Trade Practices and Consumer Protection, by G. Q. Taperell, R. B. Vermeesch and D. J. Harland, Sydney, Butterworths Pty. Ltd., 1974, xi + 274 pp. (including index). $9.00 (paperback).

This work on the Trade Practices Act 1974 has been well received as a practice-book by legal practitioners and corporate lawyers. A practice-book it undoubtedly is, for although it is expressly described as being primarily written for businessmen (and although the pages are sprinkled with chatty abbreviations such as "don't", "wouldn't" and "doesn't"), most lay readers would have put the book down in mystification on reaching the discussion of constitutional distributive severance on pages 6 and 7, if not before. It should therefore be judged on its merits as a legal working tool.

Among lawyers working in the areas of restrictive practices and consumer protection, the success of this work shows that it has met a real need, both because of its timely appearance and because of its adequate coverage. It deals with the constitutional background and the structure of the Act, terminology, administration and the substantive parts of the restrictive practices and mergers provisions, together with the machinery for clearance and authorization. The last three chapters give an introduction to the consumer protection provisions, and indeed these are perhaps the strongest and most polished chapters. A lawyer who thoroughly read this book would gain a working grasp of the main provisions of the Act and would be aware of the main areas of difficulty and some of the more significant drafting lacunae, both those which he might turn to his client's advantage (as in s. 45), and those which are merely bizarre (s. 55).

Whether a reader coming to the subject for the first time would also gain a sound understanding of the purpose of the Act, or of the economico-legal considerations underlying such fundamental concepts as the doctrine of the "relevant market" is more doubtful. However, the authors do refer the reader to other works which deal with these topics in more depth. What is more important in a practice-book of this kind is that it gives the lawyer practical suggestions which he can put to use at once in advising his client or his employer company. A couple of examples are the suggestion to companies issuing advertising brochures that they should include a statement that the information given is correct as at a certain date; and the discussion of cost-justification in relation to s. 49, which reproduces a summary of the areas in which expenses of distribution are most likely to vary with the size of the order. Practical advice of this kind is valuable in itself—but it is also helpful in as much as it gives the lawyer who is new to the field a measure of instant self-confidence when dealing with his client and when confronting the client's day-to-day problems.

The authors opt boldly for the view that the phrase "restraint of trade" in s. 45 has exactly the same meaning as it does at common law.

They draw the corollary that if a trade tie is incorporated in a dealing in land such as mortgage, lease or conveyance, the supplier may escape liability under s. 45 through the narrowness of the common law test, and may also escape s. 47 because the subsequent supply of goods or services is not itself subject to an exclusive dealing condition. This view appeared rather extreme at the time this book first appeared, but in light of the dicta of the High Court in *Quadramain* v. *Sevastapol*[1] it begins to seem like clairvoyance. However, in adopting the common law test of restraint of trade—that which restricts an existing freedom—the authors ensnare themselves in the same difficulties as those which entangle the dicta of the majority in *Quadramain* and fail to resolve the resulting contradictions and absurdities. They are driven to describing the permissive part of the English *Tyre Manufacturers'* agreement[2] as "restricting the freedom of those participating in the scheme", an interpretation which strains the facts of that case beyond recognition. Again, American and English cases cited as illustrations of "arrangements" or "understandings" coming within s. 45(2) would in a number of instances immediately be taken outside the scope of s. 45 again if the common law definition of restraint of trade were applied. There is also the real problem of whether an agreement among suppliers to buy from their competitors, at the ruling market price, stocks of "distress" goods which might otherwise depress the market price can constitute an arrangement in restraint of trade. In *United States* v. *Socony-Vacuum,*[3] the United States Supreme Court held that such an arrangement had the effect of placing a floor under the market price and was therefore caught by s. 1 of the Sherman Act; but applying the common law test to these facts would produce the opposite result, thus placing this important form of informal price-fixing among competitors outside s. 45. However, the authors do not refer to the *Socony Case* at all, a surprising omission.

Considerable use is made of the United States antitrust cases, however. Here again, the reader would gain a useful understanding of the subject matter, a body of doctrine which has been the foundation for so much of the legislation and judicial interpretation in this field throughout the world. However, the treatment is not free from inaccuracies. The analysis of the 1966 *Borden Case*[4] overlooks the major qualifications introduced by the 1967 *Borden Case.*[5] The discussion of price information agreements seems to lean too heavily on a (non-American) secondary source and perhaps for that reason misses the signal 1969 decision, *United States* v. *Container Corporation*;[6] but only one side of the argument set out by the secondary source is given, with the result

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[1] *Quadramain* v. *Sevastapol* (1976) 8 A.L.R. 555.

