basis that "status and reputation" would be affected by the Auckland Boxing Association's decision. In *Stininato* a hearing of the applicant was considered basic to natural justice.

In Australia the Trade Practices Act has expanded on the position existing at general law concerning the right of a party to obtain membership of a trade association and the right of a non-member to have the association perform services for him. Such an expansion has been both in the area of coverage and in the area of qualification for membership. According to Pengilley where the Trade Practices Act has application the admission cases at general law and

5 "Antitrust and the Judicial Process" (1964) 7 J. Law and Economics 27, 27-28.
6 [1960] N.Z.L.R. 1121.
7 [1961] N.Z.L.R. 177.
8 [1961] N.Z.L.R. 161.
9 [1978] 1 N.Z.L.R. 1.

their limitations can probably be relied upon with little confidence as setting the scene for future court determinations.

Trade association is defined in the New Zealand Commerce Act[10] as meaning "a body of persons (whether incorporated or not) which is formed for the purpose of furthering the trade interests of its members or of persons represented by its members".

Under the Commerce Act[11] the unjustifiable exclusion from any trade association of a person carrying on, or intending to carry on, in good faith the trade in relation to which the association is formed, brings the practice within the scope of section 22 which gives the Commerce Commission the power to make orders against the practice.

For determining whether any exclusion is unjustifiable the Commission may examine, in addition to any other matters which it considers relevant, not only the application of any rules of that association but also the reasonableness of any such rules. Where any agreement is made by a trade association, section 23(8) deems the agreement to be made by all persons who are members of the association as if each were a party to the agreement.

Where specific recommendations are made by a trade association to its members concerning action on their trading conditions, the provisions of the Act are applied[12] as if membership of the association constituted an agreement under which the members agreed with the association and with each other to comply with the recommendations, notwithstanding anything to the contrary in the constitution or rules of the association. There is, however, a proviso whereby a member can in writing dissociate himself from any agreement made by the association and thereby exempt himself from section 23(8) and (10).

The widening of locus standi to give the Commerce Commission greater latitude as to who shall appear has perhaps contributed to more adversarial procedures. Organisations such as the Combined State Service Organisation have won for themselves the opportunity to represent consumer members before the Commerce Commission. Similarly organisations such as Federated Farmers have been engaged adversarily before the Commission with the Stock and Station Agents Association. In other words trade associations or organisations close to them are arguing against other trade associations.

One difference between what is happening in Australia and New Zealand is demonstrated by Mr Pengilley's list of grey areas. He states that from an evaluation of a number of submissions to the Trade Practices Commission it is clear that many trade associations feel they are unable to carry on a number of activities which might, in the community interest, be considered highly proper and be encouraged. He lists among the chief "grey" areas of trade association activities, matters which have never been under close scrutiny here such as the ability to

10 Section 2.
11 Section 23(1)(b).
12 Section 23(10).

exchange statistics and market information, the ability to utilise standard form contracts, the ability to standardise or certify quality products, the ability to enter into joint marketing, buying or promotional activity as well as a number of other matters.

The subject inevitably raises major questions of administrative law and it is a pity that Mr Pengilley either does not explore them or explores them in insufficient depth. Such concepts as the public interest and the activities of trade associations, justiciability and locus standi as well as the role of the courts and tribunals are very much relevant. A thorough discussion of the major matters arising from judicial oversight of trade associations is not really undertaken. It is not sufficient just to consider the impact of the general law on the matter of admissions and expulsions, important as these aspects are from the viewpoint of competition. But, given the somewhat restricted compass which Mr Pengilley imposes on himself he does provide a very useful survey of the matters he takes up.

A HISTORY OF CUSTODIAL AND RELATED PENALTIES IN NEW ZEALAND by Patricia W. Webb. Government Printer, Wellington 1982, 197 pp. including index. Price $12.50. Reviewed by Neil Cameron.*

New Zealand has recently begun to acquire the nucleus of a respectable body of historical literature on its penal systems. Mayhew's early informal history of the system up to 1924[1] has been fleshed out by unpublished work on the Hume administration,[2] the Crimes Amendment Act 1910,[3] the penal policy of the 1960s[4] and the custodial and other treatment of neglected and destitute children.[5] Published material is also available on such areas as transportation,[6] the early exercise of the prerogative of mercy,[7] the struggle to abolish capital punishment,[8] the

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1 P. K. Mayhew *The Penal System of New ealand 1840-1924* (Department of Justice, Wellington, 1959).

2 T. Y. Wilson *New Zealand Prisons 1880-1909: The Administration of Colonel Arthur Hume* (Unpublished M.A. thesis, Victoria University of Wellington, 1970).

