Trade Associations, Fairness and Competition, by Warren Pengilley, Canberra, Law Book Company Limited, 1981, xxvii + 247 pp. $36.00 (hard cover).

This is the second volume in the Monash Studies in Law, a series established to encourage writing on specific themes, including some which may not come within the scope of general Australian textbooks on traditional legal subjects.

The author, whose earlier books in the trade practices area on collusion and advertising will be known to practitioners, is a former member of the Trade Practices Commission. He has had extensive practical experience in the administration of the competition policy enshrined in the Trade Practices Act 1974. His book reflects the benefit of his practical experience and his familiarity with competition law. Its content and style also reflect his legal education in the United States.

His study basically considers trade associations in relation to common law and competition law. It was intended to give some guidance to trade association executives and their advisers as to what are and are not permissible activities of trade associations under the law and how to carry them out without running foul of it. It deals with the law as at 31st October, 1981. It is the only comprehensive Australian textbook on competition law since the 1974 Act which is devoted to trade associations.

The study is comprised of eleven parts. The first two are introductory in nature, dealing with the nature of the study, inherent problems due to the lack of direct precedents involving trade associations, the use of U.S. precedents, and some academic and stilted definitions of trade associations, little of which will be of value to competition law practitioners.

The author notes the uncertainties and areas of doubt in the law on trade associations because of the dearth of decisions directly on them. Many issues affecting them are still to be decided. He refers to the considerable difficulty in reaching conclusions and in predicting the law in this area. He has been guided by available court decisions, including U.S. decisions, by T.P.C. decisions, information circulars, and experience and by general principles. He notes the possibility that his general conclusions may not be supported by the courts.

Although the T.P.C. may revise its guidelines and its views do not bind the courts, its decisions and guidelines are obviously a useful starting point. However, there are considerable limitations in the assistance to be gained from U.S. anti-trust decisions because of constitutional differences and differences in the language of the relevant statutes. The author has an inclination to favour U.S. decisions. He probably attaches more weight to them than others would.

The next four parts deal with rights of admission to and expulsions from trade associations. Because trade associations rarely deny admission to potential members and rarely expel members, these parts deal with what would be academic questions but for the point made by Dr. Pengilley that rights of access to a trade association and its powers of expulsion may be

important in obtaining an authorisation from the T.P.C. He points out that the anti-competitive threshold will be lowered, and thus the chance of authorisation will be increased, if provisions for access and expulsion and proper procedures are incorporated in the trade association's rules, which are satisfactory to the T.P.C.

He claims that the right of a member (sic) to seek access to a trade association is considerably assisted by statutory competition law and that the general law position on expulsions has been significantly affected by the advent of the Act, the relevant provisions being the "exclusionary provisions" and the "substantially lessening competition" provisions of s. 45.

The first leg of s. 45 makes unlawful contracts, arrangements or undertakings which contain an exclusionary provision (defined in s. 4D). The author notes that there may be difficulties in proving a "purpose" within the definition of an exclusionary provision and that the impact of the Act may be lessened quite considerably because s. 4D requires that exclusionary provisions relate to "particular persons". He also says that it may be that a refusal to admit cannot be per se banned as it does not come within the s. 4D definition.

The exclusionary provisions of s. 45 are aimed at group boycotts and do not expressly deal with admissions or expulsions. In my view major difficulties face anyone seeking to use s. 45 to gain admission to a trade association.

It would be rarely if ever that an admission rule of a trade association would itself be an exclusionary provision within s. 4D involving the stopping of supplies to or from persons by members of the association. It is conceivable but unlikely that the association's other rules would be caught by s. 4D.[1] A successful action brought against a non-supply agreement between a trade association and a monopoly supplier (whether a member or a non-member) might force abandonment of the boycott, but it is difficult to see how that would enable the Federal Court to make orders concerning the admission of a person to the trade association or altering the admission rule. The boycott agreement caught by s. 4D would be in breach of the Act whatever the admission rule was.

Further, it is difficult to see how, in practice, some combination of (1) a boycott agreement, not already caught by s. 4D, between a trade association and a monopoly supplier and (2) an admission rule not caught by s. 4D could be brought within s. 4D so as to found a case for admission or alteration of the admission rule.

Analogous problems arise in relation to the impact of the Act on expulsions. For practical purposes, the exclusionary provisions are unlikely, in my view, to influence opportunities for admission to trade associations or expulsions from them.

