

Price Discrimination Law: Regulating Market Behaviour, by MICHAEL BLAKENEY, B.A., LL.M. (Syd.), Barrister of the Supreme Court of New South Wales, Senior Lecturer in Law, University of New South Wales. (Legal Books, Sydney, 1983), pp. i-xlix, 1-259, with Table of Contents, Table of Cases, Table of Statutes, Select Bibliography, Appendix and Index. Recommended retail price \$34.00, paperback \$27.50. (ISBN 0 949553 02 6).

Michael Blakeney and his publisher, Legal Books, are in the fortunate position of having published the first textbook devoted solely to section 49 of the Trade Practices Act 1974 (Cth) concerning price discrimination in the same year that the Full Federal Court has breathed life into this most controversial section. Many commentators have felt that the section would become a dead letter. In *O'Brien Glass Industries Ltd. v. Cool & Sons Pty. Ltd.*¹ the Full Court confirmed the trial judge's decision that a supplier of windscreens had unlawfully discriminated in price between its customers in the Wagga district and that the effect of the discrimination was likely substantially to lessen competition. The decision will no doubt be contentious but for the author and publisher it should increase sales as business executives and legal advisers dust off their copies of section 49 and begin to digest the implications of the *Cool* case.

Blakeney has made a thorough and systematic examination of section 49 and its context, beginning quite generally with a survey of the issues involved in legal regulation of market behaviour. He then briefly treats the economic implications of price discrimination before making a comparative examination of other legal approaches to the question, principally the Robinson Patman Act of the United States upon which section 49 is directly based. Before his detailed examination of the legal issues in section 49, he repeats its thin legislative history revealing the comparative dearth of either hard evidence or coherent philosophic base concerning the section in Australia.

Chapters 6 through 10 expound section 49 in all its complexity, including taking account of American judicial authority and the full range of Australian commentators in the absence of significant local judicial authority, the book having been written before the appeal in the *Cool* case. This analysis covers all issues ever raised in relation to the section; as to the required competitive injury issue, it draws on Australian authority in respect of other sections of the Act which have the same test for legality, as well as on the trial judge's decision in the *Cool* case. Accordingly, these chapters are an essential reference for any practitioner or any student examining the Act. Having considered other aspects of Federal law and on the Trade Practices Act 1974 (Cth) which bear upon price discrimination, Blakeney concludes his book with an evaluation of the section in relation to its objectives.

Much of Part IV of the Trade Practices Act 1974 (Cth) only prohibits conduct which is likely substantially to lessen competition. Section 49 is in that category. Yet almost 9 years after its enactment the courts are still tentatively stabbing at the meaning of the expression. Blakeney is forced to acknowledge that recent cases in the Federal Court are not particularly informative on what constitutes "substantial lessening of competition". Nor has the Full Court in the *Cool* case remedied this failure. The courts are not drawing on, and critically developing into legal tests, the

matters raised in the decisions of the Trade Practices Commission and the Tribunal, and by the commentators. All writers in the field find the task of exposition on this question daunting. It would be expecting too much of this textbook to fill that information gap completely, but it is a matter of regret that Blakeney has not devoted more of his considerable talent to addressing the issue; the 6 pages directly devoted to the subject together with other comments scattered throughout the book, leave the reader longing for more. He has at least taken the factors of competition as pronounced by the Tribunal in *Re Queensland and Co-Operative Milling Association Ltd.*² and asked how price discrimination might lessen or improve those factors in order to assist in answering the question, "When does discrimination substantially lessen competition?". Hopefully courts will soon begin to apply this methodology in greater detail so that practitioners have much needed guidance in advising clients.

