

thrown so demonstrably into the arena by the Costigan Report and the *Criminal Injustice System*.

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#### FOOTNOTES

1. F. Costigan, *Royal Commission on the Activities of the Federated Ship Painters and Dockers Union* (1984).
2. D. Chappell and P. Wilson, *The Australian Criminal Justice System* (2nd ed. 1977).
3. H. Packer, *The Limits of the Criminal Sanction* (1968).

*Safeguarding the Worker: Job Hazards and the Role of the Law*, by NEIL GUNNINGHAM, LL.B., M.A., Senior Lecturer in Law at Australian National University. (The Law Book Company Ltd, Sydney, 1984), pp. i-xxiv, 1-426 with Bibliography and Index. Paper bound recommended retail price \$42. (ISBN 0 455 20504 3).

*Guidebook to Australian Occupational Health & Safety Laws*, by ADRIAN MERRITT, LL.B., PhD., Barrister of the New South Wales and Australian Capital Territory Supreme Courts, Senior Lecturer in Law at University of New South Wales. (CCH Australia Ltd, Sydney, 1983), pp. i-viii, 1-525 with Case Table and Index. Paper bound recommended retail price \$41. (ISBN 0 86903 337 8).

The two books under review provide some much needed scholarly work on the body of law in Australia that purports to protect workers' health and safety. British law on this topic has had such standard commentaries as Redgraves (now Fife and Machin)<sup>1</sup> and the insight provided by reports of committees of inquiry such as that chaired by Lord Robens.<sup>2</sup> But in Australia the mish-mash of laws that has grown up at state and federal level, has been bereft of book-length commentary and critique. Dr Adrian Merritt's work provides an extended commentary on the current legal framework, and she focuses successively on (a) employers' liability at common law; (b) structure and scope of protective legislation — the old approach; (c) reform — proposals and achievements (up to the Occupational Health and Safety Act 1983 (N.S.W.)); and (d) breach of statutory duty. Mr Neil Gunningham's text is less of a handbook and more of an analysis.

It examines the role that the law plays in preventing workers from being injured and diseased, providing an overview of existing health and safety legislation in Australia. It also examines the strengths and weaknesses of this body of law, and considers the wider issues of law reform, and the social and economic arguments for and against State intervention in this area. We deal with Gunningham's text first.

In Part I, Gunningham provides an introduction to the field. He quotes case studies of accidents and accounts of life on the shop floor to indicate the grim reality underlying legal discussions of employer liability and responsibility. He introduces the role of law, and argues that "legal regulation, despite some important limitations, has a critical function to perform in curbing work hazards" (p6). The argument is simple, yet crucial. First, Gunningham notes that "accidents do not just happen, in the sense that their causes are unascertainable and uncontrollable . . . most accidents can be prevented." Secondly he disposes of the argument that "job injuries result from worker carelessness and that therefore the most sensible approach to occupational safety is to educate workers rather than to impose legal obligations on employers." Hence "it is employers who are directly responsible for most accidents and it is they who are in the best position to prevent them." Thirdly, he disposes of the notion that employers can be relied upon to take voluntary measures to safeguard the health and safety of their workers, on the economic grounds that "safety and profit do not invariably coincide. It is frequently cheaper for employers to allow accidents and disease to occur than it is to spend the money to prevent them." Therefore he is able to conclude that "enlightened self-interest and voluntary measures alone cannot be relied upon to ensure adequate standards of workplace safety. Some form of external pressure is necessary to force employers to recognise their responsibilities in this area." Gunningham checks off the available sources of "external pressure" — trade unions, economic incentives, and the law, and concludes that there is a role for all three. But crucially "the law is the only mechanism capable of compelling employers to meet their responsibilities for workplace safety."

This line of reasoning is by no means new — it goes back at least to the reports of the early Factory Inspectors and Medical Officers to the Privy Council in Britain in the nineteenth century — but it is essential that it be restated in these clear terms to justify *legal regulation of the behaviour of employers* directed towards enforcing a minimum standard of care which reflects prevailing community values. But if this argument is accepted, as it is

implicitly wherever legal standards of worker protection are adopted, why then do workers continue to suffer injuries and disease? Gunningham is unequivocal in his response. He states:

In the past, the law has failed to realise its potential as a technique of accident prevention. The law itself has been piecemeal and fragmented, it has not addressed some of the most serious hazards and it has relied almost entirely on voluntary compliance to the virtual exclusion of adequate enforcement mechanisms. These mistakes need not be repeated. (p.8)

Here then are all the themes of this book, argued succinctly in the first few pages. The rest of the book fleshes these out in considerable detail. The book is divided into four parts. The remainder of the Introduction explains the different types of safety law, and in particular the distinction between preventive and compensatory law, and it introduces the complexities of the Australian constitutional system.

