Review of S G Corones, *Competition Law and Policy in Australia*, Sydney: Law Book Company, 1990. pp v-xix; 1-324.

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This book is a good read. It covers important aspects of the Commonwealth Trade Practices Act 1974 ("TPA") in an authoritative manner. Anyone involved in competition law and policy in Australia would be well advised to study this book as a basic reference.

The text takes the form of a comparative analysis of United States, European Community ("EC") and Australian anti-trust law. It is original so far as the inclusion of Australia is concerned although there have been many comparative works between the United States and the EC. The text is also of value because it includes a substantial amount of material in relation to the enforcement policy of the Trade Practices Commission and political statements of committees of enquiry into competition law. It is a not infrequent failing of lawyers, in discussion of trade practices and competition issues, to believe that only "black letter law" is relevant and nothing else matters. However, the TPA is very much a political, social and economic animal, and much of its de facto effect turns on the views of economists and statements of politicians and the Trade Practices Commission.

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The text is of interest not only for its treatment of the law but because it delves behind the law. As the title implies, the text relates to competition "policy" as well as competition "law". The "policy" leg of the title is not ignored in the text. The author fully highlights what competition law is "all about".

The text is written in a concise style and the ability of the author to express himself in easy, readable language is a feature which is to be highly commended. The author has, however, chosen a large topic and, in some places, there is a feeling that some matters have been treated a little superficially. In a sense this is not a criticism of the work but merely a comment that, in various areas, the reader who is genuinely interested in detail will have to delve further. I thought, for example, that the analysis of joint ventures was somewhat superficial. No doubt the author took the view that he had to constrain the text within appropriate bounds and that if he launched forth on joint ventures in any great detail, any such restraint would not be possible. I also thought that dealing with the Australian law of price discrimination in but four pages could perhaps be regarded as a little ambitious. However, in view of the fact that the Australian price discrimination law is both complex and unenforced, the author's decision to cut short his analysis in this area cannot be criticised too much. I thought that dealing with the whole question of secondary boycotts in slightly under two pages was skating on the surface somewhat, but perhaps the author regarded this primarily as an industrial matter (as, on the ground, it has been) rather than a matter involving traders and trading relationships. Having said that, however, a failure to deal with a substantial number of the secondary boycott cases is an omission in the work. The only case dealt with in the secondary boycott analysis is the Federal Court decision in *Jewel Foodstore Pty Ltd v Amalgamated Milk Vendors Association Inc and Ors*,[1] which has since been overruled in the High Court. One might have thought that a considerable number of the secondary boycott cases should have been mentioned in the discussion and, in light of the fact that the text is on trade practices "policy" as well as law, some of the policy difficulties of section 45D of the TPA could well have been canvassed.

I cannot accept the decision in *Queensland Wire Pty Ltd v The Broken Hill Pty Co Ltd*[2] ("*Queensland Wire*") with the same equanimity as does the author. The author was involved in the Guidelines issued by the Trade

1. (1990) 12 ATPR 40-997.
2. (1989) 11 ATPR 40-925.

Practices Commission and was also a consultant to Queensland Wire Industries Pty Ltd, which was victorious in the case. In these circumstances, the author perhaps does not see the manifest problems caused by the decision. I have recently written an article on this in the *Law Review*[3] and will not reiterate here what I said in that article. Suffice it to say that the problems of regulation which seem to follow from *Queensland Wire* are not discussed by the author in detail and I think this in unfortunate in a book which deals so well with policy issues in other areas. The issues which flow from *Queensland Wire* are currently very "live" indeed and the extent of the reach of section 46 of the TPA must be one of the most controversial issues of competition law at the moment. I am also yet to be convinced (although the Trade Practices Commission seems to accept the point) that it necessarily follows that a refusal to license patented material is protected under the TPA. There is no exemption for patent licensing in the legislation and it is very difficult to see what is different between investing in a patent and investing in a plant and equipment if the real issue is simply one of innovation and investment encouragement. There are also significant conceptual difficulties in determining what price a party having a substantial degree of market power should charge. I think the conceptual difficulties are understated in the text. For example, the author states that a party having a substantial degree of market power would not generally be prevented from selling at "too high" a price.[4] However, this was exactly what happened in *Queensland Wire* where the Broken Hill Pty Co Ltd ("BHP") did in fact offer to supply Queensland Wire Industries but the price was "too high" (though it was stated by the High Court in various judgments that the offer price was "unreasonable", "not competitive" and so on). Further, the author does not state (and perhaps cannot because the High Court has not stated) what is meant by a "competitive market" by which criteria those having a substantial degree of market power must have their actions judged. In my view, the text avoids discussing these fundamental problems in depth. I concede that perhaps my singling out of this issue may be because of my own interest in these problems, but I get the impression that the whole discussion of *Queensland Wire*, whilst interesting, seems to peter out a little without getting to the essence of the real issues.