While the author is to be congratulated on the task of reviewing and consolidating all the learning on legal regulation of price discrimination, perhaps the book suffers a little from attempting a complete contextual survey. The opening chapter, an analysis of the whole issue of regulation of market behaviour, appears somewhat slight, while the comparative chapter on laws in countries other than the United States, is really of only passing interest. Two areas where the author might have devoted more energy — being the areas where detailed examination is really needed in Australia — are first, the economic issues involved in price discrimination and secondly, an evaluation of the section as drafted in the context of the Australian economy. He has provided a tantalising appetiser on issues where readers need a feast. The second issue would have required substantial primary research of the experience in particular Australian markets and such data may simply not be available to an academic researcher without substantial research funds. Unfortunately, it means that policy making in respect of price discrimination continues to rely on generalised opinions, American attitudes based on an entirely different economy and the inevitable inertia which arises from the existence of a piece of legislation on the statute books. Unlike Blakeney, I am firmly of the opinion that the section has been not only a waste of time but also, upon its introduction, operated in an inflationary manner. The oligopolistic structure of Australian industry meant that the effect of giving such oligopolies an excuse for wiping out secret discounts was to remove one of the rare ways in which price competition is able to operate within oligopolies. Many net prices rose as a result of the introduction of the section. Blakeney, in true academic tradition, states all sides and I would have been pleased to read his own position more forthrightly stated in the debate, as a counter to those of us who advocate repeal of the section.

It is incumbent upon a reviewer, even one who endorses the book under review, to raise some questions about details of the book. It is unfortunate that in a book devoted principally to section 49 of the Act, the precise words of the section are never spelt out in full nor examined in terms of its substance until the sixth chapter. It would have been very useful for an introduction to have outlined the section for the uninitiated reader first by reproducing it and secondly, by summarising the way it applies. The author too often avoids clearly stating his own opinion on both policy and legal issues; in an area where the charts for Australia are still undrawn, firm

opinions of all commentators are avidly sought even if judges seldom appear to refer to them. Blakeney takes a degree of delight in complex language and expression, sometimes at the expense of simplicity in areas where very clear, simple analysis would be beneficial.

A note to the publisher: if Legal Books wishes to dent the Australian legal publishing market, it really must employ a proof reader; the number of typographical errors in the book is excessive. It should also consider larger print size, darker print and, in a book intended to be used as a practitioner's tool and a reference work, the positioning of notes at the end of each page or in the text itself.

Practitioners will benefit greatly from the collection of detailed analysis of the section but some may find this book too academic in that it indulges the author's interest in the wide variety of opinions on all these issues. The academic reader may find it somewhat brief on the conceptual issues of the economics of price discrimination, the anti-competitive impact of discrimination and the justification for the section in Australia. More importantly, the book advances the learning on the section substantially and demonstrates that in the trade practices field in Australia there is no lack of competition between writers on the subject; competition law is certain not to become an oligopoly as long as writers of the calibre of Blakeney continue to devote their energies to it.

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FOOTNOTES

- 1 (1983) A.T.P.R. 40-376.
- 2 (1976) 25 F.L.R. 169.

Remedies, by BRUCE KERCHER, B.A., LL.B. (Syd.), LL.M. (N.S.W.), Lecturer in Law, Macquarie University and MICHAEL NOONE, B.A., LL.B. (Melb.), LL.M. (Lond.), Senior Lecturer in Law, Macquarie University. (The Law Book Company Limited, Sydney, 1983), pp.i-xxxvi, 1-408, with Table of Cases, Table of Statutes, Table of Rules and Index. Cloth recommended retail price \$38.00 (ISBN 0455 204 454). Paperback recommended retail price \$28.00 (ISBN 0455 204 462).

The law of remedies, explain the authors, is concerned with the means of redressing or preventing infringements of rights (page 1). With this general concept in mind, they give an account of actions for the recovery of debts, and actions for damages both for breach of contract and for various torts. The discussion of damages makes up the largest segment of the book. Under the heading "Consumer Remedies", they discuss Commonwealth and State legislation dealing with procedures for mediation and for consumer claims tribunals, and laws on misleading and unfair conduct, sale of goods and consumer protection legislation,