

section 49 the authors correct identification of the comparative ease of avoidance of the section if it were given a strict construction leads to their apparent endorsement of the questionable indirect purchaser theory and the view that conduct of companies in the same group should in effect be aggregated.

Inevitably the range, novelty and complexity of the legislation leaves ample opportunity for speculation and adoption of interpretations which may differ from those favoured by the authors on particular questions, and it is rare for the authors to fail to refer to available alternative arguments. All the same it is fair to say that the strong emphasis on policy leads them to some debatable conclusions.

The allocation of space between the many topics and questions raised appears generally to be well balanced. The practitioner might have hoped for rather more extensive discussion on important questions under both sections 45 and 47 of causation and aggregation and a more sustained analysis of the administration of the Act as it applies to authorizations and notifications. There is also a certain lack of feeling for matters of a more mundane and practical kind, for instance, the effects of unnecessarily applying for authorization or giving notification, the *de facto* importance in the authorization test of 'industry aggregation' and the status and role of intervening parties in cases before the Federal Court.

The work is complemented by a wide bibliography, a detailed index and tables of cases and statutes. The text has few typographical or cross referencing errors and the book is well printed and produced. The style, as can be expected in a book of joint authorship, is sometimes uneven and prolix, but the authors' commitment and expertise in Trade Practices law guarantees interesting and frequently challenging discussion.

Although some reservations must be made, the overriding virtues of this work will secure its place as a valuable and stimulating guide for those involved in trade practices law in Australia.

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Trade Practices Law, Volume 2: Restrictive Trade Practices, Deceptive Conduct and Consumer Protection, by B. G. Donald and J. D. Heydon, (Law Book Co. Ltd., 1978), pp. i-lliii, 509-875. Price \$26.50. ISBN 0 455 19742 3.

The Trade Practices Act 1974 (Cth) is a complex statute. It is based on concepts which are unfamiliar to most lawyers, yet it affects a wide range of businessmen in their day-to-day activities. There is widespread demand for information about what it says, how it works and the extent to which it affects established legal principle and commercial practice.

On the other hand, the Act is still relatively new. It has been subject to an almost constant process of amendment since its passage in 1974 and there is no guarantee at all that it is as yet in anything like its final form. The courts are only just starting to grapple with its provisions, while astute legal advisers are repeatedly finding new uses to which the legislation may be put. There is a host of still unanswered questions about the Act; for example (in the context of consumer protection): how far does Part V go toward providing a statutory alternative to common law actions based on the economic torts? Will damages actions under section 82 be governed by tort principles or contract principles? In so far as civil actions are available for contraventions of Part V, how far does the Act encroach on the general law of contract?

All of this poses a dilemma for intending text-book writers. Should they attempt to meet the demand for information and write a book which, while timely, cannot hope to be the last word? Or should they wait until the dust settles and give a more rounded account of the topic?

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While on the merits there is little to choose between either approach, the alternatives are mutually exclusive. One gets the impression that Mr Donald and Professor Heydon have tried to side-step this stumbling-block in the compilation of their two volume treatise. In the preface to Volume 1 the authors quite rightly stress the need for a work of the first kind, but go on to express ambitions for the book which suggest that they are attempting the second alternative. To say that these ambitions are not achieved is not to denigrate the work. The point simply is that, in so far as it was intended as a comprehensive account of trade practices law in Australia, it was written too early and perhaps too quickly.

For all that, the work is impressive in its pursuit of the first alternative. Volume 2, which deals with the provisions of the Act relating to deceptive and unfair conduct, consumer protection, overseas cargo shipping, enforcement and remedies, is only marginally slimmer than Volume 1, the text running to 353 pages. It incorporates analysis of the Act as amended to November 1977, which means that like Volume 1 it was written over a period which is extraordinarily short in view both of the breadth of discussion and the sheer physical size of the work.

There is no doubt that both volumes will find a wide readership among legal practitioners, businessmen and students. One drawback so far as students are concerned will be the price of the work. It will be difficult to avoid purchasing both volumes. This is because those predominantly interested in restrictive trade practices (Part IV of the Act) must look to Volume 2 for a discussion of enforcement and remedies, while those interested in consumer protection will need to consult Volume 1 for analysis of the constitutional background to, and scope of, the Act. Of course, so far as consumer law courses are concerned, the work is further limited, as the authors themselves freely admit (at page 511), by the fact that it is concerned only with the Trade Practices Act; State consumer legislation is referred to only incidentally and only where it relates to the discussion of the Trade Practices Act provisions. As a result, consumer law students will have to look elsewhere for analysis of credit laws, small claims tribunals, compulsory warranties in State legislation and so on.

