

*Trade Practices and Consumer Protection: A Guide to the Trade Practices Act 1974 for Businessmen and Their Advisers*, by G. O. Taperell, R. B. Vermeesch, and D. J. Harland, (Butterworths Pty. Ltd., Australia, 1974), pp. i-xi, 1-274 Recommended Australian Price \$9.00; ISBN O 409 38103 9.

The federal Trade Practices Act 1974 is likely to have a more powerful impact on business activity in Australia than any other legislation hitherto enacted, whether at national or at state level. Apart from Part X, which re-enacts previous legislation relating to overseas cargo shipping, the Act has two broad objectives, namely to control restrictive trade practices adversely affecting the public interest and to protect the consumer against a range of unfair trade practices. The newly-established Trade Practices Commission, which is responsible for administration and enforcement of the Act, is already showing its teeth with a challenge to oil companies to justify their exclusive contracts with service stations.

The appearance of this new publication is therefore most timely. The authors modestly say that the book is designed primarily for the layman, though they express the belief that it will be of assistance to the lawyer. It is in fact a work of remarkably high quality which will be found invaluable by the practitioner. The achievement of the authors is all the more creditable in that they were able to reach publication within months of the Royal Assent.

The heart of the Trade Practices Act consists of Parts IV and V. The former, departing from the case by case approach of the prior legislation, draws its inspiration from American anti-trust legislation rather than the less punitive fair trading statutes of the United Kingdom. It is made an offence to enter into or give effect to any contract, arrangement or understanding in restraint of trade, except through the gateways permitted by the Act. Monopolies, exclusive dealing arrangements, resale price maintenance and price discrimination are all brought within the ambit of the Act, as are mergers likely to have the effect of substantially lessening competition in a market for goods or services. Infringement of this Part of the Act attracts a penalty of up to \$250,000 for a corporation and \$50,000 in the case of any other person. Part V outlaws a number of unfair consumer trade practices (false or misleading conduct, bait advertising, referral selling, pyramid sales, and the like), provides for regulations prescribing minimum product safety and information standards and, in the civil law area, establishes a range of implied terms in favour of the consumer who is a party to a supply transaction, these being modelled closely on the United Kingdom Supply of Goods (Implied Terms) Act 1973, and capable of exclusion only in the conditions specified in the statutory provisions.

In describing the background to the Act, the authors provide a concise but valuable insight into the constitutional law issues involved. To the reader coming fresh from a country without a written constitution and with a unitary system of legislation, the drafting devices utilised in the Act appear at first sight strange, not to say bizarre. For example, numerous provisions are expressed to be confined to dealings entered into by corporations, but s. 6(2)(h) provides that subject to certain exceptions the Act is to have effect as if a reference to a corporation included a reference to a person not being a corporation. It is only after further perusal, aided by the penetrating comments of Messrs. Taperell, Vermeesch and Harland, that one comes to appreciate the subtle ingenuity of the Parliamentary draftsman, who (improving on a well-known commercial law technique by which a series of ever-narrowing restrictive covenants is set out in a service contract in the hope that if one is struck down as too wide, the next in line will succeed) has selected a number of ingredients attracting the legislative power of the federal Parliament (corporations, inter-state trade, etc.), combining these in such a way that if any part of the statutory provisions is declared unconstitutional, the combinations produced by s. 6(2) and the operative sections will substantially secure the impact of the vitiated provisions, even if the boundaries of these become redefined.

Competition law cannot be understood without a reasonable comprehension of the different techniques used by business to gain market ascendancy. Alive to this fact, the authors have depicted typical forms of collusive action and commercial pressure designed to reduce competition and to maintain price levels. A description of these practices is skilfully interwoven with legal analysis.

The examination of the provisions relating to unfair consumer trade practices draws heavily on English law dealing with comparable statutory provisions, with which the authors are obviously fully familiar. Their treatment of misleading conduct and false representations is particularly helpful, and shows that the draftsman has avoided some of the weaknesses that have become apparent in the United Kingdom legislation. Inevitably, the book misses some of the problems that may arise. Does a seller who tenders goods not in conformity with the contract description commit an offence under s. 64 by demanding payment? This depends upon how widely the courts will construe the definition of 'unsolicited goods' in s. 4(1). If the recipient, having used the goods, refuses to pay for them, what impact, if any, does this have on the contract of sale generated by his deemed acceptance? Does the property still remain with him? If so, this appears to have the effect that the sender can neither recover the goods nor complain if the recipient damages or even disposes of them.