Part II examines the long history of government attempts to deal with the protection of workers' health and safety, including a most valuable chapter on the origins of factory legislation in Great Britain. Again this material is not new, but it is brought together here in a succinct and compelling way, and shows just how fierce has been the resistance, in Australia as much as in Britain, to the notion that the law should set minimum standards of care.

Part III examines the present system of occupational health and safety law in Australia, looking successively at the newer style of legislation in South Australia, Tasmania, Victoria and New South Wales. It then looks at the law relating to factories, shops and industries, machinery safety, construction safety and existing workers' rights. This part is concerned with the current state of the law, but it is linked to the book's wider analysis, and so the law's fragmentary origins and its shortcomings are consistently pointed to.

Part IV is entitled "Towards Reform" and it canvasses such issues as : should the law rely on coercion or co-operation?; the role of government intervention and welfare economics; legal strategies for control, including regulation directly through statutory requirements, and indirectly through tort liability, a workers' compensation system, and taxes on injuries.

A number of specific recommendations are made as to how regulation may be improved, in the chapter "The Way Ahead". After the author's monumental labours in the earlier sections, one might have wished to see him be more specific and hard-hitting in these recommendations. He notes that the regulation strategy depends crucially on three factors: the setting of appropriate

standards; the design and application of standards; and the enforcement and administration of the legislation. Yet the discussion of these issues is patchy. Less than two pages is devoted to the development of standards, and only a footnote to the tripartite Health and Safety Commissions at state and federal level proposed in ALP policy, and since adopted in Bills brought before Victorian<sup>3</sup> and Western Australian<sup>4</sup> Parliaments, and recommended in the report of the Interim National Occupational Health and Safety Commission<sup>5</sup> and of the South Australian tripartite Steering Committee on Occupational Safety, Health and Welfare.<sup>6</sup> Admittedly these developments post-date the finalising of Mr Gunningham's manuscript, but they are the dominant developments of the past two years and one wishes that he would have shown more prescience in his treatment of this issue.

In the design and application of standards, Gunningham provides an excellent criminological account of fines, civil and criminal penalties, and such notions as the "equity fine", as well as a brief discussion of licensing. This discussion takes much of the heat out of the sometimes hysterical discussion of fines and imprisonment for breaches of health and safety regulations.

On enforcement and administration of the legislation, Gunningham gives an illuminating account of the role of an inspectorate and of the forces that operate on it to nullify its effectiveness. Gunningham's perspective is the welcome one of recommending clear-sighted measures for dealing with white collar crime (namely, negligent actions of employers towards their employees) and his discussion complements the more recent political debates in Australia over the Costigan Commission revelations and the proposed National Crimes Authority.

Finally, Gunningham devotes just over four pages to the issue of worker participation in health and safety. He calls for the development of a workers' "Bill of Rights" to enable them "not merely to consult and co-operate, but to have greater influence and *control* over the conditions under which they work." Again, given the widespread public debate over this issue, one wishes that Gunningham could have devoted more space to fleshing out just what such a bill of rights should include. The reader must look elsewhere for an extensive discussion of this issue, for example to the report of the South Australian Steering Committee, 1984.

In a final chapter, Gunningham looks at "Politics and Reform", and the extent to which the measures he recommends are being implemented. Here Gunningham's text is severely dated. He is burdened by a severe pessimism as to the prospects for unions taking up the issue of health and safety in any systematic

way — despite the overwhelming evidence of the past three or four years that it is becoming one of the Australian unions' biggest campaigning issues. He states: "Although trade unions are becoming more active in taking industrial action to secure the removal of specific hazards, such action is likely to be limited and spasmodic and a reaction to visible, dramatic and immediate threats to health." This statement is excessively harsh, and it is contradicted by his own acknowledgement that the unions are negotiating comprehensive health and safety agreements and developing systematic policies and bargaining postures on all aspects of the quality of the working environment. It is a pity that Mr Gunningham could not have revised his excessively pessimistic outlook during the long gestation of this chapter, for he notes that, in 1983, the prospects for reform were brighter than they had been for many years.

Despite these strictures relating to the recommendations for reform, Mr Gunningham's book stands as a towering achievement. It is the first major analysis of the role of the law in protecting workers from job hazards to be published in Australia, and thereby clears a lot of ground on which others can build.

The scope of Dr Merritt's book "Guidebook to Australian Occupational Health & Safety Laws" is necessarily more limited. It is designed primarily for practitioners of the law — in the courts, in the workplace, and the community. Dr Merritt eschews discussion of the social role of law and of the prospects for reform, but focuses instead on providing a detailed guide to the existing law, and a commentary derived from a reading of cases settled. As such, the book fills a gap long felt by health and safety practitioners in Australia, and provides us for the first time with an equivalent to the United Kingdom Redgraves guide to health and safety law.

