Book reviews

GUIDE FOR MEETINGS AND ORGANISATIONS by N. E. Renton. Fourth Edition, Law Book Company Limited, Sydney, 1985, xxiii + 343 pp. (including index and 9 appendices). Limp only A$12.50. Reviewed by W. R. Atkin.*

This is a practical book. Its subtitle is "A Handy Reference Manual for Members of Clubs and Societies and a useful Primer on Election Systems". While it is not aimed at lawyers, it will nevertheless be a valuable asset to lawyers involved in advising non-profit making organisations or directly concerned with the running of such bodies. It is the sort of book which a new chairman, or a person wishing to set up a club, or a minutes secretary could confidently be referred to. While the author is Australian, the book is readily appropriate to New Zealand and other jurisdictions.

Because of its aim, the book is sparsely footnoted. The law is mentioned but infrequently, (e.g. the chair has no casting vote at Common Law (paras. 110, 813), at Common Law a motion need not be seconded (para. 420), confirmed minutes are only prima facie evidence of what happened at a meeting (para. 1516)), but the bibliography at the end will point people in the right direction if more detail is needed. Much of the book relates to conventions about chairing meetings, moving motions and amendments, etc., handy hints on controlling debate, formulating constitutions and standing orders, and making major decisions such as whether to incorporate. Nine appendices provide for such matters as "Examples of Badly-Worded Motions", "Illustrative Extracts from Minutes", and "Model Standing Orders". Several up-to-date ideas are included, such as the suggestion that a constitution should have a "political neutrality clause" and that members should be able to participate in meetings by means of electronic communications devices. But on the other hand the author permits the usage "Madam Chairman" even though by the mid 1980s such an expression appears self-contradictory. (The author states that "Chairwoman" and "Chairperson" are to be avoided: para. 1554.)

The book is concisely written. It will be easily followed by the layperson and maybe of unexpected use for the professional.

* Senior Lecturer in Law, Victoria University of Wellington.

AUSTRALIAN FEDERAL CONSTITUTIONAL LAW by Colin Howard, Third Edition, The Law Book Company Limited, Sydney, 1985, lxxviii + 611 pp. (including index, table of cases, table of statutes, bibliography and the Commonwealth of Australia Constitution Act 1900 (U.K.)). Reviewed by D. C. Hodgson.*

It has taken the author, the Hearn Professor of Law in the University of Melbourne, thirteen years to produce the third edition of this work. Nonetheless, the wait would appear to have been worth it, at least from the standpoint of students of the Australian Constitution. As its title suggests, this book's primary, if not exclusive, focus is upon the federal Parliament, its laws and law-making capacity, and the federal judiciary, as opposed to those of the six Australian States. Not unexpectedly, substantial changes have been made to the content and structure of the book to take inventory of the numerous important developments since the publication of the second edition in 1972. Briefly, the major changes include the omission of the chapter on Federal Jurisdiction and substitution therefor of a new chapter on Parliament and Government (covering, *inter alia,* elections, the bicameral system and the deadlock procedure, the Governor-General and Parliamentary appropriation), the addition of material on the High Court's attitude to precedent in constitutional cases and its change in approach to constitutional interpretation, an expanded treatment of the law relating to constitutional amendment, and the modification of the external affairs power section to incorporate such recent politically-inspired cases as *Koowarta* v. *Bjelke-Peterson*[1] and the *Tasmanian Dams*[2] case. These two decisions illustrate the present High Court's willingness to adapt to changing circumstances against a back-drop of interpretation of the Australian Constitution by its predecessors which has generally tended to be legalistic and restrictive and, as such, neutral in meeting the special needs of a federal system of government.

