

BOOK REVIEWS

Restrictive Trade Practices: Commentary and Materials by Anne Hurley (Law Book Company Limited, Sydney, 1991) pages i-xxv, 1-609, 611-615, ISBN 0 455 21007 1 (hardback); ISBN 0 455 21008 X (soft cover)

In her Preface to *Restrictive Trade Practices: Commentary and Materials*, Anne Hurley outlines the scope of and reasons for her book in the following terms:

Part IV of the *Trade Practices Act 1974* (Cth) contains the prohibitions on practices which lessen competition. The significance of these prohibitions to those in trade and commerce was emphasised by Spencer J. in *T.P.C. v. British Building Society* (1988) A.T.P.R. 40-880: 'Businessmen . . . who remain in ignorance of the requirements of the *Trade Practices Act 1974*, do so at their own peril.'

There is now a significant body of law which has developed in relation to the provisions of Pt IV. This book is intended to provide students with a comprehensive . . . collection of the cases on Pt IV, materials relating to the administration of the Part (Trade Practices Commission circulars, guidelines and policy statements), and extracts of reports on the working of the provisions (Swanson Committee, Blunt Committee and Griffiths Committee).¹

In my view, Hurley's casebook is largely successful in achieving its aims and fills a significant gap which has existed for some time now in restrictive trade practices teaching materials. This is an area of the law which, while far short of the maturity of United States antitrust law, continues to grow. A steady stream of reported decisions has now led to a significant body of case law. In particular, following legislative amendment in 1986 and the landmark High Court decision in *Queensland Wire Industries Pty Ltd v. BHP Co. Ltd*,² actions under s. 46 of the Act for misuse of market power have flourished.

The heightened profile of restrictive trade practices law has arisen not only from the growing number of successful actions brought under it, but also through its increased political focus. As Paul Keating once said, even the parrots in the pet shops are talking of microeconomic reform. The Federal Government, in words at least, has expressly and emphatically claimed reliance on the restrictive trade practices provisions of the *Trade Practices Act 1974* (Cth) as a key part of its competition policy. Standing Committees on Legal and Constitutional Affairs in both Houses of Federal Parliament have reviewed the merger and misuse of market power provisions of the Act, and amendments to the Act have recently been introduced. A number of other Federal Parliamentary Committees have also recommended changes to the Act. The reach of the Act may also be broadened.

1 Hurley, A., *Restrictive Trade Practices: Commentary and Materials* (1991) vii.

2 (1989) 167 C.L.R. 177.

The Victorian Law Reform Commission has released a Discussion Paper on ways restrictive trade practices legislation might be introduced into Victoria, and has very recently provided a Report recommending that the Law Institute of Victoria and the Bar Council be subject to such legislation. The Federal Government has also indicated its intention to expand the coverage of the Act to include, for example, State instrumentalities otherwise outside its scope.

For these various reasons an understanding of Part IV of the Act has become increasingly important. Hurley's book thus meets a significant need. The only other relevant casebook in the area is now out of date.³ Hurley's casebook also complements the Law Book Company's other recent publication in this field.⁴

The book is essentially structured to follow the order of the provisions of Part IV of the Act. That is, after two introductory chapters, the following chapters deal respectively with anti-competitive arrangements (s. 45), misuse of market power (s. 46), exclusive dealing (s. 47), resale price maintenance (s. 48), price discrimination (s. 49) and mergers (s. 50). The final chapter then considers remedies, penalties and enforcement. The first of the introductory chapters is entitled 'Background' and deals briefly with the history of the Act, its constitutional basis and limitations, and the aims of antitrust legislation generally. The second chapter is devoted to two of the fundamental concepts underpinning Part IV of the Act, namely competition and markets. 'Authorization' decisions, by which the Trade Practices Commission or the Trade Practices Tribunal can 'authorize' conduct which might otherwise be in breach of Part IV, are included in the chapters dealing with the relevant conduct rather than in a separate chapter.

