of footnotes is poor and parts of case names or citations are omitted on a number of occasions. The name of one case (*Healey* v. *Rauhina* on page 122 footnote 191) is incorrect and that error is carried into the table of cases. There are errors in the names and mode of citation of statutes. The title and date of the Bland Committee are incorrect. Only two and not three books were foreshadowed in the 4th edition of Benjafield and Whitmore, *Principles of Australian Administrative Law.*

Today, many of the rules of grammar are changing and what is ungrammatical to some is acceptable to others. The authors have, however, been unduly inventive. Among the new words appearing in the text are "mandamused" (page 364), "mandamusable" (page 367) and "certiorariable" (page 442). On page 217 the authors discuss "the most well-known case" on an issue. However, the statement which the reviewer will remember appears on 285: "a declaration is neither positive nor negative, but neuter".

G. D. S. TAYLOR*

Trade Practices Law. Restrictive Trade Practices Deceptive Conduct and Consumer Protection. Volume I. Introduction and Restrictive Trade Practices by BRUCE G. DONALD, B.A., LL.B. (A.N.U.), LL.M. (Harv.), Solicitor of the Supreme Court of New South Wales, Lecturer (part-time) in Restrictive Trade Practices, University of Sydney and J. D. HEYDON, B.A. (Syd.), M.A., B.C.L. (Oxon.) of Gray's Inn and the N.S.W. Bar, Barrister-at-Law, Professor of Law and Dean of the Faculty of Law, University of Sydney, Vinerian Scholar, Sometime Fellow of Keble College, Oxford. (The Law Book Company Limited, 1978), pp. i-lix, 1-508. Cloth, recommended retail price $34.50 (ISBN: 0 455 19598 6).

This work is a valuable addition to the Australian literature on competition law and will be an essential working tool on the Trade Practices Act 1974-1977 (Cth) for specialists and teachers. Volume 1 deals with Part IV of the Act (restrictive trade practices and mergers) and Volume 2, which is in preparation, will cover Part V (consumer protection).

The coverage and depth of detail in Volume 1 are excellent, most of the problem areas being discussed and sound solutions for them put forward.

An opening background chapter is followed by a survey of the constitutional foundation for the Act. The authors conclude that (subject to some reservations which do not go to the heart of the legislation) the Act is constitutionally valid. The question whether sections 47(8) and (9) are invalid as takings of property by the Commonwealth on unjust terms is not referred to. (This issue has been

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resolved in the affirmative as to part of section 47(9) by *Re Tooth & Co. Ltd* September 1978, T.P.R.S. 303.200.)

The state of the authorities on section 92 of the Constitution, which leave it open to the High Court to consider the validity of the Act one provision at a time, seems to exasperate the authors. One wonders why. If it is appropriate for the Trade Practices Act to focus on the individual provisions of a commercial agreement, there may be something to be said for having section 92 focus on individual provisions of an Act of Parliament, even if the remainder of the statute in question does not, on balance, infringe the constitutional guarantee.

For there is a symmetry here. The Trade Practices Act is designed to protect society against the economic, social and political dangers of monopolies and cartels in trade and commerce. These dangers have long been understood and are fully described in the literature. Section 92 of the Constitution, on the other hand, is capable of giving society some protection against the dangers presented by the growth and power of government bureaucracy. Sociologists of the nineteenth and early twentieth centuries such as Emile Durkheim, Max Weber and Alexis de Tocqueville, while noting that a "rationalising" bureaucracy could in some circumstances benefit society by setting it free from blind tradition, at the same time warned that in our century bureaucratic power might extinguish social diversity, cultural variety and individual liberty. As de Tocqueville put it

> This power would be like the authority of a parent if, like that authority, its object was to prepare men for manhood; but it seeks, on the contrary, to keep them in perpetual childhood. . . . It covers the surface of society with a network of small complicated rules, minute and uniform, through which the more original minds and the most energetic characters cannot penetrate, to rise above the crowd. . . . Such power does not destroy, but it prevents existence; it does not tyrannize, but it compresses, enervates, extinguishes and stupefies a people, till each nation is reduced to nothing better than a flock of timid and industrious animals, of which the government is the shepherd.[1]

In relation to interstate trade, commerce, and intercourse, section 92 limits bureaucratic power to that which is needed for the regulation of "injurious practices". This guarantee provides benefits that are apparently measurable even in purely economic terms. The fact that the Australian interstate trucking industry is perhaps the most efficient in the world is generally thought to be directly traceable to the *Hughes and Vale Case (No. 1)*,[2] which struck down a network of controls and restrictions administered by the New South Wales Transport Board. If the High Court's pattern of interpretation leaves some doubt about the validity of some of the individual provisions of Part V, as Mr Donald and Professor Heydon suggest, that may be a small price to pay for the preservation of a free interstate market in goods, services and ideas. At

[1] de Tocqueville, *Democracy in America* translated by Bradley, (New York 1945), i, 318-319 (first published Paris, 1835).