Volume 2 is divided into four parts: Deceptive and Unfair Conduct (Chapters 11-14, which discuss most of the provisions in Division 1 of Part V); Consumer Protection (Chapters 15 and 16, which deal respectively with consumer product standards and consumer rights of action against suppliers and manufacturers); Shipping Provisions (Chapter 17); and Enforcement and Remedies (Chapter 18, which deals with the penalties for contravention of Part IV, sanctions for contravention of Division 1 of Part V and the various private rights of action and orders available in respect of each).

The layout of each chapter in Volume 2 is the same as for Volume 1, with introductory observations subsequently expanded under a large number of sub-headings. As observed in the accompanying review of Volume 1, this approach — while ensuring a thorough coverage — does sometimes lead to disjointedness and repetition. An example of the former is the treatment of manufacturers' liability, which is discussed first in Chapter 16.2 under the heading 'Development of Manufacturers' Liability' and again in Chapter 16.9 (42 pages further on), which contains an outline of the manufacturers' liability provisions (in Bill form) of the Act. An example of the latter is to be found in Chapter 18.5, where twice in the space of eight pages *World Series Cricket Pty Ltd v. Parish*¹ is discussed in relation to the doctrine of laches. In instances such as these the layout of the book will frustrate the reader who is after an answer in a hurry.

Sections of the book seem to have been tailored specifically to the needs of businessmen and corporate executives: for example, Chapter 18.2 on corporate responsibility extends beyond a discussion of corporate criminal liability under the Act to suggestions for the adoption by corporations of compliance programmes to minimize the risks of prosecution (at pages 789-92); Chapter 16.4 (on limiting liability for breach of the implied terms in the Act) discusses in the light of sections 68 and 68A certain types of exemption and limitation clause currently in use — the

¹ (1977) 16 A.L.R. 181.

authors have even drafted a standard clause designed to make maximum use of section 68A without falling foul of other provisions in the Act (at page 722); Chapters 11 and 12 contain multiple examples culled in remarkable detail from Federal Trade Commission cases of the types of conduct and statement likely to contravene sections 52 and 53 of the Act. Perhaps unlike some of the decisions in the antitrust field United States case law on misleading advertising does offer guidance as to how the Australian provisions are likely to be interpreted.

The emphasis on legislative policy which is evident in Volume 1 is sustained throughout Volume 2. The advantages of this approach are well catalogued in the accompanying review of the first volume and need not be repeated here. The principal drawback in the approach is evident in both volumes: there is a tendency to confound the law as it is with the law as the authors believe it should be. For example, in Chapter 18.2 (on corporate responsibility) the authors discuss whether the presence of section 84 in the Trade Practices Act has the effect of precluding resort to *Tesco Supermarkets Ltd v. Natrass*² in the interpretation of section 85. There are two views on this question, each based on different possible interpretations of the Act. The discussion in Chapter 18.2 is liable to confuse because the authors first discuss the relevant case law (at pages 784 f.) before indicating what the two views are (at pages 786 f.). This approach results in separate conclusions (one of law and one of policy) which, unless the whole section is read with care, may cause the reader difficulty. On the question of policy the authors conclude with an expression of preference for the second of the two views (that *Tesco* is excluded) (at page 787). However, they do not make it clear that that expression of policy does not necessarily represent the existing state of the law and that on their own assessment (at page 785) the case law — confused though it is — tends to support the alternative conclusion.

Another instance of commitment to policy tending to mislead as to the state of the law is on page 749:

The availability of equitable remedies under the Sale of Goods Acts was put in doubt by *Riddiford v. Warren* (1901) 20 N.Z.L.R. 572 and *Watt v. Westhoven* [1933] V.L.R. 458 on the basis that equity did not interfere in sale of goods and secondly that s. 61(2) of the English Act and its Australian counterparts preserve only the 'rules of the common law'. Meagher et al. . . . consider the doubt to have been misplaced. So do we.

