

BOOK REVIEWS

Trade Associations, Fairness and Competition, by WARREN PENGILLEY, B.A. LL.B. (Syd.), M. Com (Newcastle), J.D. (Vanderbilt), A.A.S.A. (Senior), Barrister at Law (A.C.T.). (Law Book Company Ltd, Sydney, 1981). pp i—xxvii, 1—247, with Table of Cases, Table of Decisions and Index. Cloth recommended retail price \$36.00. (ISBN 0 455 20086 6).

Pengilley's book aims to analyse the dividing line between what aspects of trade association conduct are lawful under the Trade Practices Act and what are not, together with a study of the general law on the topic.

Part I introduces the subject, and contains a warning against importing those parts of American law which depend on a different constitutional and procedural structure: this is a salutary warning, since much of the book consists of an analysis of other more relevant parts of American law. Part II usefully summarises the purposes and activities of trade associations. Part III discusses "rights" of admission to a trade association at common law; Part IV discusses that subject in the light of the Trade Practices Act. Part V discusses expulsions from trade associations under the general law, and Part VI discusses that topic in the light of the Act. Part VII discusses issues relating to the legality of such particular activities as exchanging statistics and market information, the use of standard forms of contract, the standardisation or certification of products, joint marketing, joint buying, joint promotional activity, costing assistance and ethical control of members' conduct. Part VIII discusses trade associations and recommended prices. In Part IX, under the heading "Clearance and Authorisation", Pengilley discusses the public benefit factors likely to lead to authorisation. Part X discusses various issues to be faced by an applicant aggrieved by trade association conduct as he seeks to enforce his legal rights. Part XI is a conclusion. Appendices include parts of the Act and segments from certain Trade Practices Commission Information Circulars.

The book is of the value one might expect from an author who has thought as long about the Trade Practices Act and has as much experience in the administration of the Act as Pengilley. It refers extensively to American and common law authority and to determinations and attitudes of the Trade Practices Commission. In that regard, paragraph 1.5 states that in the absence of court decisions, the most

persuasive authority is likely to come from determinations of the Trade Practices Commission. The author, probably presciently, acknowledges that the courts may not pay much attention to them. He does not there mention the power of the Trade Practices Tribunal to review these determinations. The courts are in fact much more likely to pay attention to decisions of the Tribunal, the panels of which are chaired by a Federal Court judge. On points of law that judge sitting in the Tribunal has exclusive control, and hence legal rulings are likely to be persuasive when cited in the Federal Court; on points of economics and evaluation of trade evidence the Tribunal has established high standards of lucidity and careful analysis. The Federal Court has therefore leaned heavily on Tribunal decisions in other areas (*e.g.* Section 50 — the *Ansett Case*)¹ and will probably do so in this. The leading Tribunal trade association case is the *Master Locksmiths Case*,² which is briefly referred to. It has much to say about such matters as the rights of admission to associations, the certification of competency of members and the significance and measurement of restrictions when weighed in the balance against public benefits.

The book is, unfortunately, marred by many spelling mistakes and similar errors. More importantly, there are certain respects in which a non-technical reader, for whom the book is partly intended, may be misled on points of substantive law. Most of these relate to a confusion — no doubt in the mind of the likely reader rather than that of the author — between conduct prohibited by section 45 read with section 4D (purposive boycotts) and conduct dealt with by the general part of section 45, that is, conduct having the purpose, or effect, of substantially lessening competition. Thus what is said in paragraph 3.1 to the effect that compliance with the rules of natural justice may be relevant to whether a trade association has been “anti-competitive” — which is an expression never used in the Act without qualification — is misleading. It can have no direct relationship to substantially anti-competitive effects; if non-admission or exclusion of a competitor would have these effects the conduct would be unlawful however procedurally impeccable the process of making the decision was. Nor, for similar reasons, can it have direct relationship to substantially anti-competitive purposes or exclusionary provisions: the prohibited purposes could exist even if the procedural requirements of the general law were met.

A related point is that Part IV accepts without criticism the Trade Practices Commission’s attitude to trade association entry rules. What is not clearly stated is that no court will find such rules unlawful unless section 45 in one of its aspects is infringed, and this may be relatively rare since the 1977 amendments to the Act. The Commission’s views are usually enunciated in relation to the very different issue of whether particular rules have sufficient public benefit to be authorised. The Trade Practices Commission’s views on desirable rules may be correct where public benefit is concerned, but appear basically irrelevant to most issues of infringement of the Act.

1 *Trade Practices Commission v. Ansett Transport Industries (Operations) Pty Ltd* (1978) T.P.R.S. 303.124.

2 *Re Master Locksmith’s Association of Australia* (1980) T.P.R.S. 203.281.

At paragraph 6.6.2, Pengilley says that whatever falls outside section 4D by reason of strict statutory construction will “almost certainly fall within” section 45 so far as it prohibits the substantial lessening of competition. “In the United States . . . any action remotely resembling boycott by expulsion from a trade association is banned per se *pursuant to competition analysis not pursuant to specific statutory wording*. Such an interpretation may well be followed here in view of the apparent logic of the principles involved”. But how will conduct which is in substance the same as a breach of section 4D but which for technical reasons falls outside it necessarily substantially affect competition? It may but often it will not. And the structure of the Trade Practices Act, which has its own per se sections (for example, section 48 and section 45A) or near per se sections (section 4D, section 46) does not permit a judicial development of new per se offences.

A parallel fallacy perhaps appears on page 179 where, in the course of criticising Northrop J.’s decision in *Adamson’s Case*,³ Pengilley remarks that it is “an odd conclusion to find common law restraint of trade doctrines assisting a party yet competition law being held inapplicable.” Is there any oddness? A law against substantially lessening competition is concerned with the general state of competition in a market, while the common law restraint of trade doctrine protects particular individuals from conduct which may have trivial, if any, market effects. There is a fundamental distinction between effects on a particular competitor and effects on competition.

In paragraph 3.4 it is asserted that, on a company law analogy, a decision in good faith not to admit a member is unreviewable. Company law would seem to be an unnecessarily remote analogy: the *Crofter Case*⁴ suggests that to conspire to injure for motives other than self interest is actionable in tort.

Though the references to American literature are copious, some of the Australian writing, such as Blakeney’s 1976 article⁵ might have been referred to.

Despite these criticisms, the book will be essential for those working in the field. It joins such useful works as Shannon’s *Franchising in Australia* in filling out particular gaps in the writing on the application of the Trade Practices Act to particular areas of behaviour.

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³ *Adamson v. Western Australian National Football League* (1979) T.P.R.S. 303.353.

⁴ *Crofter Hand Woven Harris Tweed Co. Ltd v. Veitch* [1942] A.C. 435.

⁵ M. Blakeney, “The Impact upon Trade Associations of Section 45 of the Trade Practices Act 1974-1975” (1976) 50 *A.L.J.* 57.