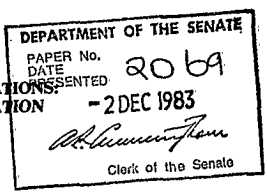
THE PARLIAMENT OF THE
COMMONWEALTH OF AUSTRALIA

Joint Committee on
Foreign Affairs and Defence


# AUSTRALIAN-UNITED STATES' RELATIONS: THE EXTRATERRITORIAL APPLICATION OF UNITED STATES LAWS

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Canberra November 1983

## TERMS OF REFERENCE

On 8 September 1981 the Committee in the previous Parliament requested the Sub-Committee on the Pacific Basin to consider and report upon the following terms of reference:

### Australian-United States' Relations

A report on the first part of the reference, entitled **The ANZUS Alliance**, was tabled on 25 November 1982.

The Joint Committee again referred the inquiry to the Sub-Committee on the Pacific Basin on 24 May 1983, and it was decided to give priority to an investigation into **The Extraterritorial Application of United States Laws**.

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* Mr P.F. Bergin replaced Mr C.G. Edwards as Secretary to the Committee on 24 August 1983.
Mr P.F. Bergin replaced Dr A.C. Edvi-Illes as Secretary to the Sub-Committee on 20 June 1983

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**EXTRATERRITORIAL APPLICATION OF UNITED STATES LAWS**

**ABBREVIATIONS**

| | |
|---|---|
| The Agreement | Agreement between the Government of Australia and the Government of the United States of America relating to Cooperation on Antitrust Matters. |
| AIDA | Australian Industries Development Association (now Business Council of Australia) |
| AMLC | Australian Meat and Live-stock Corporation |
| ANL | Australian National Line |
| Attorney-General's | Attorney-General's Department |
| Foreign Affairs | Department of Foreign Affairs |
| Trade | Department of Trade |
| OECD | Organisation for Economic Co-operation and Development |
| UNCTAD | United Nations Conference on Trade and Development |



**Foreword**

1. On 24 May 1983, the Sub-Committee on the Pacific Basin again received the reference 'Australian—United States Relations' from the Joint Committee on Foreign Affairs and Defence. Details of the conduct of the inquiry are set out in Appendix I.

2. This reference had first been referred to the Sub-Committee in the previous Parliament and a report on the ANZUS Alliance was tabled in the Parliament in November 1982.

3. In investigating the ANZUS alliance, the Committee became aware of the effect of the extraterritorial application of US laws on Australia-United States relations. The Committee noted that:

> 'Another important issue on which the Australian Government has been outspoken is the extraterritorial reach of US laws. The Australian Government has sought and recently obtained a bilateral agreement with the United States, the aim of which is to avoid future irritants to Australian-US relations in this area through government-to-government consultation.'[1]

4. The Sub-Committee also received comments on extraterritoriality in submissions from the Department of Trade and the American Chamber of Commerce in Australia. A number of witnesses raised the issue as a matter of importance to Australia-US relations, while giving oral evidence to the previous Sub-Committee. As a consequence, the present Sub-Committee resolved in May 1983 shortly after the commencement of the Thirty-Third Parliament to report on this aspect of Australia's relationship with the United States of America. It then invited submissions and held a series of public hearings.

5. The issues raised by this inquiry are complex, encompassing the spheres of international trade, international law and foreign policy. Extraterritoriality needs to be seen in this wider, complex perspective and not just in the light of particular events such as the Australian reaction to the Westinghouse case and the Santos case. (These cases are discussed in Chapter 3 of this Report). Several witnesses who gave evidence to the Sub-Committee emphasised this complexity of Australian interests affected by the extraterritorial application of United States laws. The Australian Industries Development Association, for example, stated that:

> the extraterritorial operation of United States laws which present difficulties for Australian industry are not confined to the antitrust laws. There are a number of other laws . . . which create similar problems, whether because of their substantive requirements or because of the discovery procedures which accompany their enforcement. The first area . . . to note [is] the impact of private treble damage suits on Australian companies.[2]

Professor K.W. Ryan, Professor of Law at the University of Queensland, stated that:

> the extraterritorial application of United States law is a matter of serious concern for two rather different reasons. The most obvious reason is its impact on our sovereignty and our capacity to make decisions on matters of national interest. But there is also the impact which it has on individual Australian residents and particularly individual Australian companies. One thing that is clear from the settlement of the Westinghouse litigation is that these two interests may not necessarily coincide . . . [3]

6. Before listing the conclusions reached by the Committee and the recommendations made it is important to understand how Australians and those doing business in Australia are, or might be, affected by the extraterritorial application of foreign legislation or measures, most particularly of the United States. There are two main instances in which this has occurred.

7. The first instance arises where the United States or its private citizens apply the antitrust legislation—the Sherman and Clayton Acts—to the activities of non-nationals

in relation to their acts taking place in foreign States, where these activities have a direct and substantial effect on the United States economy. Wherever the non-national is subject to the personal jurisdiction of United States courts (for example, when he is physically 'found' within the United States or—if a company—through its US-registered parent), the United States antitrust legislation may be applied to his foreign activities and treble damages awarded against him. Both the judgement and the treble damages may be enforced either within the United States or in courts of foreign States which accept the obligation reciprocally to enforce such foreign judgements. In this way the United States legislation asserts a jurisdiction extraterritorially over the foreign activities of non-nationals, and any resulting judgement for penal damages may be enforced in a foreign jurisdiction.

8. The most notorious example affecting Australian interests is the Westinghouse Uranium dispute, which was settled in 1981 at a cost of over $11 000 000 to the four Australian defendant companies.[4] A recent example is the United States Justice Department investigations into shipping conferences which involve Australian shipping interests. These and other cases have involved Australian companies in high administrative and legal costs, so much so that they may feel obliged even in unmerited litigation to seek an out-of-court settlement rather than risk incurring treble damages and hundred of thousands of dollars in legal costs which are not recoverable under US law against unsuccessful plaintiffs.

9. The second instance of extraterritorial application has arisen where the United States issues Orders under legislation such as the Export Administration Act 1979 and Regulations. Under such legislation jurisdiction is asserted over 'United States persons' which include 'any foreign subsidiary or affiliate of any domestic concern which is controlled in fact by such domestic concern'.[5] Such control may be as low as 15-25 per cent share ownership by United States nationals in a company registered in Australia and therefore Australian national.

10. The Act and Regulations have been employed to implement United States foreign policy objectives, most recently in the Siberian Pipeline case. In that instance the United States intended to impose sanctions against the Soviet Union. The Act was invoked to embargo the export or re-export of equipment containing United States manufactured components for use in the Soviet-European gas pipelines. This embargo included the export of equipment made outside the United States under United States licences or by overseas subsidiaries of United States companies.

11. The embargo affected indirectly the Australian company Santos Ltd. which had contracted with Dresser France to supply gas compressors. The United States Presidential ban prohibited United States companies from providing energy-related technology, goods or information, to European companies. When Dresser France, which was involved in supplying to the Soviet pipeline became subjected to the United States Order, Santos had to find another (US) supplier for the compressors it needed.

12. It is conceivable that orders under the Export Administration Act could jeopardise Australian defence procurements and, if Australia wished to export defence equipment or other high technology goods, Australia's overseas assistance programmes. Such unwarranted rejection would be additional to existing attempts—as in the Westinghouse case—to hinder orderly marketing of primary products (e.g. uranium) which has been encouraged by producers' governments.

13. In June 1982 the Australian and US Governments signed a bilateral Agreement relating to Cooperation on Antitrust Matters. This Agreement was hailed as a significant achievement in overcoming some of the problems which had bedevilled Australian/US relations. The Committee was very interested in the operation of the Agreement and further, concluded that the antitrust Agreement is a significant step towards



resolving the difficulties which have arisen and recommended that it be regularly monitored. A discussion of the Agreement can be found in Chapter 4.

14. Notwithstanding that the Agreement has been in operation for little over a year, it is clear it will not be able to resolve all the difficulties which might arise as it is restricted to antitrust matters. A major concern is the treble damages threat in private litigation under US antitrust laws where US litigants cannot be controlled by the US Administration. Also, there could be issues which arise under other legislation referred to in the report, particularly the US Export Administration Act. A further concern is associated with the Pacific Shipping Case. A detailed description of this case is found in Chapter 3, paragraphs 27-37.

15. This report also draws attention to the impact on United States trading partners, including Australia, of US use of powers such as in the Export Administration Act, Trading with the Enemy Act and other Acts intended to regulate trade and commerce beyond the US. These laws and their impact in Australia are analysed in Chapters 1 and 2 of this Report.

16. In preparing its conclusions and recommendations, the Committee has given priority to the need to preserve the rights of Australian individuals and business to trade freely, and to the need to preserve Australian sovereignty in its international relations for example, the Government's policies of assisting the orderly marketing of Australia's primary products. Australia must be in a position to protect itself, its citizens and businesses from the excessive and unjustified extraterritorial application of US laws and policies. In assessing options for appropriate Australian responses to the extraterritoriality problem, the Committee was mindful of the responses of other countries. These are treated in Chapter 5. In Chapters 6 and 7 of this Report the Committee investigates the need for, and recommends the development of, a full range of legal defences to protect these Australian interests.

17. The Committee hopes that this Report will be of constructive assistance to the debate on the extraterritoriality issue, not only in Australia but also in the United States and other countries attempting to extend their jurisdictional competence.

David Charles, M.P.,
Chairman
Sub-Committee A

November 1983

**Endnotes**

1. Parliamentary Paper No. 318/1982—The Anzus Alliance Report by the Joint Committee on Foreign Affairs and Defence—p.70.
2. Evidence, 25 July 1983, p.5.
3. Evidence, 26 July 1983, p.99.
4. Evidence, 25 July 1983, p.43, Mr L. Maher.
5. See G. Triggs, **State Jurisdiction over Corporations : The Nationality Principle at International Law** in **Ninth International Trade Law Seminar**, Canberra, 1982, especially p.61.

