

Trade Practices Law. Restrictive Trade Practices Deceptive Conduct and Consumer Protection. Volume 2. Deceptive and Unfair Conduct, Consumer Protection, Shipping, Enforcement and Remedies 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-liii, 509-875. Cloth, recommended retail price \$26.50 (ISBN: 0 455 19742 3).

Since the Trade Practices Act was enacted by the Commonwealth Parliament in 1974 the provisions of the Act and subsequent amendments to it have been the subject of close scrutiny by practising and academic lawyers. Not the least of the topics which have attracted attention has been the consumer protection provisions contained in Part V of the Act and there is a considerable body of literature on the subject. The latest work to appear is the survey of the sections of the Act dealing with deceptive and unfair conduct, consumer protection, overseas cargo shipping, and enforcement and remedies contained in Volume 2 of *Trade Practices Law* written by B. G. Donald and Professor J. D. Heydon.

The book is a close and detailed analysis of the relevant provisions of the Act which takes into account much of the literature on the topic both in Australia and the United States of America together with appropriate decisions in these and other jurisdictions. There is an extensive bibliography set out at the beginning of the book to which reference is made in the text from time to time. Gaps do however appear—some relevant periodical literature is not listed and, conversely, there are references to some sources which are not contained in the bibliography; see for example the citation of Heydon (1978, p. 91) (page 525). Relevant Canadian legislation, periodical literature and decisions—for example *Findlay v. Couldwell*¹—could have but have not been cited. Nevertheless, the book is a comprehensive survey of the Act and of commentaries on it including judicial decisions and guidelines issued on various aspects of it by the Trade Practices Commission.

While at times the authors are a little hesitant in their approach and it is not always easy to ascertain what is the final conclusion arrived at on a particular point (for example, the problem of what kind of person is contemplated by section 52 as being misled or deceived, discussed at pages 533-538), they have for the most part not been afraid to take a position on controversial issues. In the absence of a considerable body of case-law on Part V of the Act, a commentator must necessarily adopt a stance on the interpretation of the provisions of the Act with which others will disagree. There are numerous instances in this book where one can disagree with the conclusions

¹ (1976) 69 D.L.R. (3d) 320.

reached by the authors. Thus, not everyone will accept that no distinction can be drawn between "representation" and "statement" in section 53 (page 577); that a wide meaning should be given to "in trade or commerce" in section 52 so that private citizens are within its ambit and isolated transactions are caught (page 521); and that "in the course of a business" (as in sections 71, 72, 74) denotes more than a single transaction "so that certain isolated sales by a seller who is in business but is not selling those goods in the course of that business may well be excluded" (page 729). Surely the test is whether the goods are supplied by the seller in the way of his business as opposed to where he sells in a private capacity, and it is irrelevant whether it is an isolated sale or not. The passage quoted may be correct so far as it goes, but it really does not say very much.

Again, not everyone will agree with the authors' conclusions in relation to merchantable quality (section 71(1)) and with the statement that the definition in section 66(2) can be interpreted so that fitness for *one* usual purpose will be sufficient to comply with the condition (pages 732-733). In paragraph 16.5.6 (page 736) it is assumed that normal purposes have been covered by section 71(1). The assumption also appears to be made that there is only one common law definition of merchantable quality—that of Dixon J. in *Australian Knitting Mills Ltd v. Grant*²—whereas in fact at least five different definitions or descriptions have been promulgated by judges from time to time. The statement that sections 66-75A should be interpreted as a code and that expressions such as "description" and "merchantability" should have been abandoned "first because they have never been very helpful, and secondly because they can only turn what could otherwise have been a straightforward code into a highly complex body of law . . ." (page 724) may also arouse controversy. The attempt to do away with familiar concepts and expressions, precisely because they were "heavily overlaid with judicial consideration", was made in the American Uniform Commercial Code with not altogether happy results. The American business community was not enamoured with the change. Similarly, the suggestion that a "consumer" should be defined by reference to his personal characteristics rather than by reference to the nature of the goods he buys and that a consumer should be confined to a natural person (pages 710-711) may not find favour with everyone. It may be that the effect of section 68A has been to reduce protection to small business but there is still some protection, and the seller is not able to exempt himself completely from the implied terms as to quality as he can under the Sale of Goods Act.

