the field of secret trusts. Insofar as *Ottaway* v. *Norman*[25] suggests that a secret trust with similarly uncertain subject-matter is valid, that case should not, in his opinion, be followed. If Mr. Oakley's view is right, cases will arise in which the intentions of testators will be defeated solely for the sake of conceptual symmetry.

Chapter 6, on the constructive trust imposed on a vendor, contains a useful account of law which will be familiar to most conveyancers. However, the discussion of *Lake* v. *Bayliss*,[26] involving the purchaser's right to trace into the vendor's hands the proceeds of a sale to a third party,[27] should be noted. The short Chapter 7 on constructive trusts imposed on mortgagees, in which the author concludes that "so far as the mortgagee is concerned, the constructive trust no longer has any role to play", completes the book.

There is no mention of the trust which arises out of a voluntary assignment of legal property which fails as a legal assignment but is effective in equity. In such a case the assignor holds the property on trust for the assignee, but, while there is an intention to assign, there is apparently no intention to create a trust. The trust may therefore be constructive. The issue may be significant to the question whether Division 6 of the Income Tax Assessment Act 1936 (Commonwealth) applies to income derived after such an assignment.[28] Perhaps the second edition of Mr. Oakley's book might cover it.

Mr. Oakley's topic leads him into many of the most difficult and controversial areas of the modern law of trusts. His work will not produce revolutions in current thinking in those areas, but is a thoughtful and competent account of the issues.

R. P. AUSTIN*

Trade Practices and Consumer Protection, A Commentary on the Trade Practices Act 1974 (2nd ed.), by G. Q. Taperell, R. B. Vermeesch and D. J. Harland, Butterworths, 1978, xxxv + 732 pp. $21.00 (hard cover), $16.00 (limp cover).

The Trade Practices Act 1974 became law on 24 August, 1974,[1] and soon afterwards the authors published their excellent 274-page *Guide to the Trade Practices Act 1974*. Although intended primarily for laymen, the book proved even more useful to professional lawyers

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[25] [1972] Ch. 698.
[26] [[1974] 1 W.L.R. 1073.
[27] *Oakley*, 129-30.
[28] *Federal Commissioner of Taxation* v. *Everett* (1978) 9 A.T.R. 211.

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who needed to become familiar with a field of law which had turned, almost overnight, into one of major importance in Australia. Not surprisingly, the authors felt encouraged to widen the scope of the book. After another four years and a number of amendments to the legislation, this second edition has been published. Whilst it retains the structure of the original work (largely dictated by the Act in any event) it is much more ambitious in general orientation and in the depth of treatment of particular legal issues. The work has nearly tripled in length: it is no longer called a "guide" but a "commentary". The authors express the hope that the work will continue to assist the businessman and his non-legal adviser, but clearly they now aim primarily at the professional and academic market.

A further indication of this re-orientation is the fact that the work has not just been published in the usual limp and hard cover versions, but has also been incorporated (in loose leaf form) into Butterworth's Trade Practices and Consumer Protection Service where it is intended to undergo continual amendment as new, relevant material, such as amendments to the Act, or Court, Tribunal and Commission decisions, come into being. The first major supplement, published in loose leaf as well as in booklet form, consists of a completely rewritten and greatly elaborated Chapter 18 entitled "Manufacturers' Liability", made necessary by the Trade Practices Amendment Act 1978 which has substantially recast the law in this area. Such continual updating of an important textbook, particularly in an area like trade practices where new developments occur almost daily, is clearly preferable to the traditional practice of bringing out new editions at intervals. Practitioners and law teachers should find the loose leaf edition the more useful, but students who wish to "learn" the subject for a once-only examination, would be better served by the bound version.

In 1978 another substantial treatise on the same subject was also published: *Donald and Heydon on Trade Practices Law*. In explaining their reasons for writing the book, Donald and Heydon point out that the first edition of Taperell, Vermeesch and Harland had offered a "penetrating general survey", but that there was room for a fuller treatment of the subject. Now we have two works which deal with the subject in detail. In this of all fields of law, the publication of competing treatises is singularly appropriate. To have available two points of view (whether conflicting or concurring) on so many issues should prove very valuable in practice and in the law schools. Both works show that much can be gained by co-operation between academics and practitioners in the writing of law books.