[2] *In re Mileage Conference Group of the Tyre Manufacturers Conference Ltd.'s Agreement* [1966] 1 W.L.R. 1137.

[3] *United States* v. *Socony-Vacuum Oil Co. Inc.* (1940) 310 U.S. 150.

[4] *Federal Trade Commission* v. *Borden Co.* 383 U.S. 637.

[5] *Borden Co.* v. *Federal Trade Commission* 381 F. 2d 175 (5th Cir. 1967).

[6] *United States* v. *Container Corporation of America* 393 U.S. 333.

that main competition policy objections to this practice are not stated. These and similar gaps and errors are no doubt attributable to the pressure to have the work available for readers by the time the Act came into force. Presumably this haste accounts also for the fact that some parts of the work give the impression of not having been proof-read.

The consumer protection chapters, which comprise a little under 40 percent of the text, are rounded and thorough. Even if they accomplished nothing else (which is certainly not the case), they would serve to convince most doubters of the need for some form of consumer protection legislation. A passage dealing with pyramid selling quoted from the annual report of the Western Australian Consumer Affairs Council is an illustration in point:

> The difficulties of making [the] large sums of money promised by these companies can be demonstrated by a simple mathematical exercise.
>
> If one person were to start a Pyramid Selling company and introduce another member each week, and each new member recruited introduces a further member each week (necessary to earn reasonably large sums), at the end of twenty weeks there would be slightly over one million members, or the entire population of Western Australia. By the end of the 24th week, there would be over 16½ million members. If the system works even moderately well, saturation is rapidly reached.

There is a lucid analysis of the legal operation of the unfair practices sections, and of the problems in implementing them—such as the anomalies resulting from the distinction between "false" and "misleading", the element of specific intent in ss. 54, 56 and 58, the requirement that the defendant corporation must "cause or permit" its servant or agent to use coercion at the consumer's place of residence if it is to be caught by s. 60. The non-excludable implied warranties, their scope and their limitations are also explained.

One criticism which could be made of these chapters, however, is their failure fully to explain why consumer protection legislation is linked with restrictive practices legislation in the one statute. The justification (whether Parliament thought so at the time or not) is the economic axiom that adequate information on both the buyer's side and the seller's side is essential to the proper working of a competitive market. Businessmen obtaining supplies for commercial purposes are professional buyers purchasing a certain range of goods and services over and over again. On the whole, they make it their business to have reliable information about the markets in which they are buying, because they know it is easy to sell well if you buy well. The consumer, on the other hand, is in most respects an amateur, with limited access to accurate market information about the thousands of different goods and services he buys. The unscrupulous seller knows that by misleading the

consumer with spurious market information he can artificially reduce the elasticity of demand for his own product and thereby gain an unfair advantage over his rivals. Consumer protection law, by prohibiting deceptive marketing methods and other unfair practices, seeks to ensure that goods and services compete on their true merits of price and quality. The goal of consumer protection, therefore, is to make competition work as effectively at the consumer level as elsewhere in the economy.

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Evidence: *Cases and Materials,* by J. D. Heydon, Sydney, Butterworths Pty. Ltd., 1975, 451 pp. $24.00 (hard cover), $14.00 (limp).

In 1973, during a seminar on five currently-used American casebooks on torts, one of the participants related an alleged conversation "reportedly held at the West Publishing Company the last time [one of the five books] was about to go to press. One of the young business types at West said to one of the more senior ones, 'Can the tort field economically support another casebook?' The older and wiser businessman said with summary business acumen, 'It will withstand this one if we can just persuade the authors to adopt it!' "[1] Professor Heydon's casebook on evidence is (as regards its Australian market) in a similar milieu. The Australian law student interested in evidence has plenty of books to choose from: Heydon, *Evidence*: *Cases and Materials*; Glasbeek, *Cases and Materials on Evidence*; *Cross on Evidence* (Aust. edition by Gobbo); Bates, *Principles of Evidence*; and *Litigation* (by the reviewer, Reaburn and Weinberg).

Heydon's book deserves a goodly slice of this Australian market although it is primarily intended to be used by English students. It is a book of cases and materials dealing with some of the major problems in the English law of evidence. The standard of scholarship is excellent. The cases and articles which are extracted are well selected, and Professor Heydon's textual commentaries on these extracts are first-rate — they represent a mine of background information, further references, and critical assessments of the present law. For example, the reader should find chapters 7, 8 and 9 ("The Right to Silence", "Confessions" and "Improperly Obtained Evidence" respectively) more informative and provocative than the corresponding sections in *Cross*. And of the books listed above, Heydon has the best references to and summaries of the American law.

A person seriously interested in evidence must, therefore, acquire

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1 H. Kalven, "Torts Casebooks on Parade" (1973) 25 *Journal of Legal Education* 15 at 21.