

BOOK REVIEWS

Prices Justification in Australia, by R. Scott, (Butterworths Pty Ltd, Australia, 1975), pp. i-xvii, 1-210. Recommended Australian Price \$14.00.

At the time when this review is being read, it is possible that the future of the Prices Justification Tribunal will be settled. However, at the time of writing, discussions as to its very future were being held between the Australian Government and the Australian Council of Trade Unions. The Tribunal itself had not been invited to attend these discussions, however, it is certain that the opinions of the Chairman, Mr Justice Williams, would have been conveyed to the present Government.

In the context of the Western world's triad of complaints—stagflation (*i.e.* unemployment with inflation), business recession and rising levels of industrial disputation, the issue of wages and incomes policies are being universally debated. The debate within Australia is not peculiar to us, although our press is rather unusual in the extensive coverage it gives to changes in the Consumer Price Index and the percentage levels of unemployment. It is fair to say the debate by the mass media is probably better conducted within Australia than in other Western societies. Alternatively it is also fair to say that the debate at an informed level by lawyers, economists, industrial relations practitioners is more poorly informed than in other societies. Mr Scott's book will help to correct that imbalance. It sets out to be a text book on Australian prices justification and a manual of practice for the Tribunal. It adequately and handsomely fulfils those purposes.

Whether the current economic position is due to a cyclical down turn or more fundamental faults in the Western system is beyond the scope of this book. However, to comprehend the Australian experience and extract the full value from Mr Scott's text, an adequate knowledge of the economic circumstances of the 1970's is vital. Mr Scott has a useful historical and comparative chapter which places in context part of the development of a prices justification within Australia. It also contains some helpful examples of overseas experience. It does not purport to be a comprehensive economic handbook, but the practitioner should be familiar with Australia's economic experience of the 1970's in order to understand the fact that we have a prices justification system at all.

The rate of Australian inflation more than doubled between 1970 and 1972. From a mean between 2 per cent to 3 per cent of the 1960's it was 6 per cent in 1972. This development plus the attendant price rises led to pressure for the establishment of machinery which would hold in check both prices and wages. Very few of the mature economies of the Western world have operated without some form of price justification or control since the Second World War. The Australian experience which saw the establishment of the Prices Justification Tribunal in 1973 was a tardy one being the exception rather than the rule. The option of actual price control was not one constitutionally available to an Australian Government, at least in peace time. The possibility being indefinitely closed off as a result of the Prices and Income Referendum of 1973. Accordingly, the Australian experience has been to establish a system of placing the onus upon companies to justify price rises rather than of regulating them. The obligation upon the Prices Justification Tribunal is to investigate and report as to the propriety or otherwise of proposed price increases and the only obligation upon the prescribed companies, those with sales in excess of \$20 million per annum, is to notify the Tribunal of increases in prices it intends to make. The Tribunal's authority is limited to making recommendations to the Prime Minister and hence to the Parliament as to these increases. It has relied upon the suasion of public opinion to ensure that these recommendations are complied with. The efficacy of this

approach is borne out by the fact that no company has failed to accept a recommendation, although legally they are not bound to do so. This system of notification and justification is in marked contrast to past U.S. and present Canadian experience.

The Tribunal was set up in September of 1973. That was a boom year of marked expansion in industrial output and a sharp escalation in the inflation rate. Demand inflation, a position whereby the demand for goods and services were hauling prices up, resulted in an initial boom and in unemployment figures of less than 1.5 per cent. In this atmosphere there was widespread public support for the establishment of any mechanism which would appear to keep prices steady.

In 1974 Australia, in common with its neighbours, experienced a wage explosion largely fueled by the inflationary expectations of wage earners who continued to foresee that prices would rise. The demand for extra wages and the fact that these were largely fulfilled eventually out ran our economies capacity to pay. We saw in 1974 a year in which average male earnings rose by more than 25 per cent but prices by an average of approximately 16 per cent. This had the affect of sharply reducing the gross operating surpluses of companies (profits or surplus value). Accordingly, companies in an effort to save costs and restore their profit positions began to effect savings by ejecting labour, this naturally increased the unemployment rates. A little later than the United States and Japan, Australia suffered the same curious conjunction of rising unemployment and rising inflation. It was in these circumstances that the Prime Minister wrote to Mr Justice Williams, the Chairman of the Tribunal on the 12 November 1974, as follows (inter alia):

I am writing at this time to convey to you officially the concern with which the Government regards the present economic situation, particularly in regard to private investment and employment. . . . I therefore undertook to write to you indicating the Government's view that in the present economic circumstances, the Prices Justification Tribunal should give particular attention to the problems of sustaining and stimulating an adequate level of private investment and of maintaining rates of return on capital which will induce the new investment required to maintain economic growth and employment. . . .

