

Price Discrimination Law, by Michael Blakeney, Sydney, Legal Books, 1983, xlix + 259 pp. \$34 (hard cover), \$27.50 (limp).

This is the first published book dealing more or less exclusively with section 49 of the Trade Practices Act 1974 (Cth.). Given that the section has been the subject of only one reported case in its first decade of operation, it is perhaps unlikely that it will sustain another lengthy published work. Yet, for the reasons which follow, it cannot be said that this book fulfils the role of the definitive treatise on the section.

Compared with the other sections in Part IV of the Trade Practices Act, section 49 has not attracted a great deal of academic attention. Apart from a number of articles published by the *University of New South Wales Law Journal* in 1975 (and that of Professor Mnookin is particularly recommended), the preponderance of published material has come from Mr. Blakeney's pen. This is so notwithstanding that Mr. Blakeney has been able to produce a "Select Bibliography" which runs to seventeen pages; for the vast bulk of the material listed there relates to the Robinson-Patman Act, the United States equivalent (and progenitor) of section 49.

Much of this large quantity of American material has been produced as part of a lengthy debate in the United States on whether the Robinson-Patman Act should be retained, modified or abolished. It would not be unfair to say that the majority academic view in America favours abolition. Economic theory would have it that discriminatory pricing is evidence either of competition in action (desirable) or of the abuse of monopoly power (undesirable). The view in Australia which is widely held by practitioners and academics (and which was evinced by the Blunt Committee) is that the latter is, or should be, dealt with by the monopolisation provisions of section 46, and that section 49 should be repealed. It is suggested that to outlaw price differentiation is to interfere unduly with the free workings of the "invisible hand" of competition, leading to price inflexibility, the abolition of discounts and thence to inflation and inefficiencies in resource allocation.

As, I think, Mr. Blakeney concedes, the major source of support for the retention of the Robinson-Patman Act (and section 49) lies not in economic theory but in populism; the need to save the corner store from the growth of supermarket chains with superior buying power. Yet there is little evidence that either the Australian or the American provision has had this prophylactic effect. Mr. Blakeney also appears to claim that section 49 cannot be anti-competitive because conduct, before it can constitute a contravention of the section, must be likely substantially to lessen competition. This ignores, of course, the difficulty of establishing and proving competitive effects and the natural conservatism of businessmen and their professional advisers in relation to possible contraventions of the Act. If the position is doubtful, the safest course will always be to charge uniform prices.

In Australia the Swanson Committee (the Trade Practices Act Review Committee, 1976) recommended the abolition of section 49. Its repeal was actually provided for in the initial 1977 Trade Practices Act Amendment Bill which incorporated a number of other Swanson Committee recommendations. The repeal provision was dropped from the Bill before enactment, apparently after considerable lobbying by small business groups. The Blunt Committee (the Trade Practices Consultative

Committee, *Report on Small Business and the Trade Practices Act*, 1979) also recommended abolition together with the strengthening of section 46. Mr. Blakeney attacks the recommendations of both Committees as lacking empirical evidence to support academic theories as to the impact of the section on prices. Yet it is in just this area that Mr. Blakeney's book is most disappointing; he refers to social and political considerations (populism) but his treatment of the Australian economic considerations, both theoretical and empirical, is at best sketchy.

This is not to suggest that Mr. Blakeney has not produced a comprehensive and useful work. The treatment is, by and large, complex and academic, reflecting the fact that it derives from Mr. Blakeney's LL.M. thesis. Many of the chapters (Chapters 2, 4, 8, 9 and 10) are based on Mr. Blakeney's published articles on the topics. As a result the book is rather lengthy, given that the section itself takes up less than a page of the statute books and has produced but one, rather superficial, reported case.

The first chapter is entitled "Law and the Regulation of Market Behaviour", a fascinating topic in these times. However, Mr. Blakeney does little more than whet the appetite. The second chapter deals with economic theory in relation to price discrimination and again the treatment is rather too brief. The third chapter deals with the history of the Robinson-Patman Act (and the debate over its retention); close analysis of the American legislation is left to coincide with the discussion of section 49. Chapter 4 looks at price discrimination laws in other countries and Chapter 5 sketches the brief history of Australian price discrimination laws.

The meat of the work, and of primary interest to practitioners, is the section from Chapter 6 to Chapter 10 in which Mr. Blakeney examines section 49 itself. Mr. Blakeney raises all the interpretational issues which are likely to arise and examines them in the light of the large body of American case law on the equivalent provisions in the Robinson-Patman Act. Perhaps wisely, Mr. Blakeney generally refrains from expressing any concluded view on contentious issues. However, the text is replete with suggestions and recommendations, presumably directed to judges and legislators (although apt to be adopted by unwary practitioners) on how various provisions of section 49 "ought" to be interpreted. These normative propositions generally rely heavily upon American authorities. Here are two examples:

In the absence of a related company exception to protect sales between members of the same corporate family, it might be *advisable* to follow the U.S. example in arguing that intra-enterprise transfers are not received by "purchasers" within the meaning of s. 49(1). [p. 108, emphasis added].