## CONCLUSIONS AND RECOMMENDATIONS

### 1. Introduction

The Committee concludes that extraterritorial application of US laws has important, potentially prejudicial, implications for the Australian Government and Australian business over a broad range of economic and political issues. (para 1.54)

The Committee concludes that:

(a) attempts by the United States to apply its trading laws extraterritorially are inconsistent with international law and with international comity, and are unacceptable;

(b) the exceptions to US antitrust laws, which protect US commercial interests but do not extend to foreign interests, are inconsistent with the US's own expressed antitrust commitment and with international expectations of comity; and

(c) Australia cannot yet depend upon the principles of comity or reasonableness or the balance of interest tests (**Timberlane** and **Mannington Mills** cases) to ensure that its national interests are protected by US courts. (para 2.54)

### 2. The Bilateral Agreement relating to Antitrust Matters

The Committee concludes that:

(a) The **Agreement Between the Government of Australia and the Government of the United States of America Relating to Co-operation on Antitrust Matters** is a significant step towards resolving numerous difficulties that have arisen between the Australian and US Governments in the enforcement of US antitrust laws;

(b) a number of important questions relating to the extraterritorial application of other US laws, such as the **Export Administration Act** have not been affected or resolved by the signing of the Agreement;

(c) it is important that Article 6 of the Agreement, relating to US Government participation in private antitrust proceedings, can be made to work effectively; and

(d) it is important that both countries seek to implement both the letter and spirit of the Agreement and that the Australian Government regularly monitor its operation. (para 4.28)

The Committee recommends that the Agreement between the Government of Australia and the Government of the United States of America Relating to Co-operation on Antitrust Matters be regularly monitored by the Australian Government to ensure that it is achieving its stated objectives. (para 4.29)

### 3. Legislative Action

The Committee concludes that, because of the limitations in the scope of the Agreement concluded with the United States in 1982 and because of certain subsequent adverse applications of US laws to Australian interests, there is a need, notwithstanding the Agreement, for Australian residents and those doing business in Australia to be protected from the extraterritorial application of those laws.

The Committee recommends that the Attorney-General introduce legislation into the Parliament:

I (a) to prohibit compliance by Australian residents or those doing business in Australia with orders of a foreign country which might damage Australia's trading interests;



(b) to enable the full recovery in Australia of damages paid by Australian residents or by those doing business in Australia pursuant to a foreign judgment which is declared to be unenforceable or not to be recognised under the **Foreign Antitrust Judgments (Restriction of Enforcement) Act 1979**;

(c) to allow for the recovery of defendants' costs, even in unsuccessful defences provided the judgment is unenforceable or not to be recognised pursuant to the **Foreign Antitrust Judgments (Restriction of Enforcement) Act 1979**; and

II the Attorney-General in drafting such legislation:

(a) give emphasis to considerations such as the protection of Australian trading interests or national sovereignty; and

(b) avoid dependence upon a prior finding that a foreign country or court has asserted jurisdiction contrary to international law. (para 7.35)

The Committee concludes that the **Foreign Proceedings (Prohibition of Certain Evidence) Act 1976** and the **Foreign Antitrust Judgments (Restriction of Enforcement) Act 1979** serve a useful purpose as part of a range of legal deterrents against unacceptable attempts to apply US laws in Australia. (para 6.42)

The Committee concludes that the enactment of blocking legislation against the extraterritorial application of judgments in US antitrust proceedings is justified by the special nature of the US antitrust laws and their interpretation by US Courts. (para. 5.13)

The Committee concludes that existing responses do not adequately resolve Australia's concern with US extraterritorial laws. (para 6.44)

If in future Australian interests are seriously threatened by foreign judgments, the Committee recommends that the Australian Government give consideration to entering into agreements with other countries for the enforcement in each other's jurisdiction of recovery back orders. (para 7.36)

### 4. Multilateral Arrangements

The Committee recommends that the appropriate Commonwealth Departments give high priority to ensuring active Australian participation in international attempts, such as those within the OECD and UNCTAD, to reach broadly acceptable arrangements to avoid or resolve conflicts in the application of national trading laws. (para 6.28)

The Committee concludes that while multilateral efforts are unlikely to be successful in the short term they are likely to be the most effective long term solution and should be pursued. (para 6.37)

### 5. Efforts to Influence US Attitudes

The Committee concludes that there is a longer term possibility that the US Administration may become sufficiently concerned by international criticism of, and reactions to, its extraterritorial laws that it may eventually moderate their application. (para 6.7)

The Committee recommends:

(a) Australian businessmen and their Associations continue and strengthen their efforts to seek changes in US attitudes (para 6.23); and

(b) diplomatic representations be pursued and intervention in the US judicial system, such as the filing of amicus curiae briefs, be undertaken where appropriate. (para. 6.35, see also para. 6.55)

## CHAPTER 1

## POTENTIAL THREATS BY UNITED STATES EXTRATERRITORIAL LEGISLATION TO AUSTRALIAN INTERESTS

### 1. Introduction

1.1 The trading laws of the United States, when applied extraterritorially in Australia or to Australian nationals, have had a significant impact on the traditional close relations between Australia and the US. In particular, antitrust and overseas trading laws have had a detrimental effect on Australia's commercial interests and may continue to be an irritant in relations between the two countries.

1.2 The US business community has long considered the free enterprise philosophy as the basis of its commercial system, and US antitrust laws are intended to reflect this philosophy and the US commitment to a competitive market. Yet the Westinghouse proceedings and other cases of extraterritorial application of US trade laws show how those laws may actually protect US business from foreign competition and also frustrate the policies of other sovereign governments.

1.3 It should also be emphasised that the conflicts which have emerged as the result of the extraterritorial application of US antitrust laws—laws which are designed to protect the United States from 'unfair' competition from foreign trade and commerce—reflect the massive expansion and increasing complexity of international trade in the last forty years, and the growth of US-based multinational corporations as a vehicle for that trade. The adoption by countries at a national level of laws relating to restrictive business practices is only one example of an increasing tendency for nations to pass laws governing international trade. At the same time as multilateral efforts have been made to adopt uniform laws and practices for the conduct of international commerce, there has been an increasing tendency for countries to adopt laws and policies which operate on a non-uniform and sometimes conflicting basis.

1.4 US antitrust laws had little appreciable impact on Australia's laws and policies until, in the mid 1970s, the Australian Government became aware of efforts by courts in the United States to seek in Australia, for the purpose of US Department of Justice antitrust investigations, information and evidence relating to the conduct of Australian uranium producers. This was done without any prior notification to, or consultation with, the Australian Government by the United States Administration. Concern has steadily developed in Australia that US laws and enforcement policies may conflict with Australia's trade laws and policies.

1.5 Mr Neaves, former Secretary of the Australian Attorney-General's Department, noted that the US antitrust laws provide the most striking illustration, from Australia's point of view, of the conflicts which may arise in this area:

> 'In broad terms, and without looking at specific objections to those laws, Australia has expressed concern with their operation because they give rise to potential and actual conflicts with Australia's trading laws and policies.'[1]

1.6 In an address to the International Law Association (Australian Branch), in April 1982, the then Attorney-General, Senator Durack, emphasised that such conflicts occur because—

> '. . . the greatly increased assertions of extraterritoriality—particularly in relation to economic laws—have not been accompanied by the development of rules of international law suitable for the resolution of conflicts of national laws that must necessarily follow.'

1.7 The United States, on the other hand, has consistently claimed extensive extraterritorial application for its antitrust laws under its 'effects' doctrine. It is those claims in particular that have both irritated US commercial relations with her trading partners

and exposed the hiatus in international law, which does not provide rules for the resolution of overlapping claims to jurisdiction.

1.8 The present Attorney-General Senator Evans has also expressed concern about extraterritoriality. In June of this year following discussions in London and Washington he indicated that—

> the new Australian Government would continue the approach of the previous government in this area, in seeking to protect its trading laws and policies. He emphasised the importance of consultations between the Australian and United States Governments to ensure that each government could take account of the other's concern. The agreement between the governments on co-operation in antitrust matters is now one year old and the Attorney-General welcomed the opportunity to discuss its effectiveness in promoting such consultations.[2]

## 2. US Antitrust Laws and the Westinghouse Case

1.9 The foundations of United States law with respect to extraterritorial jurisdiction are rooted in early case law, involving the extension in jurisdictional scope of the US federal antitrust laws, and to a lesser extent in certain public international law precedents[3]. It has been pointed out that the use of the term 'extraterritorial jurisdiction' in this context is really a misnomer, since US courts have always considered such an exercise of jurisdiction to be rooted in territorial principles[4]. What has occurred is that, over the last 70 years, American courts have been faced with interpreting antitrust laws, which at first reading appear to be simple and straightforward, and applying them to situations that have become progressively more complicated[5].

1.10 According to Professor Ryan—

> The antitrust legislation in my view has the status almost of a constitutional text—it is too sacred to be interfered with . . . [6]

Several other witnesses expressed a similar judgement.

1.11 The major Act in this area is the Sherman Act of 1890, of which Section 1 declares illegal any contract, combination or conspiracy in restraint of trade or commerce among the several States or with foreign nations. Section 2 of the Act makes it an offence to monopolise, or attempt to monopolise, or combine or conspire with any other person or persons to monopolise, any part of inter-state or foreign trade or commerce.

1.12 The Sherman Act is supplemented by the Clayton Act of 1914 which makes unlawful certain kinds of restrictive practices, including price discrimination among purchasers, exclusive dealing arrangements and the acquisition of the stock or assets of competing corporations.