[2] *Hughes and Vale Pty Ltd* v. *New South Wales* (1954) 93 C.L.R. 1 (P.C.).

the same time, *Tradestock Pty Ltd* v. *T.N.T. (Management) Pty Ltd*[3] is a reminder that even in the interstate freight transport industry itself, a Trade Practices Act is needed to protect the market from restraints of competition perpetrated by some of those trading in it.

The authors analyse the law and the authorities—Australian, American, United Kingdom and EEC—in as much detail as most readers are likely to need. Their conclusions are generally clear and helpful. For example, they assert on cogent grounds that the date for determining whether a long-term contract offends the section 49 prohibition on price discrimination is the date on which the contract is made. They point out that restrictions in shopping-centre leases, which constituted a significant proportion of Commission decision-making under the pre-1977 Act, will now almost never be caught because the new provisions require proof that the restriction causes a substantial lessening of competition in a market. This should put to rest any confusion which some recently published work might have generated in the minds of readers. The authors also enumerate the factors which have been found relevant to the question whether an agreement or a course of conduct substantially lessens competition. However, a reader who wanted to know in practical terms just how to go about forming a judgment on that issue or on the market effects of a merger for the purpose of advising his client would probably have recourse to other sources as well.

In their chapter on the new law of mergers as laid down by section 50, the authors debate the meaning of the central phrase "control or dominate". The interpretation of these words has exercised the minds of a number of commentators already. One view is that they mean simply "a leading position", but this seems far too broad, particularly in the context of a quasi-criminal provision, since occupancy of the leading position in a market says nothing about whether that market is workably competitive or not. Messrs Santow and Gonski suggest that the word "dominate", which is clearly intended to mean something less than "control", has the same meaning as was given to the word by the European Communities Commission in the *Continental Can* case.[4] They also suggest that the concept is essentially a structural one.[5] There are difficulties with this view also. The definition of "dominant position" in the *Continental Can* case was in fact incorporated in the 1974 Act as an inclusive definition of the words "position substantially to control a market" for the purposes of monopolization in section 46. This definition was not changed by the 1977 amendments. It is difficult to accept that this formulation can be called in aid as a definition of "dominate" when it is already used in the Act to define "position substantially to control". If Parliament intended to adopt the *Continental Can* formula in section 50, the logical course would have been to use the same words as in section 46; but it did not.

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[3] (1978) A.T.P.R. 17563.

[4] *Re Continental Can Company Incorporated* [1972] C.M.L.R. D11.

[5] Santow and Gonski, "Mergers After the Trade Practices Act 1974-1977" (1978) 52 A.L.J. 132.

Professor Heydon and Mr Donald do not take a dogmatic stand on the distinction between "control" and "dominate", but favour the notion that "dominate" means to induce fear or a docile attitude in competitors. They initially seem to find some attraction in the view that "dominate" has a structural meaning, but later move to a structure-conduct-performance position.

The decision of Northrop J. in *T.P.C.* v. *Ansett Transport Industries*[6] advances the debate on this point but does not settle it. The judge in that case accepted that "The word 'dominate' is to be construed as something less than 'control' ", and considered that "dominate" was used in its ordinary sense and meant "having a commanding influence on" (a dictionary definition also advanced by Messrs Santow and Gonski). He then analysed the evidence by applying to it five criteria of a principally structural nature. These criteria are quite useful in themselves, but they will not greatly help courts to apply section 50 in the future, partly because they are not weighted and partly because his Honour's definition of "dominance" does not give a clear enough picture of the "*actus reus*" which the section requires.

In fact, a feature of all the definitions advanced so far is that they look at only part of the problem. Section 50 is designed to block mergers which will produce a passive, non-competitive market. Yet the existing definitions either consist merely of synonyms, or else focus on possible causes or indicia of dominance, such as concentrated structure or frightened competitors, without directly describing the actual state of affairs—"dominance"—that Parliament has sought to prevent. A more complete definition is needed.[7]

Trade Practices Law is written in a direct and forthright style. When the authors believe that an opposing argument is unsound, they leave the reader in no doubt about their opinion. No space is wasted on leisurely footnotes or donnish irony—there is just a whizz and a bang as another well-aimed projectile demolishes its mark. Selected for early criticism is the prolix and bewildering drafting of the 1977 amendments. Here one must point out that Parliamentary counsel have great skills which are rare even among good lawyers. Their services are in perpetually heavy demand. But because of the pressures under which they must work, they tend to develop habits in drafting which, though unconducive to clarity and simplicity, are unlikely to be modified because Parliamentary counsel so seldom have the time to make a thorough review and reappraisal of established drafting practices. Some of the habits which have become entrenched in this way are the tendency to use participles and ablative absolutes instead of indicative verbs, and the stubborn refusal to break a sub-section into two or more sentences. This latter practice in particular, which produces what must be the most breathless, tedious and confusing legislation in the English-speaking world, is not explicable on grounds of ancient practice since a statute such as the Bills of Exchange Act 1909 (Cth), which is a model

[6] [1978] A.T.P.R. 17705.