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[1] Moreover, in the case of a trade association registered as an industrial organization of employers under the Conciliation and Arbitration Act 1904, a rule that would be caught by s. 4D should not be registered by the Industrial Registrar because of the provisions of s. 140(1) of the Conciliation and Arbitration Act.

The author says that even if the exclusionary provision sections are escaped, it is a different question entirely as to whether s. 45's second leg on substantially lessening competition will be escaped, and that it would appear to be of greater relevance in connection with admissions to trade associations than the first leg. Again there is a "purpose" problem.

The author claims that the second leg of s. 45 makes substantial inroads into areas in which the courts have previously declined to supervise admission rights (sic) to trade associations. He says that the T.P.C. has been concerned about clauses in rules that might be used for anti-competitive purposes, and that the U.S. courts and the T.P.C. have followed a roughly similar line, that is to the effect that a qualified person cannot be arbitrarily excluded from membership of a trade association which is economically essential to his business.

It is open to doubt whether that approach will coincide with Federal Court decisions involving applications of the "substantially lessening competition" test, which in the end is a question of fact.

It is doubtful whether the Act has dramatically changed the general law on trade association expulsions or has reversed its thrust as much as Dr. Pengilley thinks.

In his discussion of expulsions and of court decisions that the requirements of natural justice should be observed in expulsions, it is surprising to find no mention of the *Mobil Oil Case,* [2] one of the leading High Court cases on the requirements of natural justice.

The discussion of expulsions also overlooks relevant provisions of the Conciliation and Arbitration Act.[3]

In dealing with admissions to trade associations, Dr. Pengilley says that the U.S. law forbids coercion to join a trade association, that the T.P.C. has expressed views to the effect that membership should not be coerced, and that under these circumstances competition law may require a trade association to make available some of its advantages to outsiders. He considers what sort of benefits should be made available to non-members, pointing out that this area of law is not well settled in the U.S., that it is a most difficult area in which to make predictions for Australia, that the basic thrust of the U.S. decisions merit respect as a probable line which will be followed in Australia, and that the decisions of the T.P.C. merit consideration.

He expresses his view that a trade association has a duty not to boycott non-members or engage in conduct having a substantial boycotting effect, for example by denying an essential seal of approval.

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[2] 113 C.L.R. 475.

[3] It overlooks the fact that many trade associations are registered as organizations of employers under the Conciliation and Arbitration Act 1904 and that it is possible for a member of such a trade association facing expulsion or who has been expelled to seek directions under s. 141 for performance of the expulsion rules or to apply under s. 140 for an order declaring the rules invalid for being in contravention of the section.

Another ramification of the Conciliation and Arbitration Act which has been overlooked concerns s. 150 which enables a trade association registered as an organization of employers to apply for an order that a member shall cease to be a member. Use of s. 150 proceedings would presumably obviate any possible breach of s. 45 of the Trade Practices Act.

The existence or otherwise of obligations to non-members depends on the applicability of s. 45, not itself an easy matter to predict. Dr. Pengilley's conclusion that trade associations have considerable obligations to non-members is open to considerable doubt in my view.

The main practical value of the book lies in the remaining parts which deal with the more interesting topics of permissible trade association activities, price recommendations, T.P.C. authorizations and problems of enforcement.

These parts will be useful to competition law practitioners generally and not merely to trade association advisers. This is because of the author's experience and knowledge enabling him to give his readers a valuable insight into the practical administration of competition law and because here he is dealing with matters of interest to corporations generally, as well as to trade associations. After all, the competition law for trade associations is only a special case of the general competition law.

The seventh part of the book dealing with the thin line between the permissible and the unlawful in the case of various trade association activities, discusses grey areas in the light of the authority available, which is mostly scant, or the objects of the Act and related principles.

The author concludes that collection of industry statistics for information purposes would not breach the Act, but statistical information programmes having an anti-competitive purpose could.[4]

The section on joint marketing, buying and promotions, referring to difficult legal questions, is useful, but might have been extended to cover joint ventures under s. 45A in view of the growing use of joint ventures of various kinds in important industries such as broadcasting and television, and petroleum products.

On joint advertising it is interesting to note the failure of 2UE's application for an injunction against the use of a joint advertising card setting out the stations' advertising rates by two of its competitors on the grounds that its use substantially lessened competition. Lockhart, J. is reported[5] as having held that overall the use of the card, aimed at attracting advertisers to buy time on the two stations together, thus giving them access to more listeners than either station could reach on its own, did not inhibit competition between anybody, but promoted it, although probably only slightly. His Honour's reported observation that "it was necessary to distinguish between arrangements which directly or indirectly restrained price competition, and those which merely incidentally affected it" has interesting implications.