1.13 Enforcement of the antitrust provisions may be secured:

1. by the US Government seeking an injunction to restrain violation of the Sherman or Clayton Acts;
2. by the initiation of criminal proceedings for breaches of the Sherman Act; or
3. by private actions for treble damages.[7]

1.14 Originally, the United States courts interpreted the words of the Sherman Act as applying strictly to activities which occurred within the United States. However, US courts have since developed the controversial 'effects doctrine', whereby they will apply antitrust laws to actions outside US territory—**even by persons or companies not its nationals**—that have direct, substantial and foreseeable consequences within the US. Details of US antitrust laws and their extraterritorial operation are included in Chapter 2 of this Report.

1.15 The recent antitrust litigation by the Westinghouse Corporation against an alleged cartel of foreign uranium producers, including four Australian defendant companies, highlights the extent to which Australian governmental and business interests can be prejudiced by the extraterritorial application of US laws pursuant to



the 'effects' doctrine. The case also exemplifies the magnitude of the financial risk to Australian companies, even those not trading in the US, from US laws allowing recovery of treble damages against antitrust violators.

1.16 In the Westinghouse case, which is detailed in Chapter 3, not only did some of the Australian companies face the risk of financial ruin by treble damage suits, but in a situation where their actions took place outside the United States and were regulated in part by their own Government's policies. As it happened, the case was settled out of court. The fear of unjustified extensions of US law, to the detriment of Australian business and government interests (including orderly marketing schemes for primary products) nevertheless remains.

1.17 A second major concern to Australian interests are the administrative and legal expenses in merely defending US antitrust actions, including demands for the production of vast quantities of documentary evidence. The Department of Trade stated that these problems could in fact hinder US/Australia trade:

> For an exporting country like Australia, which is essentially a medium sized country where exporters do not have a lot of capital to enable them to fight these things through a series of courts, the best legal advice can be very expensive and itself constitutes a constraint on the exports.[8]

For example, in the 1981 case of **Western Australian Conservation Council v Alcoa**—which was dismissed by the court of first instance in the US as a legally unfounded attempt to have US environmental protection laws applied extraterritorially—the Australian defendant's legal costs totalled between $300 000 and $400 000[9]. In the Westinghouse case, the out-of-court settlement still cost the four Australian companies approximately $11 000 000 as well as very expensive legal costs.[10]

## 3. Production of Documents in Antitrust Proceedings

1.18 The most forcible protests from the international community against the extraterritorial reach of United States antitrust laws have been generated by US courts ordering the production of foreign documents.

1.19 United States courts have adopted the rule that once a court has personal jurisdiction over a party it may order the production of all documents in that party's possession wherever they may be, providing that the party does not infringe the law of the state in which the documents are present. On a number of occasions, United States courts have attempted to subpoena the production of foreign documents pursuant to antitrust or Federal Maritime Commission investigations. These include subpoenas to obtain documents relating to the international oil industry, foreign shipping conferences, the Canadian pulp and paper industry, and the Dutch incandescent lamp industry. Each instance provoked strong diplomatic protests that the requests were beyond United States jurisdiction and were an infringement of the foreign state's jurisdiction.

1.20 Under procedures available in **civil** proceedings, a plaintiff may call for discovery and production of documents to the court from the other party. Investigations are initiated by the Department of Justice or the Federal Trade Commission. Those investigations will be accompanied by subpoenas or civil investigative demands ("CIDs"), the latter being issued under the **Hart Scott Rodino Act** seeking the provision of information and the production of documents.

1.21 In most common law countries such a procedure exists, and it enables each party to have access to all documents in the possession of the other which are directly relevant to the suit. Under United States procedures, however, the defendant may be required to produce not only documents that are directly relevant, but also any documents that lead to admissible evidence. Accordingly, in the case of private antitrust suits, discovery may generate the costly and time-consuming production of massive

quantities of documents. In the case of one defendant in the Westinghouse suit, half a million or so documents in Australia were subject to 'discovery'. Non-compliance with subpoenas or CIDs issued in these investigations is backed by criminal sanctions.

1.22 The Australian National Line (ANL) referred to 'fishing expeditions' by attorneys who do not charge a fee but work for a share of the damages awarded. According to ANL these discovery procedures result in a 'considerable amount of administrative time being spent in sorting out all relevant documents wherever they may be held, and large legal fees being run up for action taken and advice and assistance given in this exercise'.

1.23 The costs involved generally mean that a settlement is proposed since 'there appears to be no provision in US law for security for costs, nor for orders for costs being made against unsuccessful plaintiffs'.[11] Settlement will generally reduce the costs involved.

1.24 As noted above, in 1976 the United States Justice Department began its own investigations into the uranium cartel allegations with the intention of instituting criminal proceedings under the Sherman and Clayton Acts. Following the empanelling of a Grand Jury to pursue the investigation and to initiate any criminal proceedings which might be warranted, attempts were made to subpoena executives of the companies concerned. Also, letters of request were made, including to the New South Wales Supreme Court, seeking evidence from persons in Australia, and from documents located in Australia. The four Australian companies defendants in the Westinghouse suit ordered their executives not to enter the United States so as to avoid subjection to United States *in personam* jurisdiction.

1.25 The Australian Government, as will be detailed in Chapter 3 of this Report, followed the practice of other foreign governments in prohibiting the production of Australian documents by Australian courts, or the giving of evidence relating to these documents, before a foreign tribunal. This prohibition was made under the **Foreign Proceedings (Prohibition of Certain Evidence) Act 1976**, the introduction of which was criticised by one witness, Mr Lawrence Maher, as unnecessary because of the likelihood that Australian courts would not accede to US judicial requests for evidence:

> The mere receipt of such a request does not compel the recipient judicial authority to accede unquestioningly to it. One of the requirements which must be satisfied is that the foreign court be a court or tribunal of competent jurisdiction.[12]

The Committee nevertheless believes (see further Chapters 6 and 7) that the 1976 Act does serve a useful purpose as part of a range of legal deterrents against unacceptable attempts to apply US laws in Australia.

## 4. US Laws Other than Antitrust

### (a) US Attempts to Regulate Foreign Companies

1.26 In evidence heard by the Sub-Committee it was emphasised that, *in addition to* the antitrust laws, there are several other laws of the United States which could pose a threat to Australia's trading freedoms and therefore to its sovereignty and the viability of Australian companies. The Australian Industries Development Association (AIDA) stated that:

> the extraterritorial operation of United States laws which present difficulties for Australian industry are not confined to the antitrust laws. There are a number of other laws (e.g. the securities laws, the environmental laws and the anti-boycott laws) which create similar problems, whether because of their substantive requirements or because of the discovery procedures which accompany their enforcement.[13]

These other laws include: the ***Trading with the Enemy Act 1917***; the **International Emergency Economic Powers Act 1977** under which the United States attempted in



1979 to freeze Iranian assets; the **Export Administration Act 1919**, under which in 1982 the United States attempted to enforce its embargo on construction of the Siberian gas pipeline, and the **Foreign Corrupt Practices Act 1972**.

1.27 In comparing the extraterritorial reach and impact of various US laws, the Department of Foreign Affairs (Foreign Affairs) stated that:

> the reach is even greater in a sense in regard to the Export Administration Act rather than antitrust. From the point of view of impact, however, the antitrust legislation could be more dramatic, particularly in the area of a private triple damages case where you have millions of dollars involved. But I think both of them are important; they have different effects and both of them are adverse, or can be adverse, to Australian interests.[14]

1.28 As was noted by the Department of Trade (Trade) in its submission to the Sub-Committee[15], these laws do not come within the scope of the **Agreement between the Government of Australia and the Government of the United States of America Relating to Cooperation on Antitrust Matters** (the Agreement) and Australia's legislative response to them has so far been limited. Trade considered that the United States laws may conflict with Australian Government laws and policies, e.g. regulation of outbound shipping.

1.29 Australia thus far has been mainly concerned with one aspect of the extraterritoriality problem, that is, the claim of US courts to exercise jurisdiction in antitrust matters. However, the furore over the US proscription of the participation in the European Soviet gas pipeline by US company subsidiaries and licensees raises the question of the jurisdiction that the US Congress and Executive claim over foreign companies deemed to be controlled by US nationals, including situations detailed in this Chapter where US shareholding may be as low as 15 per cent.

1.30 Those attempts sometimes include the practice, not only by the United States,[16] to extend national legislation to companies in foreign countries controlled by corporations in the legislating States. According to evidence given by the Attorney-General's Department ("Attorney-General's"), this presents three types of problems: first, whether the company is in fact controlled by a United States corporation; second, and perhaps more importantly, where the laws or policies of the country in which that controlled company is carrying on business, or where it may be incorporated, conflict with those of the United States; and third, US legislation has at times been used by US Administrations in attempts to enforce American foreign policy in other countries.[17]

1.31 With respect to the first area of concern, Attorney-General's Department stated in evidence:

> 'One can take the kind of legislation which has been of great concern in England and Canada. For instance, one can take the Act dealing with export administration and the anti-boycott provisions which, in effect, treat as a controlled company any company in which the United States parent has a 25 per cent interest. One of the problems is the relatively small equity which invariably is treated as establishing control. One Bill with which we were concerned, the Oil Windfall Acquisition Bill, which never proceeded, would have provided for United States control over the acquisition by oil companies of any foreign company. It would have been sufficient if the acquiring company were controlled by a United States oil company and to establish control if the United States company had a 15 per cent interest. In the foreign policy field are a number of United States laws that have been applied on these grounds. The Foreign Assets Control Regulations and the Cuban Assets Control Regulations are all under the Trading with the Enemy legislation. What they do is define the entity subject of the legislation as 'persons subject to United States jurisdiction' and then proceed to say that that includes not only United States companies but also companies owned or controlled by United States companies.'[18]

1.32 In his submission, Mr Flint argued that it does not matter in US law that a subsidiary is incorporated under the law of Australia, and is regarded here as an Australian corporation: it is still subject to ultimate US control, as judged by the United States.