3 G. G. Hall *The New Penology in New Zealand: Crimes Amendment Act 1910* (Unpublished LL.M. thesis, Victoria University of Wellington, 1975).

4 M. V. Stace *Penal Policy in New Zealand 1961-69* (Unpublished LL.M. thesis, University of Auckland, 1971).

5 J. Beagle *Children of the State; A Study of the New Zealand Industrial School System* (Unpublished M.A. thesis, University of Auckland, 1974); P. J. Whelan *The Case of Destitute, Neglected and Criminal Children in New Zealand 1840-1900* (Unpublished M.A. thesis, Victoria University of Wellington, 1956); J. A. Seymour *Dealing With Young Offenders* (Unpublished Ph.D. thesis, University of Auckland, 1975).

6 R. M. Burnett *Penal Transportation; An Episode in New Zealand History* (Institute of Criminology, Wellington, 1978) — Occasional Papers in Criminology No. 9.

7 R. M. Burnett *Executive Discretion and Criminal Justice; The Prerogative of Mercy: New Zealand 1840-1853* (Institute of Criminology, Wellington, 1977) — Occasional Papers in Criminology No. 5.

8 P. F. Engel *The Abolition of Capital Punishment in New Zealand, 1935-1961* (Department of Justice, Wellington, 1977).

development of the juvenile justice system[9] and the penal and administrative policies of the Hanan/Robson period.[10] While this material is, as one would expect, highly variable in quality and largely lacking in any attempt to link the developments under consideration to larger movements in New Zealand society, it is nevertheless of considerable interest and does at least provide a potential starting point for a proper social and legal history of the system. Furthermore excellent models for such a history exist in the overseas literature. What Thompson,[11] Hay,[12] Brewer[13] and many others have recently done for the historical study of crime and criminal justice generally, Ignatieff,[14] Foucault[15] and Melossi and Pavarini[16] have done for the prison system in particular, producing vivid, fully social accounts, well grounded in theory and tackling the task of explanation head-on.

Regrettably *A History of Custodial and Related Penalties in New Zealand* makes little use of the existing New Zealand material and none at all of the insights and methods of the more recent overseas work. On this count alone it is difficult to regard it as a significant contribution to our knowledge of the New Zealand system.

What this volume does provide is a fairly detailed account of the bare bones of imprisonment, probation and their variants. To do so the author draws heavily on official reports and parliamentary debates, largely ignoring anything that might be going on outside the cloistered halls of government. To be sure the outside world does occasionally break in — the Dunedin unemployed criticise the roadbuilding experiment at Milford Sound and are rebuffed,[17] the Governor does the same and is not,[18] newspapers opine (wrongly) on the significance of the abolition of borstal training[19] and so on — but this is filtered through the mesh of departmental and parliamentary perception and response. The law and its development provide the major focus, and the rather limited debates that occurred as each successive reform was introduced provide the sole context for this "history" of penalties.

In approaching the history of imprisonment and probation in this way Webb, formerly Chief Legal Adviser for the Department of Justice, seems to be very much

9 J. A. Seymour *Dealing With Young Offenders in New Zealand — The System in Evolution* (Legal Research Foundation Inc., Auckland, 1976) — Occasional Pamphlett No. 11.

10 J. L. Robson "Penal Polcy in New Zealand" (1971) 4 Aust. and N.Z. Jo. Criminol, 195; *Crime and Society* in R. S. Clark (ed.) *Essays on Criminal Law in New Zealand* (Sweet & Maxwell, Wellington, 1971) 113; "Prison Administration — The Problem of Maximum Security" (1974) 36(2) N.Z. Jo. Public Administration 1.

11 E. P. Thompson *Whigs and Hunters* (Allen Lane, London, 1975).

12 D. Hay *Property, Authority and the Criminal Law* in D. Hay, P. Linebaugh & E. P. Thompson (eds) *Albion's Fatal Tree* (Allen Lane, London, 1975) 17.

13 J. Brewer & J. Styles (eds) *An Ungovernable People* (Hutchinson, London, 1980).

14 M. Ignatieff *A Just Measure of Pain* (Macmillan, London, 1978).

15 M. Foucault *Discipline and Punish; The Birth of the Prison* (Pantheon Books, New York, 1977).

16 D. Melossi and M. Pavarini *The Prison and the Factory: Origins of the Penitentiary System* (Macmillan, London, 1981). See also G. Rusche and O. Kirchheimer *Punishment and Social Structure* (Russell & Russell, New York, 1939 — rep. 1968).

