REVIEW ARTICLE*

Competition Law and Policy in Australia: SG CORONES (Law Book Co, 1990) pp 1-324 hardcover recommended retail price $82.00, softcover $60.00 (ISBN 0 455 20900 1).

There has been a remarkable growth and awareness of Part IV of the *Trade Practices Act* 1974 (Cth), aptly termed "Competition Law" by the author. The growth in popularity may be attributable in part to the publicity given to cases such as *Queensland Wire Industries Pty Ltd v BHP Pty Ltd*[1] and more recently, *Trade Practices Commission v CSR Limited*.[2]

As the author points out, although practitioners have been well serviced in this area, there are few student texts. Some which started their life as texts have since succumbed to looseleaf while others are in need of urgent update. This book aims to give the reader an insight into the law and policy of Part IV. It is not intended to and is by no means an exhaustive treatment of the law on each topic. Comparisons are made in each topic with the relevant provisions and policies of the United States and the EEC. This review is not strictly academic but indeed logical and useful in view of our reliance, both in drafting and interpretation on the laws and policies developed in the US and the EEC. Although this review is pertinent, it is perhaps ambitious in what the author himself recognises is primarily a students text.

The book does not examine the constitutional limitations of the Act, presumably because this can occupy an entire work in itself. However, with the passage of time, the issue has received more than cursory attention with the Trade Practices Commission[3] indicating in its recent Priorities paper that it may target some State enterprises presently thought to be beyond the reach of the

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1 (1989) 167 CLR 177.

2 (1991) ATPR 52,135.

3 Trade Practices Commission Priorities Paper 1992-1993.

Act. Although there is yet no consensus by State Governments, some have indicated that they may be prepared to implement their own Trade Practices legislation to overcome the constitutional limitations of the legislation.[4]

In Chapter 2 the author provides a most useful and concise introduction to microeconomic theory in an attempt to explain the goals of competition policy. A constant theme throughout the chapter and throughout the work is an assessment of the dichotomy between the Chicago school and the Harvard school of economic thought and the implications for the goals of competition policy and the appropriate degree of regulation.

In the *Queensland Wire Case* Justice Deane commented that an analysis of s 46 necessarily begins with a description of the market.[5] That statement is as true for s 46 as for the rest of Part IV. As relatively long ago as 1976,[6] Woodward J uttered the often quoted words:

> We take the concept of the market to be basically a very simple idea. A market is the area of close competition between firms or, putting it a little differently, the field of rivalry between them.

As with most statements of principle, their application to particular situations is notoriously difficult. The difficulties of market definition will be apparent to any one involved in competition law. As the author notes in this chapter, identifying the market requires an application of the economic concepts of demand side and supply side substitution, which are embodied in s 4E of the Act and applied in the various cases to which he refers. Since the publication of this book, further cases, (notably on abuse of market power) have vindicated this approach.[7]

The chapter also deals briefly with the concept of sub-markets and single brand markets. There is also a discussion of the Australian and European courts' assessment of market power although there is a separate chapter (Chapter 6) devoted entirely to s 46.

That chapter deals with abuse of market power and in keeping with the stated aim of the work, attention is given to the US and EEC approach, particularly in relation to predatory pricing. Reference is also made to the two cost based tests which have been used in the United States to assess predatory pricing but which have not yet found universal favour with Australian courts.[8] The remainder of Chapter 6 is devoted to a concise exposition of the law of s 46 and the types of conduct which may give rise to a contravention of that section. The date of publication of the book pre-dated a number of recent and useful decisions in this

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4 See "Competition Law - The Introduction of Restrictive Trade Practices Legislation in Victoria", Discussion paper No 22, Law Reform Commission of Victoria (April 1991).

5 (1989) ATPR 40-925 at 50, 012.

6 *Re QCMA and Defiance Holdings* (1976) 8 ALR 481.

7 See notes 8-10.

8 See *Eastern Express Pty Ltd v General Newspapers Pty Ltd* [1992] ATPR 52,876.

area, particularly *Singapore Airlines*,[9] *Australian Performing Rights Association*,[10] *Eastern Express*[11] and *Dalgety*.[12]

The author has devoted the whole of Chapter 4 to mergers. Here he examines the threshold requirements of the section from both an Australian, US and EEC perspective including references to the US and Australian merger guidelines. Attention is also given to the Trade Practices Commission's approach to the granting of authorisations with specific reference to a number of its determinations. No other section of Part IV has come under more scrutiny by Governments and business (except possibly s 46) than has the mergers provision. In Chapter 5 the author questions the future of merger policy. A brief review is undertaken of the overseas approach and the threshold test adopted by the Americans and the Europeans. This is followed by a review of the studies and empirical evidence available on the perceived benefits of mergers.

There is also a discussion of the submissions made to the Griffiths Committee and that Committee's recommendation for retaining the then existing dominance test. The author advocates an amendment to s 50 so as to prohibit mergers that create or strengthen positions of substantial market power. Interestingly the recent report into s 50 undertaken by the Cooney Committee recommended a return to the substantially lessening of competition test.[13] The Attorney General has since indicated that the Government will be implementing that recommendation.

The Chapter on horizontal restraints provides a brief overview of the US and EEC law on anti-competitive agreements and understandings including price fixing arrangements. A comparison is then made with the equivalent provisions in the Australian Act. Some attention is given to the treatment of joint ventures both overseas and in Australia. As the author points out, our legislation is notable for the absence of any significant provisions dealing with joint ventures, despite the popularity of that structure, particularly in the natural resources sector.[14]

It is not surprising that little attention is given to secondary boycotts, as it has long been doubted whether the provision should be included in the *Trade Practices Act* at all or, if included, whether it is not properly the province of industrial law rather than competition law.

Vertical restraints are discussed collectively in Chapter 8 although price discrimination is considered separately in Chapter 9. It is unfortunate that a more comprehensive discussion of distribution, licensing and franchise

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9 *Singapore Airlines Ltd v Taprobane Tours WA Pty Ltd* [1992] ATPR 40,156.

10 *Australasian Performing Rights Association Ltd v Ceridale Pty Ltd* [1991] ATPR 52,118.

11 See note 8.

12 *Dowling v Dalgety Australia Ltd* [1992] ATPR 40,247.

13 Senate Standing Committee on Legal and Constitutional Affairs - Mergers Monopolies and Acquisitions, adequacy of existing legislative controls Commonwealth of Australia 1992.

14 See D Williamson "Trade Practices Law - Its Implications for Mining and Petroleum Joint Ventures" (1977) 1 *Australian Mining and Petroleum Law Journal* 59.

agreements could not be undertaken given the tendency of exclusive dealing practices to pervade these areas.

It would not come as a surprise to many to learn that price discrimination is still practised despite the existence of s 49. Certainly the Trade Practices Commission has never treated it as one of its top priorities, preferring instead to target the more heinous practice of resale price maintenance. Despite efforts both here and in the United States to hasten its repeal, s 49 remains a reality and it is left to the author to attempt to justify its continued existence. Given the few cases decided under this section in Australia, the author relies heavily on US authorities which are more than persuasive given the substantial similarity of the sections. However, the author does not provide a detailed discussion of the various elements of s 49 and the available defences. The reason for this may well be explained in the author's submission that a contravention of s 49 is only likely when the conduct is also a contravention of s 46.

It is inevitable that trade practices and particularly competition law will continue to gain in popularity. This book will add to the growing body of literature on competition law in this country and will prove to be a most useful reference for students and others who have an interest in this area.