### (b) Conflict of US and Foreign Laws

1.33 With respect to the second area of concern, the Sub-Committee was told that, in some instances, the United States has recognised the question of conflict with other states' laws. As in the case of the Cuban Asset Control Regulations, it has been prepared to defer application of its law where it would conflict with the local law or policy.[19] There may also be available the defence of foreign sovereign compulsion (see further Chapter 2) when a defendant's unlawful activities have in fact been required by a foreign government. These, however, are exceptions to the traditional US judicial non-recognition of conflicting foreign laws. The **Timberlane** and **Mannington Mills** approach of balancing conflicting interests is a recent and as yet unfinished attempt to change judicial attitudes, but for reasons detailed in Chapter 2, this tentative approach is unlikely to result in US courts routinely giving adequate regard to Australian interests.

### (c) Laws Used as Vehicles for US Foreign Policy

1.34 The third area of concern is that there have been a number of instances where the United States has attempted to apply its laws extraterritorially, not even subject to the limitations of the international legal principle—the 'protective principle'—under which laws may be passed and applied extraterritorially for protection of national security, but because of broader foreign policy concerns.[20] Those laws, and instances of how they have been used, are discussed below, including the action of the United States in 1982 in regard to the Soviet gas pipeline, which aroused such strong reactions from even the United States' closest European allies.

### (d) United States Export Administration Act 1919

1.35 There are several other instances in which Congress has attempted successfully and unsuccessfully, to enforce its economic policies against both US and US controlled foreign corporations. For example, with the aim of preventing United States enterprises aiding the League of Arab States in their boycott of Israel, the Export Administration Amendments of 1979 defined a 'United States person' under the anti-boycott provisions of the **Export Administration Act** to include 'any foreign subsidiary or affiliate of any domestic concern which is controlled in fact by such domestic concern'.[21]

1.36 In the application of the Act to Australian interests, the following concern was expressed by Trade in its evidence:

> One area of concern in relation to the Export Administration Act which we have noted is that the Americans are now tending towards what we call dual purpose technologies, those technologies which have both military and commercial application. They are moving on the side of restricting the commercial application of technology as well as the military. The military we can understand and appreciate but the commercial aspect we have problems with and there have been instances where Australian companies have been disadvantaged through the reluctance of the American Government to give approval for those companies to undertake export of a product which includes restricted componentry even when that componentry is available from other sources on a commercial basis.[22]

The Santos case, detailed in Chapter 3 of this Report, is one example of how this Act can prejudice Australian interests.

1.37 The most recent issue to divide the United States and its allies in regard to the question of extraterritorial jurisdiction of US laws, was President Reagan's attempt to prevent construction of the Soviet gas pipeline. The effect of the Regulations made by President Reagan on 22 June 1982 under the **Export Administration Act** was to apply a ban on the supply of equipment for construction of the 5000 kilometre pipeline which is being installed to convey natural gas from Siberia to Western Europe and which is due for completion in 1984. The grounds for the United States' action were to bring pressure on the Soviet Union in relation to the continuation of martial law in Poland, and President Reagan's concern that Western Europe may become over dependent upon Soviet gas and energy for its energy needs. The Regulations applying to US companies and to foreign companies controlled by US companies, were intended to apply even where there was no affiliation between the foreign company and the US company, but where technology that originated in the United States had been supplied under licence to the foreign company.[23]

1.38 One of the US's closest European allies, the United Kingdom, invoked the **Protection of Trading Interests Act 1980** to block the US decision. Substantial construction contracts had been signed with British firms, the major one being with John Brown Engineering of Scotland to provide 21 gas turbines for the project. Rotors for the turbines were to come through subsidiaries of the US company, General Electric. In an unprecedented legal move, the UK Trade Secretary invoked the 1980 Act by signing an order citing the American decision as damaging the trading interests of the United Kingdom.

1.39 After a lengthy and acrimonious confrontation between the United States and its allies, the situation eased in mid-November 1982, when President Reagan lifted the constraints against the European firms. Controversy over this issue was revived recently, when the UK and the EEC protested against amendments to the Act proposed by the US Administration. These amendments are currently before Congressional Committees.

1.40 The **Export Administration Act** has important implications for Australia's defence. The Department of Defence made a submission to the inquiry and a representative of the Department was examined at a public hearing. At the hearing the Department placed great stress on the existing alliance with the US and claimed "Australian defence needs are certainly tied with America"[24]. The Act was seen as a key part in the process to slow down the transfer of American technology to certain countries especially in the Soviet bloc.

1.41 The Department was also concerned that Australia's supply of defence equipment from the US not be prejudiced:

> "We have a close and very durable alliance with the Americans. We have a lot of equipment based on American design and American-made equipment in many cases, and we would not wish to see ourselves denied a continuation of the technology or indeed the equipment itself from the United States."[25]

1.42 The Department's evidence did not extend to the wider issues addressed in this Report such as the need for, and implications of, further Australian blocking legislation, although it recognised potential benefits of Australian exports of high technology including some military technology. It appears that the Department of Defence needs to be more involved in officials' discussions on extraterritorial application of foreign laws.

1.43 The Committee notes that the application of the **Export Administration Act** is controversial within the US. As the Department of Foreign Affairs stated in its evidence:

> The Export Administration Act or a similar type of legislation has been invoked by administrations recently for political purposes against considerable resistance in the United States. I think most people in the United States, even the Administration officials supporting the Export Administration Act, endorse the idea of the importance of the predictability of the environment for international commerce. So I would hope to see that area being most affected by changing attitudes. The antitrust area is an area of entrenched legislative attitude.[26]

1.44 The Export Administration Act expired on 30 September 1983. The Act was extended for 14 days but then lapsed on 14 October 1983. Export controls which took place under the Export Administration Act are now being administered under the *International Emergency Economic Powers Act 1977* as an interim measure.

1.45 The two principal bills at present before the Congress on the reauthorisation of the Act do according to Trade, 'address themselves to some of our concerns, such as sanctity of contract and restrictions on the implementation of foreign policy controls. However the basic thrust of the bills appears to retain a number of provisions we have found objectionable in the past.'[27]

1.46 The Department of Trade went on to note that both bills (Heinz-Garn bill in the Senate and the Bonker bill in the House of Representatives) retain extraterritorial control over foreign subsidiaries and over re-exports of products or technology of US origin. Differences between the bills *will need to be resolved by a joint conference.* According to Trade 'it would be reasonable to expect that some compromise language is likely to be arrived at which might not necessarily be to our advantage'.[28]

### (e) United States Trading With the Enemy Act 1917

1.47 The best known attempt by the United States to exercise jurisdiction under this Act over foreign-located subsidiaries[29] is the Fruehauf case. This concerned the US Treasury's unsuccessful attempt to use the Act to enforce President Truman's embargo on trade with China.

1.48 In another instance, despite a recession in Canada and unemployment in the aluminium industry, a Canadian corporation, Aluminium Company of Canada Ltd. (Alcan), a corporation owned and controlled in the United States by varied individual shareholdings, refused a substantial Chinese order for aluminium. It has been asserted that it did so after 'informal pressure' had been exerted on the American parent corporation. Ms Gillian Triggs, Faculty of Law, University of Melbourne (Ms Triggs), remarks:

> 'Here again, US legislation had for all intents and purposes been applied against a foreign subsidiary operating in a State with a policy of authorising and encouraging trade with China. It is significant, however, that the US will not generally, and did not in this instance, attempt to enforce its legislation directly against the foreign subsidiary. The practice has been to secure compliance through the US national parent controlling the corporation. Hence no problem of extraterritorial enforcement arises'.[30]

### (f) International Emergency Economic Powers Act 1977

1.49 The definition of 'persons subject to the jurisdiction of the US' employed in the **Trading with the Enemy Act** was also mirrored in the Iranian Assets Control Regulations of 1979, issued under the **International Emergency Economic Powers Act of 1977**. The Regulations froze all assets of Iran, its agencies and instrumentalities and entities controlled by it, which were held by such persons.

1.50 In response to the Iranian hostages crisis, on 4 November 1979, President Carter froze all Iranian accounts in American banks, whether or not they were located in the United States. In London, Citibank offset all its Iranian deposits against its loans to Iran. Although the Iranian state bank, Bank Markazi, instructed Chase Manhattan to pay interest due from its London branch on a major syndicated loan, the Chase took the view that the freeze meant that the interest could not be repaid. A demand was made for full repayment, and when Iran did not comply she was declared in default. Bank Markazi had attempted to withdraw its dollar denominated deposits in US branches and subsidiaries, and instituted legal proceedings against American banks in London and Paris to require compliance with its attempted withdrawals.[31] This was followed by



an attempt by Chase Manhattan in New York to enjoin the English proceedings. While this motion was denied, and there was consequently no discussion of the merits, the US Federal Court said it was 'reasonable, to say the least', for the Iranian bank to have the question of the legality of the application of US legislation to an English branch determined in an English court. The flood of litigation which promised to flow from these Regulations was stemmed with an Executive Order in January 1981, which cancelled the set-offs and ordered the transfer to escrow accounts of any funds made subject to the Regulations. In this way, intergovernmental conflict was avoided[32]. According to Mr Flint—

> 'During the dispute the Thatcher Government was torn between a wish to morally support the United States, and a desire to maintain confidence in the London financial market. Because of the settlement, the British and French courts did not have the opportunity to definitively rule on the question of jurisdiction'.[33]

### (g) Foreign Corrupt Practices Act 1977

1.51 The **Foreign Corrupt Practices Act 1977** was designed to end the corrupt payments by US corporations to foreign government officials, although criminal sanctions apply less broadly under this legislation than under the **Trading With the Enemy Act 1917.**

1.52 Congress chose not to include foreign subsidiaries within this legislation, except that when a registered foreign 'issuer' as defined in the **Securities and Exchange Act 1934** engages in bribery of foreign officials directly through a subsidiary it too will be liable. This is so regardless of United States nationality, or contact with the United States, and despite the fact that the payments may have been legal under the law of the country where they were made.[34]

1.53 The Sub-Committee was told by representatives of the American Chamber of Commerce in Australia that Australia should be aware of the political impact of this Act on investment. It was suggested that, since American companies contribute very significantly to Australia's exports, if the **Foreign Corrupt Practices Act** deters a US company from venturing into certain countries in the Asian-Pacific area, then that is a disadvantage for Australia's potential exports and something about which Australia should legitimately be concerned.[35]

## 12. Conclusions

1.54 The Committee concludes that extraterritorial application of US laws has important, potentially prejudicial, implications for the Australian Government and Australian business over a broad range of economic and political issues.