The book contains four parts, treating in turn:

- (1) employers' liability at common law;
- (2) protective legislation — the pre-Robens approach;
- (3) protective legislation — post-Robens laws of South Australia, Tasmania, Victoria and New South Wales; and
- (4) breach of statutory duty.

Parts 1 and 4, therefore, have regard to common law actions and the notion of employers' duty of care and obligations towards employees. This is a puzzling inclusion in the book, for it concerns the protection of workers' rights to damages, that is compensation, rather than prevention of mishaps in the first place. As such, it covers much of the ground that has already been most

competently dealt with by Creighton, Ford & Mitchell in their text, *Labour Law*.<sup>7</sup>

Parts 2 and 3 consist of the exposition of the existing body of protective legislation in Australia, together with legal commentary. As already stated, this commentary is a valuable addition to the armoury of the health and safety practitioner in Australia. But it must be stated that the commentary is partial, and can only be seen as constituting a beginning. Much case law and experience in prosecuting offenders is absent from the commentary.

For example, if we turn to Dr Merritt's discussion of the employer's general duty of care spelt out by section 29 of the Industrial Safety Health and Welfare Act 1972 (S.A.), we find a lengthy technical discussion on the wording of the clause, but no mention of the fact that it has in practice been relied on by the South Australian Department of Labour inspectorate to secure numerous prosecutions. This makes it a uniquely successful clause in United Kingdom and Australian law on health and safety, and it is astonishing that Dr Merritt passes over this fact in silence. To take another example, Dr Merritt discusses the legal basis of the South Australian Industrial Safety, Health & Welfare Board in her section 827, but gives absolutely no data on the activities of the Board since its inception. These included references from the Minister relating to health and safety representatives, for example, and the detailing of rights of safety representatives to be included in employers' safety policies. These policies are discussed by Dr Merritt in her section 823, but her failure to refer to the activities of the Board makes her discussion of the issue incomplete. Again, the reader is referred to the report of the South Australian Steering Committee for detailed discussion of these points.

Dr Merritt's Guidebook stands as a most useful introductory exposition of the law on health and safety at work in Australia. This reviewer would recommend that the publishers, CCH, keep the book strictly up to date through issuing numerous editions, and that the authors of these subsequent editions expand the commentary where it is deficient.

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## FOOTNOTES

1. I. Fife and E.A. Machin, *Health & Safety at Work* (1980).
2. Robens Committee, *Safety & Health at Work* (1972).
3. Occupational Health & Safety Bill 1983 (Vic.), introduced October 1983 and withdrawn October 1984.
4. Occupational Health Safety & Welfare Bill 1984 (W.A.).
5. Interim National Occupational Health & Safety Commission, *Report* (1984).
6. South Australian Steering Committee on Occupational Safety, Health & Welfare, *Protection of Workers' Health & Safety* (1984).
7. W. Creighton, W. Ford and R. Mitchell, *Labour Law — Materials & Commentary* (1983).

*Breach of Confidence*, by FRANCIS GURRY, LL.M.(Melb.), Ph.D.(Cantab), (Clarendon Press, Oxford, 1984), pp.i-xxvii, 1-487, with Table of Cases and Index. Recommended retail price £40. (ISBN 0 19 825378 8).

The action for breach of confidence has recently become of great practical importance. Not surprisingly it has attracted the attention of writers of books<sup>1</sup> and of journal articles.<sup>2</sup> It has also been investigated by law reform bodies.<sup>3</sup> Dr Gurry's work is, however, the first book devoted exclusively to a consideration of the current English law of confidence. It is therefore an important addition to the literature on the subject, especially as Gurry's analysis of the law is exhaustive, stimulating and generally excellent. There are only a few portions of that analysis with which the present reviewer would take issue.

First, it is not correct to say that "(b)efore the Judicature Act of 1873 the common law courts were powerless to grant injunctions for breach of contract" (page 36). The common law courts had possessed the power to issue injunctions since the Common Law Procedure Act of 1854.<sup>4</sup> Historically this point may be of some substance, for if the common law courts were prepared to issue injunctions in the concurrent jurisdiction on a different basis to courts of equity,<sup>5</sup> any reluctance to issue injunctions in the auxiliary jurisdiction on the basis that there was not present an express or implied negative covenant<sup>6</sup> could have been overcome. The point would only be relevant today if it were assumed that: (a) the historical basis of the jurisdiction is important; (b) that basis had not been affected by section 37 of the Supreme Court Act 1981 (Eng.); and (c) different principles obtain in the concurrent jurisdiction. None of these assumptions