Publication of the Prime Minister's letter had a great affect upon the Australian business community and, apparently, upon the Tribunal. Whereas in 1973 and 1974 the Tribunal was assailed by the business sector for failing to perceive the need for an adequate return on capital, in the latter part of 1974 and 1975 it was assailed just as vigorously by the labour sector for justifying price increases which restored profitability but which could not be matched on the wage front due to other Government policies such as Wage Indexation. The rate of inflation which was almost 17 per cent in 1974 fell to 14 per cent or 12 per cent (depending upon the Medibank factor) in 1975. There had been some shift in the share of gross domestic product back towards the private sector, the rate of wage increases had decelerated sharply but unemployment remained more than 4 per cent throughout the year.

However, the incoming Government had as part of its election platform a policy of abolition of the Prices Justification Tribunal. Nevertheless, it seems unlikely that this promise will be put into effect, that policy appears to have been developed in 1973 and 1974 and has not caught up with the general acceptance of the Tribunal throughout the community which developed in the latter part of 1975 and at the present time. Accordingly, the future of the Tribunal albeit in some altered form would seem assured.

This book grapples competently with the difficult area of defining the criteria by which the Tribunal will award price increases. The enabling legislation pointedly omits any reference to the guidelines or criteria by which the Tribunal should act. Consequently, those guidelines are being built up by way of precedent through the Tribunal's Reports, by the preparedness of the Tribunal to note indications of policy delivered by the Government and, most importantly, by its own appreciation of market forces. The actual reports of the Tribunal following upon its various enquiries address themselves to these factors, although at first instance they would appear to represent a jungle of single instances. The author has been successful, so far as it is possible, in defining various criteria by which the Tribunal will assess a

notification for a price increase. Factors such as company and industrial productivity, the profitability of a particular company as compared with companies in the same industry or related industries, the requirements to service working and fixed capital and other costs related to capital, unavoidable costs especially those relating to wage increases due to 'sweetheart deals' are all considered in a lucid manner.

The strength of the market place in actually setting prices is proven by the fact that there have been instances where, after enquiry, the Tribunal has recommended price increases but the notifying company has found that it has been unable to charge those recommended prices in the market place. The consuming public will never be aware of the obverse side of this coin, that is where a recommendation has justified a price which a company might never have been able to pass on to its customers were it not able to point to the Tribunal's recommendation and thus legitimate its price increase. Of course, it is not the Tribunal's function to set market prices. Its function is limited to recommending or rejecting price increase in those circumstances where a price increase sought by an individual company is justifiable on economic terms and not necessarily in the terms of the market place.

This book in its 'nuts and bolts' chapters dealing with the mechanics of the Tribunal is excellent. The exposition of the Tribunal's operation and the forms to be followed are clearly laid out and should save the staff and executives of notifying companies a great deal of time and effort. The broad scheme of the Act requires that companies (including related ones) which have sales in excess of \$20 million per annum must notify the Tribunal of any proposed increases in their prices. Within 21 days the Tribunal, either tacitly or explicitly, must either accept the price increase, recommend a lower price to the company, which can then charge that price, or else move for a public enquiry. In certain circumstances, such as in relation to retail stores dealing with a multiplicity of products, an exemption from this requirement of notification is made. In other circumstances, the Tribunal will allow an interim increase pending further examination.

Amendments to the Act in 1974 permit the Tribunal itself or the Prime Minister to initiate enquiries as to the prices being charged or proposed to be charged by companies which have sales of less than \$20 million per annum. This particular amendment was made in response to the failure of wholesaling and retailing companies to pass on the full value of the 1974 tariff reductions. It is a significant new power and its boundaries are only just being explored by the Tribunal's staff.