There is room for disagreement also with regard to such propositions as these, *viz.* that a statement may be misleading (and therefore within section 52) if, although it is true when made there is a good chance of its soon becoming false, and liability can be avoided only by indicating how the statement may become false, for example, by reference to the likelihood of increased fares, strikes, natural disasters *et cetera* (pages

² (1933) 50 C.L.R. 387, 413.

554-555); that a deliberate silence unconnected with any positive statement may come within section 52 by virtue of the definition of "engaging in conduct" in section 4(2), although the position subsequently taken by the authors is apparently that deliberate silence does not attract liability so long as it does not make false, misleading or deceptive what has been said (page 544); and that the common law rule which regards the display of goods in a shop as an invitation to treat and not as an offer, is of no authority in Australia (pages 620-621). The authorities cited in support are cases dealing, not with the technical contractual meaning of "offer", but with questions of breach of statutory duty or creation of an offence under industrial legislation, that is, they are concerned with the interpretation of a particular statute. Likewise the statement that "puffs and statements of law and opinions do not ground liability" at common law (page 511) should be amplified, not only in the light of the subsequent discussion at page 522 but also in the light of such decisions as *Public Trustee v. Taylor*.³

It may be correct to say that "[s]. 52 can be contravened even if no one is aware of the conduct" (page 524), but presumably the aggrieved party must be aware of it to act on it and suffer loss as a result. Damages could be recovered only in the latter case. Incidentally, any future discussion of remoteness of damage (page 748) should take into account the decision in *Parsons (Livestock) Ltd v. Uttley Ingham & Co. Ltd*.⁴ Finally, is it accurate to say that in *Thorne & Co. Pty Ltd v. Borthwick & Sons (A/asia) Ltd*⁵ a collateral contract was proved in order to establish a sale by sample (page 739)?

Some criticism can be made of the style of the book especially in the first half of the text. The paragraph numbering is awkward, the short sentence is used too frequently on occasion, and the inclusion of cases and references in the text instead of in foot-notes is apt to confuse. Quotations are not indicated clearly—there are no inverted commas or different type—and it is not always easy to ascertain where the quotation ends and the text begins.

The use of the first person can be disconcerting, for example; "We agree with Murphy J. that even descriptive words may be deceptive; we disagree with Stephen and Jacobs JJ. in their refusal to extend s. 52 beyond passing off; and we find some difficulties in the short judgment of Barwick C.J." (page 532).

The provisions of the Trade Practices Act are not set out anywhere even as an appendix to the book and in view of the close reasoning and detailed analysis of the consumer protection provisions in the text it is unfortunate that the relevant sections of the Act are not set out therein. Their absence makes some of the arguments of the authors difficult to follow. Likewise, the absence of a list of abbreviations in Volume 2 is unfortunate. Not every reader will know the different reports designated by "T.P.R.S.", "T.P.C." or "Trade Cases" or know

³ [1978] V.R. 289.

⁴ [1978] Q.B. 791.

⁵ (1956) 56 S.R. (N.S.W.) 81.

where to find them, although the matter is adverted to in Volume 1 at p. xxvii. Any future edition should remedy this deficiency and at the same time the opportunity should be taken to correct proof reading errors on page 528 and in the citation of *T.P.C. v. Annand & Thompson Pty Ltd*⁶ (page 592).

The impression is gained from a reading of this work that at times the authors tend to be too technical and too legalistic in their analysis of the Act. This can be illustrated by the suggestion that to mislead the public may mean that statements to specific individuals or to restricted private classes are excluded from the ambit of section 55 (page 618). The authors do recognise, specifically in relation to section 52, that their analysis in part depends on the courts applying the section literally and not implying limitations on its scope by reference to the legislation in which it is contained (page 573). It is this reviewer's hope that the courts in interpreting the consumer protection provisions of the Act will exercise a considerable degree of common sense in their interpretation of the relevant sections and will apply them in a robust and practical way.

The comments that have been made above are not meant to detract from the obvious fact that this book is a most valuable contribution to the literature on the Act. It is clear that much work and much thought have gone into the production of this book by the authors. They have broken new ground in their closely reasoned arguments and they have given a most useful survey of the overseas cargo shipping provisions contained in Part X as well as a comprehensive discussion of the enforcement, remedies, and defences provisions to be found in Part VI. In future no lawyer who is concerned with the operation of the Act, be it in the capacity of judicial officer, practitioner or teacher, can afford to overlook this work when examining the impact of the Act on the problems confronting him.

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⁶ (1978) 4 T.P.C. 61.

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