The third edition contains a rich and up-to-date collection and analysis of High Court constitutional jurisprudence spanning eight and a half decades since the Commonwealth of Australia Constitution Act 1900 (U.K.) entered into force on 1 January 1901. In terms of this work's relevance to students of the New Zealand constitution, it may be of some interest to note that section 6 of the Commonwealth of Australia Constitution Act 1900 (U.K.) defines the term "The States" to include the colony of New Zealand in addition to what are now the six States. This reflected the possibility articulated at various stages of the federal movement in Australia during the 1890s that New Zealand might be included in the nascent Commonwealth. Such a possibility was never realized and Professor Howard's work accordingly contains not a single reference to a New Zealand case or statute and a mere two incidental references to New Zealand itself. This is not surprising given the fundamental structural differences prevailing between the Australian and New Zealand systems of government. New Zealand is a unitary State; Australia is federal. Unlike Australia, New Zealand lacks a written

* Lecturer in Law, Victoria University of Wellington.

1 (1982) 39 A.L.R. 417.

2 *Commonwealth* v. *Tasmania* (1983) 46 A.L.R. 625.

constitution in the narrower sense of the term and accordingly derives more of its inspiration for its constitution from the United Kingdom than from any other national system. Unlike the New Zealand unicameral legislative structure since 1950, Australia is a bicameral parliamentary representative democracy. Although the Australian Constitution is based upon the British system of responsible government, it is also modelled on the American conception of federation and the United States Congress.[3] Indeed, decisions of the United States Supreme Court have left their mark on Australian constitutional jurisprudence. The upshot of these differences is that the greater portion of Professor Howard's work will be of little or no direct relevance to New Zealand readers. Topics in point include inconsistency arising between Commonwealth and State laws, the ability of the Commonwealth and the States to bind each other with their laws and the perennial judicial struggle to determine the limits of Commonwealth legislative competence in relation to such important heads of power as taxation, corporations, external affairs and trade and commerce. For those of us following with interest the developments concerning the New Zealand Government's proposal to introduce a Bill of Rights, Professor Howard's work contains three scattered references to this topic in the Australian context and nothing in the way of a judgment on whether Australia should once more follow American precedent and adopt a constitutional bill of rights.[4]

Which portions of the book, then, can be commended to New Zealand readers? In the nature of a review of such a comprehensive work, it is possible to comment only on a limited number of subjects. Professor Howard provides a comprehensive and interesting exegesis on the law and practice of Australian constitutional amendment. The relevant provision, section 128 of the Constitution, prescribes *inter alia* that a proposed law altering the Constitution shall be submitted for referendum approval in each State and Territory. In terms of the track record of constitutional amendment in Australia, only nine proposals for amendment out of a mere total of thirty-seven such proposals formally put to the electorate have been passed since 1901. Such a dismal record the learned author refuses to attribute to an alleged natural conservatism in the Australian electorate but casts an accusing eye instead in the direction of the politicians.[5] Although New Zealand constitutional law is flexible, in theory at least, in that (with one qualified exception[6]) all New Zealand statutes can be amended or repealed by another statute by a simple majority of parliamentarians present and voting, Professor Howard's account detailing the practical context in which section 128 operates may be apposite in relation to Article 28 — the entrenchment provision — of the Draft Bill of Rights inasmuch as one wonders what the chances would be of a proposed amendment that did not command the support of the two major national

3 This is presumably the foundation of a recent description of the Australian system as the 'Washminster' system.

4 Despite the replacement of Senator Gareth Evans as Commonwealth Attorney-General, the proposed Bill of Rights for Australia would still appear to be considered a viable project albeit in a revised form under the present Attorney-General Mr. Bowen: *The Sydney Morning Herald,* 18 May 1985.

5 Page 571.

6 Electoral Act 1956, s.189.

political parties being passed at a referendum of the New Zealand electorate. For those who adhere to the view that New Zealand constitutional reform should include the monarchy and Governor-General, Professor Howard paradoxically observes that "the better the incumbent does the job, the less relevant is he or she to the government of the country"[7] and further charges that[8]

> Australia has enjoyed none of the governmental benefits of constitutional monarchy but only the disadvantages of an inflexible and anachronistic colonial institution. Whereas the powers and functions of the British monarchy have continued during the 20th century to evolve in accordance with changes in the function and practice of parliament and with developments in public opinion, the inherent rigidity of the Governor-General's office in Australia has not been modified significantly . . .