### Endnotes

1. **Ninth International Trade Law Seminar**, Canberra, 1982, p.3.
2. Press release by the Attorney-General, Washington D.C., 27 June 1983.
3. Joseph Jude Norton 'Extraterritorial Jurisdiction of US Antitrust and Securities Laws', **International and Comparative Law Quarterly, vol. 28**, October 1979, p.576.
4. Norton, p.575 (footnote 1).
5. Michael J. Owen and Peter A. Bobeff, 'The Westinghouse Case—Its Implications', Australian Industries Development Association, **Bulletin** 324, November 1980, p.1.
6. **Evidence**, 26 July 1983, p.102.
7. K.W. Ryan, 'The International Application of United States Antitrust Legislation'; paper given at the **Fifth International Trade Law Seminar**, Canberra, 1978, p.95.
8. **Evidence**, 26 July 1983, p.124.
9. **Evidence**, 22 September 1983, p.232 (*Business Council of Australia Submission*).
10. **Evidence**, 25 July 1983, p.43, (Mr L.W. Maher).
11. Letter from ANL to Committee dated 7 October 1983.

12. **Evidence**, 25 July 1983, Submission No. 2, p.S129.
13. **Evidence**, 25 July 1983, *Submission No. 5*, p.S162.
14. **Evidence**, 26 July 1983, p.77.
15. **Evidence**, 20 August 1982, p.695.
16. For some examples of attempts at extended jurisdiction by other countries, see Report Chapter 5, para's 5.9 to 5.13.
17. **Evidence**, 9 September 1982, p.948.
18. **Evidence**, 9 September 1982, p.949.
19. **Evidence**, 9 September 1982, p.949 (Attorney-General's).
20. **Evidence**, 9 September 1982, p.952 (Attorney-General's).
21. G. Triggs, 'State Jurisdiction over Corporations ...' in **Ninth International Trade Law Seminar**, Canberra, 1982, p.61.
22. **Evidence**, 26 July 1983, pp.138-139.
23. **Evidence**, 9 September 1982 (Attorney-General's Department), p. 950. For an analysis of the Soviet pipeline case, see newspaper article by Mr D. Flint set out in **Evidence**, 9 September 1982, pp.943-945.
24. **Evidence**, 22 September 1983, p.224.
25. **Evidence**, 22 September 1983, p.203.
26. **Evidence**, 26 July 1983, p.96.
27. Letter from Trade dated 27 September 1983.
28. Letter from Trade dated 27 September 1983.
29. Under the **Foreign Assets Control Regulations** pursuant to the **Trading with the Enemy Act** of 1917, any unlicensed trade, payment, foreign exchange transaction, or transfer of property in which the designated country or its nationals has an interest is forbidden. The Regulations applied to 'persons subject to the jurisdiction of the United States' and included in this category were not only persons and corporations actually within the United States, but 'Any partnership, association, corporation or other association, wheresoever organised or doing business which is owned or controlled by persons specified in the preceding categories. See Triggs, p.58.
30. **Triggs**, p.61, citing J.I.W. Corcoran, 'The Trading With The Enemy Act and the Controlled Canadian Corporation', **McGill Law Journal**, vol. 14, 1968, p.174 ff.
31. **Evidence**, 9 September 1982, p.936.
32. **Triggs**, p.63.
33. **Evidence**, 9 September 1982 (Submission), pp.936-937.
34. **Triggs**, p.62.
35. **Evidence**, 2 June 1982 (American Chamber of Commerce in Australia), p.431.



## CHAPTER 2

## UNITED STATES ANTITRUST LAWS AND EXTRATERRITORIAL JURISDICTION

2.1 The formal rules by which international law allocated jurisdictional competence to states were formalised during the nineteenth century, when states played little part either directly in international trade or in regulating it. However, as Ms Triggs notes, states today, as major participants in international commerce, are increasingly concerned to control the activities of their nationals whether they operate domestically or in foreign states and, if necessary, to assert an extraterritorial reach for their legislation.[1]

2.2 International law, however, places largely territorial limits on national jurisdiction.[2] Attempts by the United States to assert and enforce its antitrust legislation extraterritorially on the basis of the so-called 'effects' doctrine (see below) have therefore prompted other states to allege violations of their sovereignty in contravention of the traditional jurisdictional limits recognised at international law.

### 1. The Sherman and Clayton Acts

2.3 These Acts and their extraterritorial application were first discussed, in general terms, in Chapter 1.

2.4 The major act in this area is the Sherman Act of 1890, of which Section 1 provides:

> 'Every contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States or with foreign nations, is hereby declared to be illegal . . .'

Section 2 of the Act provides:

> 'Every . . . person who shall monopolise, or attempt to monopolise, or combine or conspire with any other person or persons to monopolise any part of the trade or commerce among the several States or with foreign nations, shall be deemed guilty of a misdemeanour.'

2.5 The Sherman Act is supplemented by the Clayton Act of 1914 which makes unlawful certain kinds of restrictive practices, including price discrimination among purchasers, exclusive dealing arrangements and the acquisition of the stock or assets of competing corporations.

2.6 Enforcement of the antitrust provisions may be secured: (1) by the institution by the US Federal Government of proceedings for an injunction to restrain violation of the Sherman or Clayton Acts; (2) by the initiation of criminal proceedings for breaches of the Sherman Act; or (3) by private actions for treble damages.[3]

2.7 Originally, the United States Courts interpreted the words of the Sherman Act as applying strictly to activities which occurred within the United States. In the 1908 Supreme Court decision in **American Banana Co. v. United Fruit Co.**, Justice Holmes concluded that:

> 'The general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done.'[4]

This appears to have been considered by the Court as a customary principle of public international law.

2.8 However, because the **American Banana** case involved specific acts by foreign states, and the complaint contained no allegations of activity within the United States or effect upon United States imports or commerce, subsequent decisions dealing with the question of the extraterritorial applicability of federal antitrust laws have been able to circumvent any restrictive implications of that case. In fact, as early as 1911, Justice Holmes in **Strassheim v. Dailey** cited his judgment in **American Banana** for the following proposition:

'Acts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a State in punishing the cause of the harm as if he (the actor) had been present at the effect, if the State should succeed in getting him within its power.'[5]

**Strassheim v. Dailey** was later drawn on in the 1945 case **United States v. Aluminium Co. of America** ('Alcoa'), which was a crucial precedent for decisions in subsequent antitrust cases with extraterritorial implications.

### 2. The 'Effects' Doctrine

2.9 Prior to the Alcoa decision, despite Mr Justice Holmes' above statement in **Strassheim v. Dailey,** United States courts would exercise jurisdiction over foreign enterprises if, and only if, there was significant illegal conduct within the United States by the foreign party, or if the illegal conduct was pursuant to an agreement with a United States concern intended directly to affect United States commerce. In effect, by determining jurisdiction by reference to the place where the offence was deemed to have been committed[6], US courts were relying upon the territorial principle for the extraterritorial extension of subject matter jurisdiction.

2.10 In the **Alcoa** case, the United States Government alleged that a Swiss company, Alliance, entered into an agreement with its shareholders, companies incorporated in France, Germany, Switzerland, Britain and Canada, setting a quota for the production of aluminium in violation of the Sherman antitrust Act. Where any shareholder exceeded the quota it was to pay progressive royalties to Alliance. The agreement was intended to include exports to the United States, and if made in the United States it would clearly have been unlawful. Alcoa, a United States corporation, was a co-defendant in the action, but while benefitting from the agreement was not a party to it. The question for the Court was whether the Sherman Act extended to attach liability to the conduct of foreign nationals outside the United States.