That may be so. However, *Watt v. Westhoven* is a decision of the Full Court of the Supreme Court of Victoria which has not been overruled. In Victoria at any rate the decision is binding, no matter how misplaced its reasoning. (Incidentally, the passage quoted appears in the course of a discussion of the remedy of specific performance. Since the sale of goods legislation *explicitly* preserves that particular equitable remedy, the doubts canvassed in the passage are not to the point.³)

Finally, in relation to the implied condition of correspondence with description (section 70) the authors take an expansive view of the House of Lords decision in *Christopher Hill Ltd v. Ashington Piggeries Ltd*⁴ and conclude: '[i]f we are right, this implied condition will be the most important of all' (at page 731). There is however the contrary view, which although less palatable is equally plausible, that *Ashington Piggeries* has all but interpreted the implied condition out of existence: the meaning of 'description' is now so narrow that the term will have been breached only in cases where there is a total failure of consideration and where as a result there will be no need to rely on the implied term at all.⁵

Chapter 18.5 embodies a substantial discussion of section 80 and injunctions (it runs to 21 pages). Some interesting points of procedure are canvassed here which will no doubt be useful for practitioners. However, this section is arguably over-

² [1972] A.C. 153 (H.L. (E.)).

³ Unless, of course, the authors have in mind the unavailability of the remedy where the goods are unascertained. However, there is nothing in the text to indicate that this is so.

⁴ [1972] A.C. 441 (H.L. (E.)).

⁵ See Sutton K. C. T., *Sale of Goods* (2nd ed. 1974) 126.

written, particularly when it is considered that only twenty pages are devoted to the whole of Part X of the Act (Overseas Cargo Shipping).

Although overall the book is well balanced, there are several other areas which the authors skate over. For example, the treatment of ancillary liability for Part IV contraventions (at pages 793-6) is scanty: there is no reference at all to the important and fascinating question as to whether, given that the prohibitions impose strict liability on principal offenders, *mens rea* is required for ancillary contraventions. Issues have arisen under the criminal law which would be relevant on this point: can a person unknowingly aid or abet the commission of a crime or unknowingly attempt or conspire to commit a crime? More specifically, if some form of intention is a prerequisite to ancillary liability under the Trade Practices Act, how much must the defendant know? Need he only be familiar with, for example, the details of an agreement which amounts to exclusive dealing or must he also know, in relation to all but the *per se* prohibitions, that the conduct in question is anti-competitive? The defence in section 85(6) is relevant to these questions but it is discussed in only ten lines on the last page of the book.

In view of the emphasis on policy throughout the book and the quite detailed attention given to the 'price abatement' test for merchantable quality expounded by Dixon J. in *Australian Knitting Mills Ltd v. Grant*⁶ it is surprising that the authors do not question perpetuation by the Trade Practices Act of the condition/warranty distinction drawn in the sale of goods legislation. Cases like *B.S. Brown & Son Ltd v. Craiks Ltd*⁷ demonstrate that so long as this distinction is drawn in preference to an approach which would allocate remedies according to the gravity of the breach, the plaintiff who purchases goods which are only 'slightly' unmerchantable will be denied any remedy at all. Incidentally, that situation will be exacerbated in the event of adoption of the authors' view that merchantable quality is concerned with function (at page 733). Such an interpretation would leave unprotected the purchaser of goods with defects going to such non-functional matters as appearance. On this point the observations of Lord Pearce in *Henry Kendall & Sons v. William Lillico & Sons Ltd*⁸ are apposite.

Legislative amendment has already caught up with portions of the book. Most importantly, the Trade Practices Amendment Act 1978, which commenced on 6 December 1978, inserted a new Division 2A into Part V of the Act dealing with manufacturers' liability. The authors did the best they could by the reader in this area by incorporating in Chapter 16.9 a brief discussion of the original Bill. However, the Bill was amended in a number of quite important respects prior to passage, so that this discussion must now be read with caution. Another achievement of the amending Act was to insert a new section 53A(2A) which removes any doubts as to whether section 53A was intended as a code on misleading conduct relating to land transactions. The criticism voiced by the authors on page 617 has thus been met.

These and other aspects combine to thwart loftier aspirations that might have been held for the book. On the other hand, there is no doubt that the second volume of Mr Donald's and Professor Heydon's treatise will, in conjunction with Volume 1, be indispensable as a source of information on this largely unfamiliar area of law. As the law settles and trends become clearer, we can expect from subsequent editions of this work things which were quite clearly unattainable in the first.

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⁶ (1933) 50 C.L.R. 387.

⁷ [1970] 1 W.L.R. 752 (H.L. (Sc.)).

⁸ [1969] 2 A.C. 31, 117 (H.L. (E.)).

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