Professor Howard devotes an entire chapter to a discussion of the separation of powers doctrine. Under the Australian Constitution, the legislative, executive and judicial powers of the Commonwealth are respectively committed to different functionaries. This formal and rigid allocation has prompted a recent observation that the Australian system of government exhibits a great deal more in the way of separation of powers than that of New Zealand.[9] This statement must be qualified in light of Professor Howard's discussion. In terms of functionaries, the Australian Constitution codifies the British system of responsible government to the extent that members of the government must be elected to parliament. The formal appearance of demarcation under the Constitution concerning the executive and legislative branches is also misleading in terms of functions performed. Beginning with *Dignan's Case*[10] in 1931 and continuing in *Giris Pty. Ltd.* v. *Commissioner of Taxation*,[11] the separation of powers doctrine has been all but eliminated to the extent that grants by Parliament to the executive of power to enact subordinate legislation and of legislative discretions in the widest of terms have nevertheless been upheld by the High Court. The underlying reasons for not adhering strictly to the doctrine in the field of subordinate legislation would appear to be common to both Australia and New Zealand.

Although the reader's progress is occasionally impeded by the author's use of such concepts as "implied inherent legislative power", the third edition of this leading work may fairly be described as readable in style and perspicacious and scholarly in substance. It is required reading for New Zealand comparative constitutional lawyers.

7 Page 64.
8 Page 63.
9 G. Palmer *Unbridled Power?* (Oxford University Press, Wellington, 1979) 5.
10 *Victorian Stevedoring and General Contracting Co. Pty. Ltd.* v. *Dignan* (1931) 46 C.L.R. 73.
11 (1969) 119 C.L.R. 365.

TORT LAW by R. W. M. Dias and B. S. Markesinis. Oxford University Press, Oxford, 1984. 526 + xxxiv pages (including index and appendix). Price limp NZ$53.50.

INTRODUCTION TO TORTS by David Baker. The Law Book Co. Ltd., Sydney, 1985. 307 + xxxiv pages (including index). Price cloth A$37.50, limp A$21. Reviewed by W. R. Atkin.*

Literature on the law of torts has a long and well established history. The market has been dominated by such names as Clerk and Lindsell, Salmond, Winfield, Street and Fleming. To break into this market is no easy thing but Dias and Markesinis have produced an excellent text which might just achieve this.[1]

Dias and Markesinis offer an alternative style to that of the standard textbooks. Before each main subject there is a select bibliography, and no pride is lost by citing the works of academic rivals. Much more importantly, the authors explore the underlying policy implications of the law and surmise on its future development. This is important for at least two reasons. First, it brings the subject alive and makes it something more than a barren repetition of rules and cases. The book is therefore a joy to read. Secondly, it recognises that law does not exist in a vacuum. It is influenced by economics, social change and social philosophy. To ignore these angles is to blunt the law's effectiveness as a tool for meeting a range of human needs. Would New Zealand's accident compensation scheme have ever emerged if such factors as the social cost of accidents and the poor overall return of tort law as a method of compensation had been left out of account? The law is a means to an end, not an end in itself. Attachment to legal concepts "to the exclusion of the pressures that guide the way in which they are used, can distract lawyers from the real policy issues that lie behind them".[2]

So, the introductory chapter begins with "Tort at the Crossroads". It notes the increase in accidents in modern society, and the importance of insurance ("traditional tort concepts, such as 'negligence', can be twisted to accommodate this new reality [i.e. insurance]" but "[p]aradoxically, the great growth of the system has coincided with increasing criticisms of its efficiency, at any rate in the area of personal injuries"[3]). New Zealand's "social security" system is cited as one response to the altered financial and social conditions.[4] The authors soon move to discuss the "Functions of Tort" and "Elements of Wrongdoing and the Role of Policy". The theories of writers such as Calabresi are introduced in a way that most readers could comprehend. Deterrence, compensation, risk alloca-

* Senior Lecturer in Law, Victoria University of Wellington.