2.11 Judge Learned Hand, delivering the opinion of the Court, concluded that it was settled law that—

'any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends; and these liabilities other states will ordinarily recognize.'[7]

2.12 In the **Alcoa** case, a US court for the first time based its conclusion exclusively on the criterion of effects and not on the fact that some of the alleged practices had occurred within the United States. The Alcoa case was also the first in which the antitrust laws were applied to practices conducted abroad, between foreign enterprises exclusively.[8]

2.13 The 'effects' doctrine of jurisdiction as articulated in **Alcoa** received approval in the commentary on Article 18 of the **Second Restatement of the Foreign Relations Law of the United States,** and has been repeated and applied in many subsequent cases. With the qualification that the effect on United States commerce must be substantial, it can be taken as expressing the settled view of United States' courts and antitrust administrators.[9]

2.14 The US Justice Department's **Antitrust Guide for International Operations** (1977) states that the 'effect' must be substantial and foreseeable. However, once the effect is shown, no specific quantum of commerce lessened by the restraint need be shown. The essential factor in a Sherman Act violation is that alleged violators of the Act deprived consumers of the advantages they would normally have derived from free competition.[10]

2.15 It is the attempt by US courts to extend, by analogy, this doctrine to the conduct of persons (or corporations) not owing allegiance to the United States and residing outside the United States that has been the main issue in the resulting conflicts between the



US and those foreign governments which have objected to this extraterritorial extension of US jurisdiction to their own territory or nationals. As Professor Ryan stated in evidence:

'The basis for the Australian concern about the United States legislation and for taking certain counter-measures which we have adopted is that the United States assertion of extra-territorial jurisdiction is inconsistent with international law and is inconsistent with international comity . . . the United States asserts jurisdiction against persons who are not United States nationals or residents for acts which are entered into outside the United States which have an anticompetitive effect in the United States. The consistency of this with the set of rules in international law is controversial.'[11]

2.16 Public international law recognises that each state may determine the scope of applicability of its laws and include within such scope any action taken abroad, whether or not the authors of such action are its nationals or persons resident in its territory, provided there exists between such acts and its territory a link which reasonably justifies such application[12]. Only where the conduct is universally deemed to be criminal, however, is the 'effects' doctrine recognised under international law[13]. There is, however, no international consensus to treat antitrust behaviour as criminal[14]. Indeed, many countries including Australia have governmental policies which encourage orderly international marketing schemes for primary products.

2.17 Following the **Alcoa** case, two antitrust cases in particular—**US v. Imperial Chemical Industries** ('ICI') in 1951 and **US v. The Watchmakers of Switzerland Information Centre, Inc.** ('Swiss Watchmakers') in 1962—began to persuade US lawyers that serious international problems could arise as a result of the uncritical application of the 'effects' doctrine.[15] In both cases, the American courts' attempts to direct orders to foreign companies in respect of acts carried out abroad brought a response from the relevant foreign authorities that the action was an infringement of national sovereignty.[16]

2.18 The basis of Australia's and other countries' opposition to attempts by US Governments and courts to apply US laws extraterritorially is examined in more detail in Section 1 of Chapter 5.

### 3. Private Treble Damages Suits

2.19 To understand the significance of the Westinghouse antitrust proceedings against the so-called foreign uranium producers' cartel (including the four Australian companies), and the crippling losses the companies concerned might have sustained, it is necessary to look briefly at the law in the United States relating to private treble damages suits.

2.20 Under United States law, the Department of Justice is authorised to bring criminal proceedings for a breach of United States antitrust laws. In addition, under the provisions of the Clayton Act, a private plaintiff can bring suit to recover three times the amount of any damage which it has sustained as a result of that breach.

2.21 In its submission the Department of Foreign Affairs stated that:

'The most serious problems arise from private suits brought pursuant to US antitrust laws, which can result in the award of treble damages against foreign companies carrying on activities which are sanctioned by their own governments. In the case of antitrust proceedings initiated by agencies of the US Government, some scope for accommodation exists as a normal function of diplomatic relations; but where the matter is in purely private hands there is limited scope for an accommodation through diplomatic channels.'[17]

2.22 Another aspect of concern to the Committee is the inability under the antitrust laws for defendants to recover legal costs against unsuccessful plaintiffs. Legal costs can total many hundreds of thousands of dollars, for example $300 000 is a minimum estimate for Alcoa's costs in the relatively short and successful defence when sued by the

Western Australian Conservation Council. Given that US litigants can obtain treble damages without risk of having to repay defendants' costs, US laws appear to act as an institutionalised incentive to seek treble damages.

2.23 The Department of Trade expressed its concern with treble damage suits as follows:

> 'Private treble damage suits in particular can exacerbate the difficulties raised in the extra-territorial application of US antitrust laws. These proceedings can be used to take unfair commercial advantage of foreign companies. At the present moment companies conducting business in the international market could find themselves the subject of private treble damages litigation in the United States, notwithstanding that the non-US companies may not have traded with the United States ... Such litigation (or even threat of private litigation) can have serious repercussions for resource development and international trade : onerous demands for documents as part of the 'discovery' process, availability of equipment and technology, provision of capital, vulnerability of assets overseas and income from foreign sources, development of international markets, including visits of company executives to the United States and the high cost of litigation including the inability to recover costs if the company successfully defends any suit. Many of these difficulties were encountered in the context of the Westinghouse case.'[18]

The treble damages remedy is penal in its purpose and effect. Private antitrust suits serve to supply an ancillary force of private investigators to supplement the Department of Justice's law enforcement; in the literature of United States antitrust law, plaintiffs in such suits are referred to as 'private Attorneys-General'.[19] It seems inconsistent therefore that the US Administration has not intervened in private suits when so requested by foreign governments (see further Chapters 3 and 4).

2.24 Under United States procedures, judgments in criminal proceedings constitute prima facie evidence for the purposes of 'civil' proceedings. Evidence before a Grand Jury may in certain circumstances be used in those proceedings. Private action is encouraged by a provision permitting the plaintiff to recover costs; the defendant, even if successful, is not entitled to recover costs. Moreover, legal costs in such proceedings can amount to millions of dollars, so that the costs alone can constitute an overwhelming penalty for an innocent defendant.

2.25 In a press release dated 5 October 1980, commenting on the Westinghouse proceedings then in progress, the then Australian Attorney-General, Senator Durack, was quoted as saying that of course the Australian Government had neither objection nor concern with regard to the use of private proceedings to advance national economic policy within the United States. Senator Durack emphasised, however, that difficulties occur in the international area where proceedings civil in form, but governmental in purpose, are handed over to private persons:

> '"The point is" the Attorney-General said, "that exactly the same principle of jurisdiction—of extraterritorial jurisdiction—applies in those private suits. In that event, the same possibilities exist for collision between the United States national economic policy and those of foreign governments and there is the same likelihood of the sovereignty of other countries being affected by extraterritorial enforcement." '

2.26 The question whether the United States can fairly be criticised on the grounds that it goes further than other states in attempting to apply its antitrust and other laws extraterritorially involves also an assessment of the exemptions under US antitrust laws. Such assessment is needed to reach a fuller understanding of the extent to which US laws may or may not be truly and consistently competitive in their objectives, and whether the same common standards are expected of both US and foreign enterprise.



## 4. Exemptions Under US Antitrust Laws

### (a) Webb-Pomerene Act

2.27 The US Webb-Pomerene Act, adopted in 1918, was intended to exempt US foreign commerce from the application of antitrust laws. Consequently, the existence of this Act, too, has led to criticism of the United States for its apparent inconsistency—on the one hand, insisting by its antitrust laws upon competitive behaviour by foreign exporters in the international market and, on the other hand, allowing its own export producers to act anticompetitively.[20]

2.28 This inconsistency was highlighted in the Department of Trade submission as follows:

> 'The Sherman Act, the principal antitrust Act, originated in efforts to legislate to ensure perfect competition. *But such perfection does not exist. Indeed the United States permits anti*-competitive behaviour through the Webb-Pomerene Act and Export Trading Company Act . . . It is paradoxical that in the assertion by the United States to proscribe conduct in international trade that affects its interests, without regard to the realities of international trade and the interests of other governments, US antitrust laws actually restrain trade in a number of ways. Antitrust litigation can cut across national policies designed to promote trade and impact adversely on the stability of international commodity trade and resource development.'[21]

2.29 Recently, there have been moves within the United States to widen this area of exemption from liability under the antitrust laws in order to improve the position of US export producers against foreign competition. *This can only increase the degree of* anticompetitive discrimination against foreign traders.

### (b) Noerr-Pennington Doctrine

2.30 Another legal means by which US citizens can, in theory, avoid liability under the US antitrust laws is the so-called Noerr-Pennington doctrine. This exception, like those under the Webb-Pomerene Act for US exports, shows how US interests are exempted from antitrust laws which at the same time give no such exemption for foreigners.

2.31 As established by the US Supreme Court in **Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.** (1961) and **United Mine Workers v. Pennington** (1965), natural and legal persons may meet with, and attempt to influence, the legislative and executive branches of the Government without incurring antitrust liability. Such activities are seen as an essential part of the democratic process, on the grounds that any other construction of the antitrust laws 'would raise important constitutional questions' concerning the invasion of the individual's right to petition the US Government.[22]

2.32 An officer of the then Australian Department of Trade and Resources made the following statement to the Sub-Committee concerning the significance of the Noerr-Pennington doctrine and its implications with respect to a continuing US Department of Justice antitrust investigation into three shipping lines—Farrell Lines, the Columbus Line and Associated Container Transportation (Australia) Limited:[23]

> 'This doctrine enables American citizens and corporations to lobby their government for an anticompetitive act, something which otherwise might be in breach of the United States antitrust laws. That said, the issue then arises in this particular case as to whether foreigners have that same right in respect of activity to lobby their government for a decision favourable to them. This is the issue in part, upon which the Australian Government has intervened recently in court proceedings in the United States (relating to the shipping investigation) on this rather narrow but very fundamental legal principle, and really a principle that extends far beyond the law—that is, if American citizens are afforded protection for that sort of behavioural conduct then so, too, ought Australian nationals.

'This matter is an issue in law at the present time in the United States whereby a United States district court held that the Noerr-Pennington Doctrine applied to United States situations but not to foreign situations.'[24]

### (c) Other US Trade Laws

2.33 Further criticism has been levelled at the United States on the ground of inconsistency, in that its trading laws run counter to its declared policy of freedom of competition in the international market, which in turn is used as justification for the extra-territorial reach of US antitrust laws.[25] For example, section 201 of the United States **Trade Agreements Act** of 1979 provides for relief to be given where—

> 'an article is being imported into the United States in such increased quantities as to be a substantial cause of serious injury or the threat thereof to a domestic industry producing an article like or directly competitive with the imported article.'