However, the emasculation of the U.S. meeting competition defence, threatened by the Container Corporation case has been overcome by a line of decision [*sic*] which have exonerated from Sherman Act prosecution [*sic*], price verification schemes under the Robinson-Patman Act. A similar approach *ought* to be adopted under the Trade Practices Act 1974, particularly since there is only a very limited availability under the Act for authorisation of price fixing agreements. [p. 197, footnotes omitted, emphasis added].

At variance, as they often are, from the language of section 49, many of these suggestions are unlikely to be adopted by Australian judges instilled with Dixonian respect for the language of the legislature. In this regard it could be noted that the other sections of Part IV of the Trade Practices Act are also based (more or less closely) on U.S. antitrust legislation and yet the citation of U.S. cases in judgments on Part IV has been extremely rare and certainly never of critical importance. Nevertheless it must be said that the U.S. authorities are of considerable interest and influence and Mr. Blakeney's cross references will provide a useful guide.

The author's treatment of the few relevant Australian decisions is, unfortunately, rather less rigorous. With respect to Trade Practices litigation in Australia, the author states that "victory will frequently go to the party with the deepest pockets" (page 10). Such a self-evident truth apparently needs no support; in a footnote appended to this statement Mr. Blakeney goes on to make the extraordinary suggestion that "This may explain the discontinuation of the action in *Broken Hill Proprietary Co. Ltd. v. The Trade Practices Tribunal* (1980) 31 A.L.R. 401" (page 17). This is, of course, nonsense; the matter was finally disposed of (in the very case cited) on a question of law. B.H.P. applied for authorisation from the Trade Practices Commission for an agreement providing for a takeover which agreement was to remain executory until the Trade Practices Commission's approval was obtained. The Commission granted authorisation and the takeover was consummated. Wylie Steel Pty. Ltd. then sought to refer the authorisation proceedings to the Trade Practices Tribunal for review. The Full Court of the Federal Court (Bowen, C.J., Franki and Brennan, J.J.) held unanimously that the Tribunal had no jurisdiction to entertain the application for review: the action could not, as a matter of law, continue. As a further example, Mr. Blakeney states that in "*Tavernstock Pty. Ltd. v. John Walker & Sons Ltd.* Franki, J. acknowledged the presence of s. 4E may call single brand markets into question but found a market for Johnnie Walker Scotch Whisky." (page 155). In fact the case involved an application for an interlocutory injunction and the judge expressly assumed, *but without deciding*, that the contention most favourable to the applicant (the single brand market) was correct. His Honour did not need to go further as he dismissed the action on other grounds, see (1980) A.T.P.R. 40-184 at p. 42,525. It should also be noted that the book does not contain any analysis of the judgments of the Full Federal Court in *Cool's Case*, the only decision on the section, as the book was published before the judgments were handed down.

In Chapter 11 Mr. Blakeney deals with other Australian legislative provisions which regulate price discrimination. In the important area of monopolisation (pages 230-232) Mr. Blakeney is content merely to set out brief descriptions of the leading Australian cases and to attack the report of the Blunt Committee for its suggestion that the work of section 49 would be better performed by an amended section 46. On page 234 Mr. Blakeney invents a new category of resale price maintenance—"the refusal to supply on disadvantageous terms", allegedly defined in section 98(1)(b).

Finally, in Chapter 12, the author provides a brief evaluation of the section, concluding with the implicit suggestion that section 49 "is here to stay". The Attorney-General's exposure draft of the Trade Practices Amendment Bill 1984, released in February 1984, provided for the

retention and strengthening of section 49. This proposal has been the subject of considerable criticism and in a recent speech (25 June, 1984) the Attorney-General indicated that the Blunt Committee approach was receiving "further consideration". At the time of writing it is accordingly quite uncertain whether Mr. Blakeney's suggestion will prove accurate.

Unfortunately for the practitioner, the author's style is rather dense and academic. The following passage, at times evocative of James Joyce, will give the flavour:

The drafting ambiguities and complexities of the American law may have been overcome to some extent by the important language difference [*sic*] in s. 49 which prune away a number of the Robinson-Patman encrustations. Of more fundamental significance for Australian practice, however, are not so much the textual anfractuositities of the Robinson-Patman Act, as the economic implications of its operation. The relevance for Australia of the small business objectives of the Robinson-Patman Act must also be evaluated as well as the relevance of its populist implications. [page 37]

Mr. Blakeney's publisher is not to be congratulated. The book is not a handsome presentation, the paper quality is poor and the print pale. It is a rare page that does not contain a typographical error, and many contain a considerable number. This is annoying. Also irritating are the inconsistencies of citation. For example, the *Australian Business Law Review* is variously cited as "*Aust. Bus. L.Rev.*", "*A.B.L.Rev.*" and even "*A.B.C.Rev.*" (*sic*); but never as "*A.B.L.R.*" as that publication prefers to cite itself. Neither does the author appear to have mastered the mysteries of citing cases published in the C.C.H. *Australian Trade Practices Reporter*.

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