1 The authors produced an earlier volume *The English Law of Torts A Comparative Introduction* (Bruylant, Brussels, 1976) but the work under review is a much more substantial piece.

2 Page 19.

3 Page 3.

4 Page 4. The New Zealand system came into force in 1974, not 1972 as the text states. The present law is now found in the Accident Compensation Act 1982, not 1972 (see page 123).

tion are discussed. New political and industrial realities, with changing moralities, help explain the abandonment of many nineteenth century approaches.

The authors do not go overboard in discussing policy and "extra-legal dimensions". "While a study of the law alone will yield but an incomplete picture of the problems with which it has to deal, to wander into economic and social surroundings without a clear grasp of the rules and limits of the law will fail even to reveal what those problems are."[5] The book is entirely sound in presenting the rules. The exposition of each tort is clear and fresh. Sufficient cases and examples are used to aid understanding, without burdening the student with excessive citations. But interweaved all the time are questions about the best formulation of the law and the policy explanations for the law.

Full opportunity of using this approach is taken, as might be expected, in examining negligence. The "Postscript"[6], for instance, raises questions about the likely extension of *Anns* and *Dutton*[7] to chattels, an area, the authors state, "which is in urgent need of economic analysis". At the same time, a more legalistic conclusion is drawn that "duty of care" in negligence may have outlived its usefulness and that "the control on liability will shift to other concepts, namely, carelessness, causation, and damage . . . ". In a quite superb section on nuisance, a case such as *Leakey* v. *National Trust*[8] is explained partly by the modern day emphasis on accident prevention and loss distribution and partly on a "benefit-burden analysis", that the occupier of land, who derives benefit from it, should shoulder the corresponding burden.[9]

Only a few examples of the approach of Dias and Markesinis have been given. Enough has been said to illustrate its quality. We have here an exciting new addition to mainline torts textbooks. The book is largely England based with very sparing citations of New Zealand and other commonwealth authorities. From a New Zealand perspective, it is hoped that more New Zealand references might be given in a future edition, especially as our Court of Appeal, with such eminent torts judges as Sir Robin Cooke and Sir Owen Woodhouse, has been bold in developing the law on negligence.[10] Nevertheless, the book should be readily recommended to students. It is essential reading for teachers of torts and will bear fruitful study by anyone interested in torts.

5 Page 22.
6 Pages 96-97.
7 *Anns* v. *Merton London Borough Council* [1978] A.C. 728 and *Dutton* v. *Bognor Regis Urban District Council* [1972] 1 Q.B. 373.
8 [1980] Q.B. 485.
9 Page 230.
10 E.g. *Takaro Properties* v. *Rowling* [1978] 2 N.Z.L.R. 314, *Bowen* v. *Paramount Builders* [1977] 1 N.Z.L.R. 394, *Scott Group Ltd.* v. *McFarlane* [1978] 1 N.Z.L.R. 553, *Allied Finance and Investments Ltd.* v. *Haddow Ltd.* [1983] N.Z.L.R. 22, *Meates* v. *Attorney-General* [1983] N.Z.L.R. 308 and *Gartside* v. *Sheffield, Young & Ellis* [1983] N.Z.L.R. 37.

The second book under review is by a member of the university staff at Adelaide. It is far less ambitious in its aims than Dias and Markesinis and is largely content with a straightforward outline of the law. Defamation and the economic torts are omitted. This is strange, given that the book purports to give first time students of torts a basic exposition of the principles. As might be expected, it draws more heavily on Australian and New Zealand materials than Dias and Markesinis.