The work under review is largely co-extensive in scope with the Trade Practices Act, but Part X of the Act ("Overseas Cargo Ship-

[1] For an account of the commencement of the Act and of the amendments to it, see [113].

ping") has been excluded. The reason for this may be that the Act treats conference agreements in the shipping industry very differently and much less harshly than it treats anti-competitive arrangements and conduct in other branches of commerce and industry. Part X seems to warrant some atention in future editions. To know something of restrictive practices in the shipping industry and of their legal control would enhance the reader's overall understanding of restrictive trade practices in Australia.

Such State legislation as there is concerning restrictive trade practices has been largely ineffectual, and the authors were quite justified in ignoring it (see [105]). Much more important and efficacious is State legislation in the field of consumer protection. Were this legislation uniform, the authors might have been inclined to include an account of it in their book. As it is, however, consumer protection law at the State level presents overall such a varied and complex picture that comprehensive treatment was impracticable (see [1307]). Nevertheless, there is frequent and effective reference to State legislation which deals with consumer protection in Chapters 13-18 for the purpose of explaining problems, particularly problems of interpretation, which arise under the Trade Practices Act. For example, at [1413] the authors suggest that conduct may be regarded as "likely to mislead or deceive" for purposes of s. 52 of the Act, even though it would not mislead the careful reader; its capacity to mislead a substantial number of readers is said to be sufficient. This suggestion is supported with a case which interpreted a similar provision of the New South Wales Consumer Protection Act, 1969 in this way.

State cases and statutes are only indirectly useful as pointers to the probable operation of the Act. The use of such material is a pervasive feature of this work. Just a few years after the original enactment (1974) and only months after the extensive amendments of 1977, there can be (particularly in a country like Australia with its small population) only a very few court decisions which supply direct and authentic authority for particular interpretations of the Act. In the absence of such judicial help, the authors have had no option but to place heavy reliance upon material which is less directly relevant and more speculative in character.

The major component of judicial experience reflected in this work is of North American origin. The greater part of the Act is inspired by United States legislative and judicial precedents and there is no reason why U.S. decisions should not be regarded here as carrying just as much persuasive weight as do English decisions in common law areas. Thus, the authors were thoroughly justified in placing heavy reliance upon U.S. decisions and related materials. Perhaps the purest example is Chapter 9 on price discrimination. Since s. 49 has never been applied by Australian courts, all the commentary is based upon U.S. cases. In doing this, the authors obviously could not hope to

make an original contribution to U.S. antitrust law: the value of their work lies in the fact that they have related this material to the Australian legislative text and to Australian commercial and industrial circumstances. Should Australian courts in fact place substantial reliance upon American cases, practitioners may need to have access to actual reports of these. Complete sets of American reports are rare in Australia, so the major antitrust casebooks (e.g., Oppenheim and Weston) may have to suffice. Indeed, a reader who wishes to gain a complete understanding of the book needs to have access to such U.S. material.

Another important source of insight, more closely related to Australian conditions than are U.S. cases, are the "Information Circulars" issued from time to time by the Trade Practices Commission. The interpretation of the Act upon which the Commission has based these circulars lacks the authority which attaches to judicial decisions. The authors rightly approach it in a critical spirit and occasionally feel free to reject it (see, e.g. [1479], at n. 186). This is not to deny that "guidelines" contained in such circulars carry considerable weight. Inevitably, businessmen will tend to rely upon them and courts are likely to prove reluctant to disappoint expectations so created. Circulars are often not just intended to make the operation of the law more certain, but also to make it more sensible and commercially expedient: thus, they must have an effect not altogether unlike the effect of amendments to the legislative text. A good example is Circular No. 22 (see [576]) in which the Commission expressed the opinion, *inter alia,* that recomended standard form contracts are less likely to lessen competition for purposes of s. 45 of the Act, if they have been drawn up in consultation with consumer organizations and other bodies likely to be affected. That view is so sensible that it would be unfortunate if a court were to reject it. At the same time, it really supplements rather than merely interprets the legislation. In view of the importance of these circulars, the authors might have listed them at the end of their table of cases rather than (somewhat arbitrarily) at the end of Chapter 3.