2.34 It has been pointed out that this provision in no way depends upon the exporting country engaging in unfair trading. The criterion upon which the section operates is successful foreign competition. The relief which may be granted under the section is by way of quotas, tariff rates, increased duties or the negotiation of orderly marketing arrangements. Thus, in pursuance of the section, orderly marketing arrangements have been negotiated, examples being in the television and footwear industry. Those orderly marketing arrangements may themselves be restrictive of competition.[26] However, the foreign uranium marketing arrangements in the Westinghouse case were challenged under the US laws.

2.35 An even more graphic example of apparent discrimination against foreign competitors under US law was given in evidence by the Department of Trade:

> 'When the United States felt that it had a problem with regards to imports of Japanese motor vehicles, the United States Government said: "Look we do not want to impose import prohibitions on your motor vehicles – we want you to get together all the Japanese suppliers and tell them to restrain their exports . . . to the United States." The point I want to emphasise is that because of the initial import restrictions and the initial restraint on trade you then engage in the antitrust activity which in turn becomes the subject of Justice Department action.'[27]

2.36 Again, Section 301 of the US **Trade Act** of 1974 (as amended by the **Trade Agreements Act 1979**) authorises the President to investigate and, if necessary, retaliate against foreign governmental conduct adversely affecting US exports of goods and services. This has been described as one relatively new method of enabling US businesses to respond to foreign conduct detrimental to the competitiveness of US exports, without having to resort to what are considered to be the more uncertain antitrust exemptions afforded by the Webb-Pomerene Act.[28]

2.37 The existence of non-competitive US trading laws and policies can directly affect Australian trade. US legislation that can be singled out in this connection includes an amendment to Section 161 of the **United States Atomic Energy Act 1964**, which allowed the US Government in 1971 to continue an embargo on the importation of uranium.

2.38 The amended Section 161 enabled embargoes to be imposed 'to the extent necessary to assure the maintenance of a viable domestic uranium industry'; in short, to protect domestic uranium producers from foreign competition.[29] According to Attorney-General's, it is almost universally acknowledged that the anti-competitive action by the US Government in 1971 in continuing the embargo on uranium imports was of great significance in the events leading up to the Westinghouse antitrust suit.[30] As



an illustration of this point are certain statements made before a Congressional Committee in January 1980 by the then US Assistant Attorney-General, Mr Shenefield:

> 'First it is an undoubted fact . . . that the cartel had its genesis in a major anti-competitive action by our own Government in walling off a major portion of the world's market to businessmen who had theretofore sold into our market.'[31]

2.39 The Committee also points out that the use of antitrust laws in the Westinghouse case amounted to an attempt to influence not the US but the international market for uranium. As Trade stated in its evidence:

> 'there was a total embargo on uranium oxide into the United States. What happened was that Westinghouse sought to buy uranium not within the United States but in the third market . . . So it has not been a question of our trade with the United States that has been the point of the exercise, it has been the attempt by the United States, largely as a result of factors which it has created - witness the embargo - seeking then to impose a further inhibition on trade in **third country markets**.'[32]

### (d) Doctrines of 'Sovereign Compulsion' and 'Act of State'

2.40 In **US v. ICI**, a clash between opposing UK and US court decrees was avoided only because the US Judge had, with some foresight, included a 'savings clause' under which his judgment would not operate against ICI where the company was complying with the law of a foreign state to which it was subject. In doing this, Judge Ryan was taking into account the so-called doctrine of 'sovereign compulsion', which operates to avoid liability under US antitrust laws where the defendant's activities abroad are required (but not merely permitted) by foreign law.[33]

2.41 A limitation on the exercise by United States courts of jurisdiction to deal with acts committed abroad is that arising from the lack of power over the person of the defendant. However, it is a limitation which has frequently been overcome by finding the defendant to be present within United States territory through its American subsidiaries or affiliates. Again, it is sufficient to found jurisdiction that goods involved in an alleged infringement of antitrust legislation are present within the jurisdiction.[34]

2.42 Senator Durack, in his second reading speech on the Foreign Antitrust Judgments (Restriction of Enforcement) Amendment Bill 1981 made the following criticism of the doctrine of sovereign compulsion as a defence against US antitrust legislation:

> 'The only clear case in which foreign government laws and policies are taken into account by United States courts in respect of private conduct carried out in pursuance of them, is by the defence of foreign sovereign compulsion. That narrowly confined defence is quite inadequate. It requires that the foreign trader shall have been *compelled* by his government to carry out the impugned conduct. By its nature, it excludes the vast range of foreign laws and policies which approve or authorise trading conduct. In point of sovereignty, compulsion or otherwise is an arbitrary and irrelevant distinction.
>
> 'Quite as importantly, the doctrine of foreign sovereign compulsion affords a defence only. The foreign law or policy does not, as we maintain it must, go to the question of jurisdiction. This is not a matter of mere theoretical criticism but of great practical importance given the nature of United States proceedings and the cost burden involved.'[35]

2.43 Secondly, United States courts have developed a conflict of laws rule known as the 'act of state' doctrine, under which all executive, legislative and judicial acts of a foreign state are immune from judicial scrutiny and will be recognised. Recently, however, each of these principles has been reduced in scope.

2.44 The matter was placed upon a statutory basis so far as sovereign immunity is concerned with the enactment of the **Foreign Sovereign Immunities Act** of 1976. This provides that a foreign state shall not be immune from the jurisdiction of courts of the United States or of the states in any case in which the action is based upon—

(a) a commercial activity carried on in the United States by the foreign state;

(b) an act performed in the United States in connection with a commercial activity of the foreign state elsewhere;

(c) an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

2.45 Ms Triggs has concluded, in relation to this sovereign immunity legislation:

> 'It is likely that the immunity defence will not be available to any government or its instrumentalities which may be charged with antitrust violations in relation to foreign restrictive trade practices.'[36]

The express provision (in (c) above)—excepting foreign governmental commercial activities that merely cause a direct effect in the US—from the protection of the statutory immunity—is said to be inconsistent with the normal immunities recognised at international law; particularly because international law would not recognise US jurisdiction where the activity takes place outside the US. In other words, the third exception from immunity entrenches the "effects" doctrine in the legislation, contrary to sovereign immunities recognised internationally. Further, 'where an immunity defence fails, the defendant's property in the United States which has been used for a commercial purpose will not be immune from attachment in aid of execution once judgment has been entered against the state.'[37]

### 5. US Judicial Attempts to Take Account of Foreign Interests: The Timberlane Approach

2.46 Among the major criticisms made of the extraterritorial character of US antitrust laws additional to the uncertain and wide scope of the 'effects' doctrine and its inconsistency with traditional international law, is the failure of US courts to consider foreign interests when US laws are applied extraterritorially.

2.47 In 1977, however, the case of **Timberlane Lumber Co. v. Bank of America**[38]—indicated that US courts were prepared to adopt a more flexible approach in applying the effects doctrine where the interests of foreign nations are involved. This decision, however, is not unanimously approved by the US judiciary.

2.48 The relevant facts of the **Timberlane** case are as follows. Timberlane Lumber was an Oregon company organised for the purpose of importing lumber into the United States. Timberlane had formed two corporations under Honduran law for the purpose of providing supplies of lumber for its United States operations. In support of its Honduran operations, Timberlane had acquired the operating assets of a defunct Honduran corporation (Lima). A subsidiary of the Bank of America had held substantial financial interests in Lima and in two other Honduran lumber mills. For the purpose of clearing its title to Lima assets, Timberlane attempted to negotiate a settlement with the Bank of America. The bank, however, refused and its agents in turn obtained from a Honduran court embargoes against Timberlane's assets in Honduran companies, for the ostensible purpose of preventing the diminution of available assets from which the bank's claims might be satisfied. Timberlane in turn brought an action in the Federal Court claiming that there had been violations by the Bank of America of federal antitrust laws. The District Court dismissed Timberlane's claim because of lack of subject-matter jurisdiction, inasmuch as there was no direct or substantial effect on United States foreign commerce.

2.49 The Court of Appeals, however, considered that the District Court had not made a comprehensive analysis of the relative interests of both the United States and Honduras and had received no evidence of a conflict of law or policy with the Honduran Government. The Court of Appeals remanded the case back to the District Court for reconsideration of the jurisdictional issue and noted that the foreign



companies involved were conducting some commercial activities in the United States and that these purposeful and deliberate activities had in fact affected the plaintiff's business.

2.50 The Court articulated for the first time a detailed formula for resolving jurisdictional conflicts. Judge Choy, speaking for the Court of Appeals, noted a great disparity of treatment among various courts and writers in trying to provide a coherent interpretation of the 'effects' doctrine as embodied in section 18(b) of the **Restatement of Foreign Relations Law** (see paragraph 2.13) and questioned the completeness of this doctrine. As an alternative approach, he endeavoured to refine the approach of Section 18 of the **Restatement** into a tripartite rule:

(a) Does the alleged restraint affect, or was it intended to affect, the foreign commerce of the United States?

(b) Is the alleged restraint of such a type and magnitude so as to be cognisable as a violation of United States antitrust laws?

(c) As a matter of international comity and fairness, should the extraterritorial jurisdiction of the United States be asserted to cover it?