The vast volume of material handled by the Tribunal is apparent from these following figures. From its inception until 30 June 1975 there were 11,361 notifications of intention to charge higher prices but these resulted in merely 48 public enquiries. It is impossible to suggest that the cost of public enquiries has been a significant cost to industry generally although it has borne heavily upon some large companies. If there is one fault with this book, it is that it fails to stress the tremendous amount of work co-operatively done by the Tribunal staff with notifying companies. Tribunal members, are allocated panels of industries for specialist attention, and the members of staff deal face to face with the executives of notifying companies. Most of the Tribunal's work is done at this level. It has been the preparedness of both company officers and the Tribunal itself which has made the Australian system of price justification work effectively. It is noted that the average employment figure of the Tribunal staff in 1974-5 was a mere 114.

This book annotates the Prices Justification Act of 1973 and the important amendment of 1974 and makes reference to some of the more significant reports delivered by the Tribunal. The reports which have been the subject of much criticism insofar as they have failed to state clearly the economic or mathematical material by which the Tribunal has arrived at its given recommendation. This criticism fails to recognize that a great deal of material delivered by the notifying companies is of a confidential nature. It would involve divulging these confidences if the Tribunal were to spell out the arithmetical processes by which it arrived at its decisions. Few commentators have noted the unfairness of the criticism levelled at the Commission on this ground.

There is an extremely useful section in the book dealing with the constitutional aspects of the Prices Justification Tribunal. The Tribunal would seem to be safely

founded on the corporation power and not suffer from a fatal complaint of mixing judicial and legislative functions. However, this latter point remains in some doubt due to comments from the Bench in the *Builders Labourers* case¹ and more particularly in the recent *Shop Assistants Federation* case.²

It would seem proper to conclude that the Tribunal is properly appraised of the economic realities of Australia's mature and mixed industrial economy. It cannot be said to be the doctrinaire creature of any particular political view point, or of the Government of the day. The Chairman in the Second Annual Report has referred to some of the criticism levelled at the Tribunal, particularly by segments of the business community, which accused it of being unresponsive to business needs or, more damagingly, of compressing profit margins to such an extent as to create unemployment or a disinclination to invest. The Chairman said '... in some instances they [the criticisms] appear to have been mainly directed at destroying the Tribunal or bringing it into disrepute. In the view of the Tribunal there has also been tendency for some companies to try to use the Tribunal as a scape goat by blaming it for shortcomings attributable to bad management . . .'. The Tribunal is a sturdy creature and is showing a robustness and independence of action which, of its own, should justify its continuation. Mr Scott's book may well be the first of a line considering the Prices Justification Tribunal and its works.

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A History of Contract at Common Law, by S. J. Stoljar, (Australian National University Press, Canberra, 1975), pp. i-xi, 1-221. Recommended Australian Price \$9.95.

Stoljar's work, the latest in a long series of publications by this distinguished scholar, makes a significant contribution to the debate on the nature and origins of the fundamental doctrines of contract.¹ His aim is to explain 'complex developments' and even treat legal history 'almost as an extension of legal analysis' (preface). In the course of fulfilling this aim, Stoljar challenges many widely held views.

Stoljar's fundamental position is that the classical theory of the common law of contract viewed contract as a reciprocal bargain with mutual benefits. So, in the continuing debate, Stoljar takes the 'bargain/benefit' position. His position is founded on a close study of the sixteenth and seventeenth century cases. For instance, he argues forcefully that the notion of 'consideration' (or 'motivation') was not fundamental. It was introduced by the courts to distinguish between non-gratuitous exchanges ('bargains') and gratuitous acts in disputes over the provision of services. It had no role in disputes over sales where the 'synallagmatic' element was evident on the face of agreement. Though acknowledging the major formative role played by *Slade's* case,² Stoljar demonstrates that it evolved from a long line of Elizabethan cases elaborating the 'bargain/benefit' basis for enforceability. Here, as elsewhere in the book, Stoljar speculates that more pragmatic influences were also at work. The court in *Slade's* case, by taking over much of the work of debt under the heading of assumpsit, was responding to the community's need to have contractual disputes settled by a method of proof (trial by jury) more appropriate than that applicable to debt (wager of law). At other points, Stoljar argues that development of the law took place in spite of the difficulties posed by the rules of pleading.

¹ 1976, High Court of Australia, not yet reported.

² 1976, High Court of Australia, not yet reported.

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¹ A synopsis, listing the names and works of the leading proponents for the various views is found in Sutton K. C. T., *Consideration Reconsidered*, (1974) chs 1 and 2.

² (1602) 4 Co. Rep. 91a; 76 E.R. 1072.