17 Page 96.

18 Page 95.

19 Page 53.

the victim of her professional background. As an ex-bureaucrat her view of history seems to belong to what can only be described as the "one-damn-thing-after-another" school. It is a view that one suspects comes naturally to a writer who has spent half a lifetime embroiled in the constantly shifting demands of legal work in a major government department. Nevertheless it is one which provides an inadequate base for effective history. Similarly Webb's lawyerly concern with the description and analysis of the legal structure of penalties, while plainly essential to any history of the system, leads her to ignore much of the reality of that system. Thus, each piece of legislation and its various permutations and reincarnations is described in detail. The lacunae and oddities are carefully pointed out. The future pitfalls are hinted at. But the ways in which the rules were implemented in practice and their meaning for those immured in the system are largely ignored. They surface only where a practical problem generates a departmental outburst or forces some further alteration to the structure.

As a result, what emerges is a detailed chronology of penal change which, while it does provide some contextual material and hence some basis for analysis, essentially trivializes the task of explanation. For Webb ideas and philosophies seem to emerge, undergo criticism and minor change, and pass into law. Some develop further, others decay. Some are good — at least as judged from the standpoint of the early 1980's — others, like the 1910 legislation, contain "oddities"[20] or are fatally flawed from their inception. They emerge from the Department or, more rarely, from the mind of the Minister. Sometimes they emerge virtually from thin air. More often they are seen as having been prompted by vague and largely undescribed overseas schemes and experience. Thus periodic detention is described as having come

> into being in response over the activities of the young hooligan or larrikin, the person whose offences are not specially serious but are shown by experience and the records to be likely to lead to worse crime unless the anti-social tendencies are checked in time.

and as owing "something to overseas schemes".[21] Similarly the Habitual Criminals and Offenders Act 1906 is described, somewhat unenlighteningly, as "an attempt to deal with the problem of the persistent offender, then as now recognised as one of the most serious and intractable problems in this field".[22] No other explanation is given for this legislation — which introduced the indeterminate sentence into New Zealand — except to quote a remark from the Minister to the effect that he hoped that it might have the effect of preventing the "influx of undesirables from New South Wales". A worthy motive, no doubt, but scarcely an explanation for the passage of this legislation, in the form it took and at that particular time. Even the Crimes Amendment Act 1910, which was to dominate the system for the next 44 years, is seen largely as the brainchild of Sir John Findlay, "much influenced by the system operating at Elmira"[23] to be sure, but still emerging pretty much out of the blue as the old system came, somehow, to be recognised as unsatisfactory.

20 Page 29 ff.
21 Page 183.
22 Page 19.
23 Page 26.

Indeed, it is this lack of even the most rudimentary discussion of the context of the changes that are being analysed that is so puzzling in a book that describes itself as a history. Administrators like Hume, Ministers like Findlay, Webb and Hanan, the anonymous Secretaries, the jailers, judges and prisoners who formed the system appear — if they appear at all — shorn of their background, beliefs and political affiliations. Thus watershed legislation like the Criminal Justice Act 1954 is described[24] in detail without it ever becoming clear who the principal actors really were, what they stood for or what parties they belonged to. Similarly the development of probation is analysed[25] almost wholly in terms of the powers and duties of probation officers without any mention of either the practice of probation and the contradictions inherent in it, or, more seriously, of the economic, social and ideological shifts in New Zealand society which accompanied its introduction and expansion. As a result of this sort of approach the process of penal reform comes to be presented as some sort of value-free search for the "best" penal method. Civil servants, penal administrators and politicians are seen as somehow combining to find the most appropriate ways of protecting society and, more recently, the offender. When conflict occurs it is seen simply as a polite clash over details — a disagreement within the consensus. Conflict, in any case, occurs very infrequently — a fact that, in a rather different type of "history", might have been seen as requiring some explanation. Any suggestion that the penal system and changes within it might be related to the shifts and crises occurring within New Zealand's particular brand of welfare capitalism, and that such an analysis might have some explanatory utility for the student of penal change, would be wholly alien to the picture presented here.

In short this is a book which contains much useful legal information but little historical analysis. It provides an official chronology of imprisonment, probation and related penalties but little feel for how those penalties worked in practice, were experienced by offenders or related to the wider concerns of New Zealand society. Students and members of the general public with little knowledge of the system will probably find it somewhat dull and uninformative. Such readers would still be best advised to start with Mayhew[26] and only go onto Webb if they wished to explore the legal background further. Readers familiar with the system and with some feel for its history already will get rather more out of this book but it still remains unlikely that they will gain any very significant new insights from it.

24 Chapter 2.
25 Chapter 6.
26 Op.cit supra n.1.