The Act interacts in innumerable ways with the general law of contract.[2] Cases (including many Australian authorities) have been skilfully used to illustrate and explain those interactions. Due attention has been given to areas in which English and Australian authorities diverge (see [1477] at nn. 180 and 181). At [594] the authors invoke the rule that a contract prohibited by statute is unenforceable and conclude that contracts which fall under s. 45(2) of the Act are unenforceable, although since the 1977 amendment the section no longer expressly says so. Although this may be correct in the result, the

[2] There are also important links with other areas of the law, particularly constitutional law (see Chapter 2) and criminal law (see. e.g., [813].

authors might have noted that the rule in question seems to be less absolute in Australia than it is in England — see *Bradshaw* v. *Gilbert's Autralasian Agency (Vic.) Pty. Ltd.*[3]

Professor Harland's suggestions as to the way in which the Act might have changed the general law of contract and tort (see [1649]-[1658]) are of particular interest. Until Parliament accepts the recommendations of the Swanson Committee giving State courts jurisdiction (at present confined to the Federal Court) to determine actions which arise under the Act, the significance of these suggestions is limited; nevertheless, no student of the general common law can afford to ignore this material even now. His suggestion that every misrepresentation, however innocent, now gives rise to a damages claim if damage can be proved is very far-reaching and it is to be hoped that courts will somehow place limits upon this suggested consequence of s. 52 of the Act (see [1651]).

The foremost guide to interpretation is the statutory language itself and the overall context and structure of the legislation. Australian methods of statutory interpretation are still more language than purpose-oriented and the authors were clearly justified in devoting a large part of the work to explanation and speculation concerning the meaning and likely operation of the statute. The particularly complex interactions between the definitions and general provisions of Part I and the remainder of the Act are explained with great patience (the reader is frequently reminded of the "additional operation" of the Act ordained by s. 6) and, on occasion, with considerable acumen (see e.g., the discussion of transitional problems arising from the introduction of s. 4B by the 1977 amendment in [1711]). Throughout, the authors' many suggestions as to the interpretation and amplification of the statutory language show an intimate knowledge and understanding of the Act, a fertile professional imagination, a thorough grasp of common law techniques of statutory interpretation, and sound common sense. Being, like the authors, not an economist, this reviewer finds it difficult to gauge the extent to which the work is based upon an equally thorough knowledge of Australian business practice. One suspects some limitations in this respect which might have been overcome had one of their number been an economist. Life has a way of facing lawyers with the unexpected: thus, it seems inevitable that problems will arise which the book does not anticipate.

The book is well produced: there are only a very few misprints. The authors and publishers are to be congratulated upon having produced a commentary which should prove extremely useful to practi-

[3] (1952) 86 C.L.R. 209.

tioners, law teachers and students and which will, one hopes, appear in many more editions.

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Bailment, by N. E. Palmer, Sydney, The Law Book Company Ltd., 1979 cvi + 1056 pp. $57.50.

This book belongs to a genre which was once very common and is now becoming increasingly rare. Its rarity is evidenced by the tendency of publishers to devote most of their efforts to producing casebooks of doubtful value, and to producing ephemeral loose-leaf publications — "services" for this or that, commentaries on legislation which is being constantly amended. The contrast with a lawyer's library of a hundred or even twenty years ago is marked. How has this come about? Partly because the law is thought to have become much more legislation-based; the fundamental doctrines and institutions of the common law are thought to be becoming interstitial and ceasing to be central. As a result, it is said, there is a declining market for work expounding the common law, and a rising one for other works. Taxation reasons play a part as well. But there are two other causes. One is that the role of legal practitioners as authors is for some reason declining; those capable of valuable legal writing do not share the need of their predecessors to supplement exiguous incomes by Grub Street activity, and a wish to make a mark on the literature of the law for non-economic reasons seems relatively less common. The other cause stems from the fact that the bulk of legal scholarly production comes from academic pens, and those who wield them are showing an increasing want of interest in common law and private law questions, preferring to examine one aspect or other of public, usually statute-based, law. And few would be found with the skill, determination and stamina to perform the task which Mr. Palmer has performed in this lengthly and valuable book.

Yet the decline in books which expound and analyze the central doctrines of the common law does not mean they are any less useful than formerly. Indeed, as the law increasingly tends to lose central controlling influences — as an overproduction of reports of the doings of newly swollen judiciaries is added to the disintegrating effect of masses of new legislation — the need will increase for works attempt-

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