[7] Commercial Law Note, (1978) 52 A.L.J. 458 suggests one possible definition.

of clarity, does contain more than one sentence in a sub-section, as do many other statutes drafted in the late nineteenth or early twentieth centuries.

The authors direct some of their heaviest fire at decisions of the Trade Practices Commission itself. They attack the large number of interim authorisations granted when the Act first came into effect. They believe that in the adjudication of exclusive dealing the Commission has given weight to irrelevant considerations such as the range of consumer choice, the affected dealer's freedom of decision and the effect of the conduct on the opportunities available to competitors. In particular, they attack "the fallacy of industry aggregation", a reference to the practice of evaluating the anti-competitive effect of a supplier's conduct, not only by reference to the impact of its own conduct, but also in light of whether its competitors follow the same trading pattern. This line of reasoning, the authors contend, is simply not permissible, especially under the post-1977 legislation.

This argument will prove difficult to refute. If correct, it means that at least a third of the Commission's work under Part IV to date has been nugatory. This conclusion would be a melancholy one at the best of times, but in present conditions it is particularly so. For these times are not auspicious for competition policy. Max Weber said that periods of economic stagnation and diminished opportunities produce tendencies towards monopoly, as established individuals and organisations seek to protect their threatened positions. If he was right, and if the present condition of near-stagnation in the world economy persists for long, the pressure on governments to weaken legislative prohibitions against industry restrictions will become severe. This tendency is already visible in the crisis cartels which are being authorised by the European Communities Commission. If it comes into play in Australia, the Trade Practices Commission's opportunities for de-cartelising Australian industry in the future may be reduced.

There are few errors of law or fact in this work. One exception is the statement that current clearance *applications* were converted into authorisation applications on 1 July 1977 (page 12). Another is the account of how the highly effective resale price maintenance amendments of 1971 came to be enacted.[8] Finally, *Trade Practices Law* is free from the defect that gives many other recent Australian books such an amateurish look: the proliferation of misprints, spelling errors and baffling syntax. The standard of proof-reading in this work is high. The same cannot, unfortunately, be said for the printing and binding, but

[8] The authors give currency to the widely-held but erroneous belief that these provisions were introduced in response to a boycott of Dunlop products announced by Mr R. J. A. Hawke (on 17 February 1971) on behalf of the Australian Council of Trade Unions and the Melbourne retail store of which it was part-owner. In fact, early in February 1971 the Attorney-General had announced the forthcoming introduction of legislation prohibiting R.P.M. This followed the completion of a study of this subject, among others, which he had commissioned in August 1970. The credit for the R.P.M. provisions thus belongs to Mr T. E. F. Hughes, Q.C., who was Federal Attorney-General at the time.

that will not prevent this book from taking its well-merited place on the desk of every lawyer concerned with trade practices in Australia.

G. de Q. WALKER*

Lawyers by JULIAN DISNEY, LL.B. (Hons.) (Adel.), Barrister and Solicitor of the Supreme Court of South Australia, Formerly Lecturer in Law, University of New South Wales, Presently Law Reform Commissioner, New South Wales, JOHN BASTEN, LL.B. (Hons.) (Adel.), B.C.L. (Oxon.), Barrister of the Supreme Court of New South Wales, Lecturer in Law, University of New South Wales, PAUL REDMOND, B.A., LL.M. (Syd.), Solicitor of the Supreme Court of New South Wales, Lecturer in Law, University of New South Wales, STAN ROSS, B.A. (Brook.), M.A. (San Fran. State), J.D. (Calif.), Member of the California Bar, Senior Lecturer in Law, University of New South Wales, with the assistance of RICK RAFTOS, B.COM., LL.B. (N.S.W.), Barrister of the Supreme Court of New South Wales. (The Law Book Company Limited, 1977), pp. i-xliii, 1-758. Cloth, recommended retail price $35.50 (ISBN: 0 455 19501 3). Paperback, recommended retail price $28.50 (ISBN: 0 455 19502 1).

To agree to review a 750 page book while preparing to depart for study leave would appear not only irresponsible but to render the temptation to skim lightly over only some of those pages almost irresistible. In the majority of cases that would be the result. However, although the commitment to review this book was made in those circumstances, the temptation has been remarkably easy to resist. This is due to the authors' diligence in collecting a large and heterogeneous quantity of valuable and interesting information on the legal profession and their striking ability to edit, organise, present and comment on that material in a manner that is at once uncomplicated, unbiassed and lucid.

The book is designed as a text for students studying the legal profession or some aspects of its structure, organisation, discipline, ethics and practices. Accordingly, the primary purpose of the book is the presentation of adequate information on the profession in Australia. That information is provided by extracts from periodical articles, monographs, survey results, government reports, judicial and professional rulings, and results of the authors' own research.

The content is divided into three parts entitled Structure of the Profession (Chapters 1-6); Delivery of Legal Services (Chapters 7-10); and Lawyer and Client (Chapters 11-14). Part I covers the history of the profession in Australia, including the debate about fusion or division of the profession, a statistical profile of the members of the

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