

BOOK REVIEWS

Trade Practices Law, Volume 1: Introduction and Restrictive Trade Practices, by B. G. Donald and J. D. Heydon, (Law Book Co. Ltd., 1978), pp. i-lix, 1-508. Price \$34.50. ISBN 0 455 19598 6.

The history of trade practices law in Australia creates peculiar difficulties for the presentation of a comprehensive and practical work on the subject. The wide oscillation in legislative policy represented by the Australian Industries Preservation Act 1906 (Cth), the Trade Practices Act 1965 (Cth) and its derivatives and the Trade Practices Act 1974 (Cth), together with the short lapse of time since the 1974 Act, has afforded no opportunity for a coherent growth of Australian case law. To this must be added the fact that insofar as the model for the Trade Practices Act 1974 was United States antitrust law, the wealth of material from that jurisdiction can often be more a hindrance than a help in identifying the intention of our own legislature.

Thus, with the enactment of the 1974 Act the earlier Australian texts became largely obsolete but there was created a complex crop of novel problems large and small to perplex and test the business and legal community. This has scarcely been helped by the continuing practice of amending the 1974 Act — twice in 1977 and more recently by the two 1978 amending Acts.

The publication of this important and ambitious treatise on trade practices law in Australia is therefore something for which the business community, the enforcement agencies, practitioners, students and the readers to whom this work is directed will be properly grateful. It represents a particularly notable achievement of authorship, as the text, which comprehends the substantial amendments made by the Trade Practices Amendment Act 1977, was completed only some four months after its enactment. The pressure of time involved in such a prodigious effort has left its mark in a certain amount of overwriting and diffusion of treatment where more time would have produced greater conciseness and synthesis.

The text of the volume under review extends to 491 pages and covers in separate chapters each of the restrictive trade practices regulated by Part IV of the Act. In addition there are introductory chapters on the history, derivation and administration of the Act, its constitutional basis and the broader economic concepts and issues underlying most of Part IV. Regrettably, enforcement and remedies as they affect Part IV are not covered except incidentally, and readers must have recourse to Volume 2 for treatment of this important subject.

Each of the chapters on the Part IV practices starts with introductory observations and is then developed under numerous headings and sub-headings dealing with particular phrases used or general and specific issues raised by the provision in question. For instance, in Chapter Five on Monopolization, under the major heading 'Substantial Control of a Market' the authors examine under twelve separate sub-headings key phrases used in the section as well as different tests of market power such as percentage market share, monopoly profit and excess price, elasticity of demand and barriers to entry. This plan has produced a very thorough treatment of each practice but sometimes this is achieved at the price of unnecessary fragmentation of discussion. Readers have a choice of six separate headings and further sub-headings under which to study authorizations in respect of section 45 and a choice of nine separate headings plus sub-headings in studying requirements contracts under section 47. Authorization for section 45 and 47 practices is dealt with in chapters on those practices rather than in a separate chapter.

The technical analysis given to each section of Part IV is close and skilful and frequently exposes many well-hidden difficulties, such as the anomalies in legislative treatment and problems inherent in section 47(6) and (7), the circularity of section 46(3) and the inherent self-contradictions in section 50(1) and (4).

In their detailed analysis of the statutory provisions the authors make use, not only of the available Australian court cases and administrative determinations of the Trade Practices Tribunal and Commission on authorizations and under the former clearance procedure, but also the extensive body of United States precedents and theories and, to a lesser extent, United Kingdom and EEC experience on comparable issues to those raised by the Australian provisions.

The use of overseas authorities is of particular value as a guide to possible avenues of development of the infant Australian law and a very real convenience for the Australian reader with limited time or ability either to identify or to assess the vast body of overseas experience.

Yet the text of this book may, if anything, be overburdened by references to overseas authorities whose ultimate use by the Australian courts will probably be minimal. Furthermore, having regard to the highly detailed style of drafting of the Australian Act, it would be surprising if interpretative questions raised are not principally decided by traditional techniques regardless of case law in other countries, such as the United States, where the statutory proscriptions are of a broader kind. It is true of course that the attitude of the Trade Practices Commission and the Trade Practices Tribunal in their more limited spheres of responsibility has been less inhibited.

Users of the work, therefore, will have to be careful to treat arguments based on overseas authorities with discretion depending on whether the issue in question is a purely interpretative one or one which raises questions of a broader nature.