3. "Queensland Wire and its Progeny Decisions: How Competent are the Courts to Determine Supply Prices and Trading Conditions?" (1991) 21 UWAL Rev 225.
4. S G Corones *Competition Law and Policy in Australia* (Sydney: Law Book Company, 1990) 177.

I also have some difficulty with the statement by the author that the drafting deficiencies in section 4D of the TPA (covering collective boycotts) can be overlooked because the Trade Practices Commission can retain control and can always grant authorisation where a collective boycott demonstrates public benefit.[5] It seems a strange view, to me, that drafting deficiencies should be excused because one can always get a tick from the regulator. The position in relation to the drafting deficiencies in section 4D is, of course, demonstrated in *Hughes v Western Australian Cricket Association (Inc) & Ors*[6] ("*Kim Hughes*") where an illegal collective boycott was found, but the Court also found there was no substantial lessening of competition. The whole philosophical rationale of banning collective boycotts outright is that they are inherently anti-competitive. *Kim Hughes* turns this philosophy on its head. Whilst the Trade Practices Commission may approach the enforcement of section 4D in a reasonable manner, individual litigants have no such constraints. They are, of course, interested only in winning cases. A boycott which has no public benefit but which is not anti-collective falls foul of section 4D because it cannot be authorised. It has no competition detriment because it is not anti-competitive. Given this, one wonders why authorisation should be necessary anyway. The Australian law at the moment seems to be somewhat strange and I think the author, like many others, tends to gloss over the inherent problems involved. The fact that there are problems has been recognised in New Zealand where the legislation has been specifically amended to cover the point.

Space does not permit an analysis of other issues. Suffice it to say that, in my view, the author too readily accepts that mergers, by and large, give rise to few efficiencies[7] - especially as this is a Trade Practices Commission line and the authority cited for the proposition is a Trade Practices Commission statement. It is notable that the recent *Cooney Committee Report*[8] thought that all Australian studies on the point were equivocal. It also seems strange to me that the author so readily accepts that the High Court in *Castlemaine Tooheys Ltd v Williams and Hodgsom Transport Pty Ltd*[9] was wrong. If the text is about policy, then the policy behind it should have been canvassed before the above conclusion was drawn. If the High Court was wrong, then every

5. Ibid, 225.
6. (1986) 8 ATPR 40-736.
7. Supra n 4, 133.
8. Australia, Parliament 1991 (December) *Mergers, Monopolies & Acquisitions - Adequacy of Existing Legislative Controls: Report by the Senate Standing Committee on Legal and Constitutional Affairs* (B Cooney, Chairman) AGPS, Canberra.
9. (1986) 8 ATPR 40-751.

delivered price contract in Australia would be illegal. As the High Court noted, delivered price contracts constitute a business practice of considerable antiquity and usually such practice has no real detriment. Is "per se illegality" of delivered price contracts the policy which it is suggested is appropriate for Australia? Further, there are frequently good and proper efficiency reasons for such contracts from a vendor's point of view. Castlemaine Tooheys Ltd stated these in the case. Is it suggested that a vendor's commercial interests must necessarily always be subordinated to those of the purchaser?

Having said all this, I return to my original observations. The book is an excellent text. It reveals what the Australian law is and is not doing. It discusses trends. It looks at overseas cases and it particularly explains the views of the "Chicago School" on competition matters. These views are of substantial importance in Australia, and elsewhere throughout the world, at this time. If anything, the book may be a little too ambitious and hence may, for these reasons, have cut down on discussion in certain areas where perhaps greater discussion is merited. Nonetheless, there is a limitation on what any author can put between two covers. A frequent rule is that texts to be used in universities are limited by publishers, for cost reasons, to three hundred pages. Given this, the author has performed admirably. The fact that in some areas a reader may have to travel elsewhere in his journey for in-depth knowledge is no reason not to read this book. Corones' book will be a basic reference in the field for some years to come.