The extracts are not confined to the leading court decisions but include decisions of the Trade Practices Commission and Trade Practices Tribunal, publications by the Trade Practices Commission, some United States anti-trust decisions, and leading academic writings. Trade Practices Commission policy statements are particularly useful, for example, for an understanding of the practical workings of the merger provisions of the Act as, at present, only the Commission or Minister can institute injunctions or penalty actions for a breach. The commentary is brief but succinct and includes short questions for consideration.

This is a very competent casebook and I happily recommend it to teachers and students of restrictive trade practices law. The following critical comments arise from my experience in using the book for an undergraduate course but are essentially of a minor nature and do not detract from the overall attraction of the book. The first criticism concerns the lengthy and important second chapter on 'Market and Competition'. The distinctive feature of restrictive trade practices law is the economic principles which

³ Ransom, A. and Pengilly, W., *Restrictive Trade Practices: Judgments, Materials and Policy* (1985).

⁴ Corones, S., *Competition Law and Policy in Australia* (1990).

not only guide the objectives of Part IV of the Act but also have been incorporated into the terms of the legislation. These matters are dealt with by Hurley in the second chapter. One difficulty I have found with this chapter is that while it examines markets and (very briefly) competition, it leaves the related discussion of market power largely to the later chapters on misuse of market power (Chapter 4) and mergers (Chapter 8). However, the relationship between market definition on the one hand and competition and its antithesis market power on the other, would be better dealt with in this introductory chapter. One consequence of Hurley's treatment, for example, is that barriers to entry, a concept fundamental to both markets and competition as well as market power, is not dealt with in any deliberate fashion until chapter 4. This point in fact can be related to a broader concern relating to the structure of the book. Following the order of the Part IV sections has a superficial attractiveness but is not necessarily pedagogically satisfactory. Splitting market power issues in Chapter 4 from discussion of markets and competition in Chapter 2 is one illustration of this. Leaving mergers, the quintessential market power topic, until the second last chapter would seem to be similarly inappropriate. The choice of some of the materials for this chapter might also be questioned. Reliance is placed, understandably, on large extracts from the *Queensland Wire* decision and the two *Australian Meat Holdings* decisions.⁵ *Queensland Wire* establishes important principles concerning markets and market power, and *Australian Meat Holdings* raises interesting issues of proof. However, neither provides particularly helpful illustrations of the general principles. A wealth of more stimulating material, including decisions from overseas jurisdictions, could usefully have been added. Finally, the commentary and questions are particularly important in this introductory chapter and yet unfortunately it is here that Hurley offers least guidance and stimulus. The questions posed throughout the book tend to be brief and open-ended.

A second general criticism concerns the manner in which the relevant decisions are presented in the book. Hurley often opts for extracts which highlight particular principles or elements of a provision. The extracts can be frustratingly brief. Particularly noticeable here is the treatment of s. 46 in Chapter 4. This chapter contains no fewer than seven separate extracts from the *Queensland Wire* decision and further short extracts from other decisions. Similarly, Chapter 5 on exclusive dealing is categorized according to at least fifteen types of conduct which may constitute a breach of s. 47. It may be doubted whether students can pick up more than a superficial understanding from a reading of such short extracts.

The final comment is not by way of criticism but observation. The book was based on the law as at November 1991. Unfortunately the number of important decisions since that time has meant that in some areas the book has become outdated. This is particularly so for the chapter on s. 46.

⁵ *Trade Practice Commission v. Australian Meat Holdings Pty Ltd* [1988] A.T.P.R. 40-876; *Australian Meat Holdings Pty Ltd v. Trade Practices Commission* [1989] A.T.P.R. 40-932.

In conclusion, a casebook on restrictive trade practices was well overdue, and *Restrictive Trade Practices Commentary and Materials* by Anne Hurley is to be welcomed. It is a very capably compiled selection of materials, with a concise but helpful commentary. Subject to the minor criticisms above, I recommend it to those with an interest in this area of the law.

JOHN DUNS*

* LL.B. (Hons), B.Com. (Melb.), LL.M. (Mon.). Senior Lecturer in Law, Monash University.