It emerges from the section on costing assistance that it is preferable from the point of view of the T.P.C. and the Act if this is confined to assistance on minimum unavoidable costs as distinct from average costs.

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[4] In my view one of the passages from T.P.C. Information Circular No. 14, cited by the author, has some weaknesses and raises difficult issues not discussed by the author.

[5] *Sydney Morning Herald* 16 Oct., 1982 p. 4.

The section on unethical codes seems to deal unnecessarily with problems in defining "Profession/alism", when it should deal directly with constitutional questions as to whether or not a particular activity is within the corporations power or other powers supporting the Act.

The author cites the Swanson Committee's observation that it regards "as unrealistic the proposition that members of the professions are not part of the business community", and hints that the T.P.C. takes a different view from that of the courts to date on the question whether some professions are covered by the Act in relation to conduct beyond purely intra State "business" (sic). Presumably he has in mind the scope of s. 6, or possibly s. 75B. He concludes that "It is too early to know what T.P.C. determinations or court interpretation will bring to Australia in the code of professional ethics field. The whole range of possibilities is open" and that "The traditional exemption of professions from competition statutes purely because they are 'professions' probably will not go unchallenged in the near future — at least in a number of significant areas".

The answers to the questions implicit in the author's approach will turn on the scope of the constitutional powers which the study deliberately but regrettably does not concern itself with in any depth.

In this setting, Dr. Pengilley deals with questions of professional advertising and fixed and recommended professional fees. Of the latter, he says "No doubt all these matters will be before the courts for decision in due course. At the moment, the safe path for the trade association executive would appear to be to tread in the path of the U.S. decisions pending authority from Australian cases."

The soundness of this advice is to be doubted, and it will probably be ignored, even though the author suggests that the T.P.C., for want of sufficient information to determine them, does not consider constitutional issues when dealing with authorisations. Presumably the Commission would take advice before taking court action against a profession, whatever may be its practice in relation to authorisations.

Part VIII deals with recommended prices. Many trade associations will have already decided to shy clear of these. They are unlikely to be effective where tariff, quota or natural protection is low, especially given the present flexibility in exchange rates. In other areas where there is substantial protection of one kind or another, many large and medium sized firms can achieve the same result as recommended price lists by letting the market leader, who is often also a leading member of the trade association, issue his new price list first.

The ninth part is useful on the matter of T.P.C. authorisations.

The last part deals with unresolved litigation problems in relation to trade associations. Although the study does not purport to be one on constitutional matters, the section on the constitutional position could have been clearer. Important constitutional questions on the meaning of a "trading corporation" left unresolved by *Adamson's Case*[6] would have merited discussion, as would the banking power.

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[6] 143 C.L.R. 190.

The section on remedies overlooks the remedies open under the Conciliation and Arbitration Act.

As to matters within the scope of the Act and in relation to purely intra state activities, the author overlooks the possible use of s. 88F of the Industrial Arbitration Act (N.S.W.) and similar provisions elsewhere to overturn contracts, etc. which are harsh, unconscionable or against the public interest.

The passage on the problems of reaching the assets of unincorporated bodies ignores the possibility of curing them by a representative order under the Federal Court rules.[7]

Like other books in this field there is no treatment of the relevance of the rule that a contract prohibited by statute is unenforceable.

Oddly, the author makes no mention of the impact of U.S. anti-trust laws on U.S. companies operating in Australia and the restraints that the reach of the U.S. law impose, at least in practice, on trade associations with major U.S. companies as their members.

The presentation of the book is good. Generally conclusions are set out at the end of each part or section, the text is not clogged up with statutory provisions and quotations, and the author helpfully reproduces relevant T.P.C. Information Circulars in Appendices and refers to valuable passages from the Commission's annual reports.

Although the book has the shortcomings and limitations referred to above, it provides a useful survey of a developing area of law still in its infancy and is unparalleled in its knowledge of T.P.C. decisions and attitudes on the matters dealt with. It will have a general usefulness going far beyond the topic of trade associations.

It merits reading by and will be useful to all serious practitioners of competition law, even though some will see it as sometimes advocating what the law should be rather than what it is or is likely to be.

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[7] O6.r.13.

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