In this latter regard Chapter Three dealing with Competition Markets and Exemptions will be particularly helpful to all who hope to gain a deeper understanding of the fundamental economic concepts inherent in the law. Its benefit for lawyers unused to working in an economic dimension is especially valuable. The authors make a strong and coherent argument for a concept of workable competition suitable for Australian conditions and in the course of doing so offer a brief but perceptive treatment of perfect and imperfect competition, market structure, conduct, performance and concentration, oligopoly, monopoly and cartels and the theories of the economic pragmatists. This is followed by a thorough and valuable discussion of market definition, although the authors' severely dismissive attitude to sub-markets owes more to logic than to economic reality.

Another marked characteristic of the authors' approach to the subject, often operating in tandem with the use of overseas materials, is the strong emphasis they place on perceived legislative policy, which is not only assessed and critically discussed in a general context, but, more adventurously, used as an aid to the interpretation of passages that may be ambiguous or which in the opinion of the authors raise matters of principle. This bold reversal of the traditional approach of gleaning legislative policy may be explained by the genesis of the work in the postgraduate classes on trade practices law conducted by the authors; it may be justified on the ground that the first extensive treatment of this subject should persuade and influence as well as analyse and instruct. Its virtues are greater illumination and understanding of the legislation in a wider conceptual context; its risks are the potential to mislead by failing to emphasize the more likely outcome of future decisions by the Australian courts.

For instance, in commenting on section 50(1)(a) the authors strongly endorse on policy grounds the view that the section could not be intended and should not be interpreted as preventing the acquisition of a body corporate already in a position to control or dominate a market in preference to the opposing strict interpretation of the section which has been subsequently endorsed, at least in clear dicta, by the Federal Court in *Trade Practices Commission v. Ansett Transport Industries (Operations) Pty Ltd.*¹ Again, in dealing with price discrimination proscribed by

¹ (1978) A.T.P.R. 40-071.

section 49 the authors correct identification of the comparative ease of avoidance of the section if it were given a strict construction leads to their apparent endorsement of the questionable indirect purchaser theory and the view that conduct of companies in the same group should in effect be aggregated.

Inevitably the range, novelty and complexity of the legislation leaves ample opportunity for speculation and adoption of interpretations which may differ from those favoured by the authors on particular questions, and it is rare for the authors to fail to refer to available alternative arguments. All the same it is fair to say that the strong emphasis on policy leads them to some debatable conclusions.

The allocation of space between the many topics and questions raised appears generally to be well balanced. The practitioner might have hoped for rather more extensive discussion on important questions under both sections 45 and 47 of causation and aggregation and a more sustained analysis of the administration of the Act as it applies to authorizations and notifications. There is also a certain lack of feeling for matters of a more mundane and practical kind, for instance, the effects of unnecessarily applying for authorization or giving notification, the *de facto* importance in the authorization test of 'industry aggregation' and the status and role of intervening parties in cases before the Federal Court.

The work is complemented by a wide bibliography, a detailed index and tables of cases and statutes. The text has few typographical or cross referencing errors and the book is well printed and produced. The style, as can be expected in a book of joint authorship, is sometimes uneven and prolix, but the authors' commitment and expertise in Trade Practices law guarantees interesting and frequently challenging discussion.

Although some reservations must be made, the overriding virtues of this work will secure its place as a valuable and stimulating guide for those involved in trade practices law in Australia.

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Trade Practices Law, Volume 2: Restrictive Trade Practices, Deceptive Conduct and Consumer Protection, by B. G. Donald and J. D. Heydon, (Law Book Co. Ltd., 1978), pp. i-liii, 509-875. Price \$26.50. ISBN 0 455 19742 3.

The Trade Practices Act 1974 (Cth) is a complex statute. It is based on concepts which are unfamiliar to most lawyers, yet it affects a wide range of businessmen in their day-to-day activities. There is widespread demand for information about what it says, how it works and the extent to which it affects established legal principle and commercial practice.

On the other hand, the Act is still relatively new. It has been subject to an almost constant process of amendment since its passage in 1974 and there is no guarantee at all that it is as yet in anything like its final form. The courts are only just starting to grapple with its provisions, while astute legal advisers are repeatedly finding new uses to which the legislation may be put. There is a host of still unanswered questions about the Act; for example (in the context of consumer protection): how far does Part V go toward providing a statutory alternative to common law actions based on the economic torts? Will damages actions under section 82 be governed by tort principles or contract principles? In so far as civil actions are available for contraventions of Part V, how far does the Act encroach on the general law of contract?

All of this poses a dilemma for intending text-book writers. Should they attempt to meet the demand for information and write a book which, while timely, cannot hope to be the last word? Or should they wait until the dust settles and give a more rounded account of the topic?

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