Of great importance are the new statutory implied terms (title, fitness, merchantable quality, etc.) imported into consumer transactions by ss. 66-74, and overlaid upon existing state legislation. It is, perhaps, in this field more than any other that the federal Parliament has pre-empted legislative activity traditionally reserved to the states. As the authors point out, 'consumer' here bears an unusually wide meaning and as regards goods of a kind ordinarily acquired for private use or consumption can even extend to purchases by companies for business purposes. The authors neatly pick up a point on the definition of 'merchantable quality' that has been missed by most English commentators in relation to the United Kingdom statute, namely that to be merchantable the goods must now answer *all* their normal purposes, not merely one. Interesting also is their analysis of the drafting weaknesses of s.73, which is designed to exculpate a finance house from the consequences of a breach of condition by the dealer under ss. 70, 71 or 72 but does not fully achieve this objective. It would have been useful if at this point the book had gone on to discuss the circumstances in which a dealer may at common law be held the agent of the finance house so as to involve it in liability for his acts, a liability which is, of course, outside the purview of s. 73.

This book is essential reading not only for businessmen but for legal practitioners and law students. It is an altogether admirable work.

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*Property Law Cases and Materials*, by R. Sackville and M. A. Neave (2nd ed., Butterworths, Australia, 1975), pp. v-lxi, 1-981. Australian price — hard cover \$29.50; ISBN 0 409 43840 5; paperback \$22.50; ISBN 0 409 43841 3.

This collection is a most valuable teaching aid and a mine of information about the law of property. The reviewer has used it for teaching purposes since its appearance in 1971. The present edition contains some new material. There is now a section on the rule against perpetuities. The first edition contained a fairly extensive discussion of future interests which stopped short of the perpetuity rule leaving the student enmeshed in the legal contingent remainder rules, the rule in *Purefoy v. Rogers*<sup>1</sup> and the Statute of Uses, and believing there was no worse to come. It is distinctly preferable that the area of future interests should be dealt with as a whole and the present edition achieves this, providing a clear statement of the common law rules and the statutory modifications effected for Victoria by the Perpetuities and Accumulations Act 1968.

A section on mortgages has also been introduced. This is welcome. It must however be recorded that the existence of the equitable mortgage in its various forms is barely acknowledged. This is surprising in view of the importance of this form of security both in practice and as a form of equitable interest for the purpose of priority disputes (cf. *J. & H. Just (Holdings) Pty. Ltd. v. Bank of New South Wales*<sup>2</sup>).

A very important addition is the chapter on Remedies: damages, specific performance and the injunction. There are three rather surprising omissions: there is no mention of the remedy of specific performance in favour of third parties (*Beswick v. Beswick*<sup>3</sup>), strange in a book which constantly and properly stresses the overlap between contract and property (e.g. chapter 5 Part V). Secondly, the discussion of specific performance of contracts for the sale of chattels, an area but slightly explored in the literature on the subject, could usefully have been supplemented by a reference to Treitel's article<sup>4</sup> on this topic. Thirdly, in the reviewer's opinion no treatment of the injunction, however concise, should fail to deal with the principles governing the question whether in the court's discretion an interlocutory injunction<sup>5</sup> should be granted in a particular case. Thus in *Beecham Group Ltd. v. Bristol Laboratories Pty. Ltd.* the High Court said: 'The Court addresses itself in all cases . . . to two main inquiries. The first is whether the plaintiff has made out a *prima facie* case, in the sense that if the evidence remains as it is there is a probability that at the trial of the action the plaintiff will be held entitled to relief . . . The second inquiry is directed to . . . whether the inconvenience or injury which the plaintiff would be likely to suffer if an injunction were refused outweighs or is outweighed by the injury which the defendant would suffer if an injunction were granted'.<sup>6</sup>

To some extent to offset these additions, the chapter in the first edition dealing with 'Problems of Planning and Conservation of Resources' has been omitted. This is a good thing *inter alia* for the reasons given by the editors: 'the general principles can be canvassed (only) superficially, but at the cost of ignoring the legislation that provides the cornerstone of planning law in each jurisdiction'. I hope that in the next edition the chapter on the 'Impact of the Federal Constitution upon the Law of Property' will also be excluded. The reasons given for its inclusion are quite artificial. There appears to be absolutely no justification for occupying space with

<sup>1</sup> 85 E.R. 1181.

<sup>2</sup> (1971) 125 C.L.R. 546.

<sup>3</sup> [1968] A.C. 58.

<sup>4</sup> Treitel G., 'Specific Performance in the Sale of Goods' (1966) *Journal of Business Law* 211.

<sup>5</sup> See p.307.

<sup>6</sup> (1968) 118 C.L.R. 618, 622.