This analysis was aimed at finding the point at which the interests of the United States are outweighed by foreign interests, so that there is insufficient reason to justify an extraterritorial assertion of jurisdiction. It is important to note, however—as did the Attorney-General's Department in its evidence—that the Timberlane principle is not that the court will not assume jurisdiction; the court acknowledges that it has jurisdiction but decides not to exercise it.[39]

2.51 These factors were elaborated in a subsequent decision, **Mannington Mills v. Congoleum Corporation**[40] (1979), when the US Court of Appeals for the Third Circuit listed the following factors as relevant to the extraterritorial enforcement of American antitrust laws:

'1. Degree of conflict with foreign law or policy;
2. Nationality of the parties;
3. Relative importance of the alleged violation of conduct here compared to that abroad;
4. Availability of a remedy abroad and a pendency of litigation there;
5. Existence of intent to harm or affect American commerce and its foreseeability;
6. Possible effect upon foreign relations if the court exercises jurisdiction and grants relief;
7. If relief is granted, whether a party will be placed in a position of being forced to perform an act illegal in either country or be under conflicting requirements by both countries;
8. Whether the court can make its order effective;
9. Whether an order for relief would be acceptable in this country if made by the foreign nation under similar circumstances;
10. Whether a treaty with the affected nations has addressed the issue.'[41]

2.52 The decision in the **Timberlane** case, therefore,

> 'established a quite new principle, a principle that was applicable to private suits. It said that even though there may be an adverse effect upon American commerce and even though the United States courts may on that account have jurisdiction, nevertheless they should before exercising jurisdiction weigh or balance the interests of any foreign government or foreign state with those of the United States and in particular take account of the foreign relations impact.'[42]

2.53 While the **Timberlane** and **Mannington Mills** judgements have been heralded as providing a rational solution to jurisdictional overlaps, they have not been applied throughout the US judicial system. Indeed, Justice Marshall of the US District Court has warned against a judicial role in balancing conflicting national interests.[43]

## 6. Conclusions

2.54 The Committee concludes that:

(a) attempts by the United States to apply its trading laws extraterritorially are inconsistent with international law and with international comity, and are unacceptable;

(b) the exceptions to US antitrust laws, which protect US commercial interests but do not extend to foreign interests, are inconsistent with the US's own expressed antitrust commitment and with international expectations of comity; and

(c) Australia cannot yet depend upon the principles of comity or reasonableness or the balance of interests tests (**Timberlane** and **Mannington Mills** cases) to ensure that its national interests are protected by US courts.

### Endnotes

1. Triggs, 'State Jurisdiction over Corporations ...' in **Ninth International Trade Law Seminar**, Canberra, 1982, p.48.
2. Triggs (1982), pp.48-49.
3. K.W. Ryan, 'The International Application of United States Antitrust Legislation'; paper given at the **Fifth International Trade Law Seminar**, Canberra, 1978, p.95.
4. 213 United States Reports 347 (1909) at p.356.
5. 221 United States Reports 280.
6. **Norton**, p.578-9.
7. *148 Federal Reporter, Second Edition*, 416, 443.
8. **Restrictive Business Practices of Multinational Enterprises**, Report of the Committee of Experts on Restrictive Business Practices, Organisation for Economic Co-operation and Development (OECD), 1977, para. 124, p.38.
9. **Ryan**, p.97.
10. G. Triggs, 'Extraterritorial Reach of United States Anti-Trust Legislation' in **Melbourne University Law Review**, December 1979, p.261; also see the commentary by Mr J.H. Greenwell, Attorney-General's Department, at **Eighth International Trade Law Seminar**, Canberra, 1981, pp.158-160.
11. **Evidence**, 26 July 1983, p.100.
12. **Restrictive Business Practices of Multinational Enterprises**, Report of the Committee of Experts on Restrictive Business Practices, OECD, 1977, para. 122, pp.37-38.
13. J.G. Castel, Q.C., 'The Extraterritorial Application of Canadian and Foreign Laws with Respect to Unfair Competition, Restraints on Trade, and more Generally Combines and Cartels', **Eighth International Trade Law Seminar**, Canberra, May 1981, p.103.
14. **Castel**, p.103.
15. **Norton**, p.581.
16. For a detailed discussion of these two cases and their significance, see **Ryan**, pp.98-101.
17. **Evidence**, 25 July 1983 (Submission), pp.S155-6.
18. **Evidence**, 25 July 1983 (Submission), pp.S145-6.
19. Senate **Hansard**, 11 June 1981, p.3070 from Second Reading Speech on the Foreign Antitrust Judgments (Restriction of Enforcement) Bill 1981.
20. J.H. Greenwell, **Eighth International Trade Law Seminar**, Canberra, 1981, p.161.
21. **Evidence**, 25 July 1983 (Submission), p.S145.
22. J. Paugh, 'Antitrust Principles and US Trade Laws: A Review of Current Areas of Conflict' in **Law and Policy in International Business**, vol. 12, no. 3, 1980, p.587.
23. This investigation was commenced in mid-1980 by the US Justice Department. The Australian Government strongly objected to the Justice Department's demands for information on confidential discussions between the shipping lines concerned and the Australian Meat and Livestock Corporation. In February 1983 the Australian Government intervened in the case by way of an amicus curiae brief.
24. See **Evidence** 20 August 1982, p.790.
25. See, for example, the address delivered to the American Bar Association on 8 August 1977 by the Honourable Griffin B. Bell, then US Attorney-General, published in **The Australian Law Journal**, Vol. 51, Dec. 1977, pp.801-803.
26. **J.H. Greenwell**, p.154; c.f. **J. Paugh**, pp.575-578, on Section 201 and a related provision in Section 406 of the Act.
27. **Evidence** 26 July 1983, pp.142-3.
28. **J. Paugh**, p.606.



29. **J.H. Greenwell**, p.155.
30. **Greenwell**, p.155.
31. As quoted by Attorney-General Durack in his Second Reading Speech on the Foreign Antitrust Judgments (Restriction of Enforcement) Bill 1981, Senate **Hansard**, 11 June 1981, p.3072.
32. **Evidence** 26 July 1983, p.140.
33. **G. Triggs** (1979), p.265; also **K. Ryan**, p.105.
34. **K. Ryan**, pp.106-7.
35. Senate **Hansard**, 11 June 1981, p.3069.
36. **G. Triggs** (1979), pp.277-8.
37. **Triggs** (1979), p.278.
38. 549 Federal Reporter, Second Edition, 597.
39. **Evidence** 26 July 1983, p.178.
40. 595 Federal Reporter, Second Edition, 1287.
41. See **J.G. Castel**, p.117.
42. **Evidence**, 9 September 1982 (Attorney-General's Department), p.874.
43. Quoted in Senate **Hansard**, 11 June 1981, p.3072.

## CHAPTER 3

## THE WESTINGHOUSE SUIT AND OTHER EXTRATERRITORIAL CASES OF CONCERN TO AUSTRALIA

### 1. The Westinghouse Case

3.1 Before 1978 American courts had on occasions received statements from the Department of State *in a variety of matters*—not solely in relation to antitrust suits—in which the foreign relations implications were important, and the United States courts had paid weight to those interventions. Therefore, when the *US Government, through* its most senior officials, endorsed the (1977) **Timberlane** decision,[1] the Australian Government approached the US Administration to intervene on Australia's behalf in the Westinghouse antitrust proceedings 'with some confidence'.[2] Such confidence was misplaced.

3.2 *The Westinghouse antitrust* suit was, however,in the initial Australian view a test case for the application of the **Timberlane** principle as a means of resolving tensions between the United States and *foreign governments in extraterritorial cases. It* also pointed up the threat to foreign commerce arising from private treble damages suits.

#### (a) *The Uranium Market and the US Embargo on Uranium Imports*

3.3 In order to understand the main implications of the Westinghouse antitrust suit for Australia, it is necessary first to review the history of the uranium market since World War II. After an initial post-war shortage, the world supply of uranium in the 1960s far exceeded demand. Most nuclear power plants were then located in the United States, which imposed a prohibition against the domestic enrichment of imported uranium if that enriched uranium was to be used *in the United States.* In other words, the United States Government placed an embargo on foreign uranium imports. As a result of the embargo, a number of foreign uranium producers closed down. One such producer was the Australian miner, Mary Kathleen Uranium Limited.

3.4 In the view of foreign producers, the embargo was obviously designed to ensure *that American uranium producers* were not faced with foreign competition. As already noted, the US Government embargo was denounced by the Australian Government as the major contributory factor in the events leading up to the *Westinghouse antitrust* suit[3]. The embargo has also been cited as a clear example of the kind of anti-competitive methods used by the United States to advance its own economic self-interest.[4]

3.5 The United States Government in 1971 announced that the foreign uranium embargo would remain at least until the latter part of the 1970s. Moreover, the United States Atomic Energy Commission announced that it proposed to dispose of its 50 000 ton stockpile of uranium on domestic and foreign markets. The governments of the countries in which uranium discoveries had been made, including Australia, were concerned at the continuance of the embargo to protect American domestic uranium producers. Foreign governments were also alarmed at the prospect of the substantial United States stockpile being released onto the already greatly over-supplied world market, and the price fall likely to result from such a move.[5] Diplomatic representations were made in respect of both of these matters, but in the short term the United States Government did not alter its policies.[6]

3.6 The policy of the Australian Government, and of the other producing countries' governments, was that the uranium producers should engage in discussions outside the United States with respect to the stabilisation of the prices in the world market. As a result of the continuing US Government embargo, that market clearly excluded the



United States market. Moreover, the Australian Government made it quite clear to all Australian uranium producers that the necessary export approvals required under the Customs Act would not be granted unless the Minister was satisfied that the price negotiated for the sale of uranium was satisfactory. Thus, Australian companies which wished to develop their uranium deposits had to abide by government policy, which was continued by the Australian Labor Party when it came to office in late 1972.[7]

3.7 In the meantime, more and more countries planned to build nuclear power generating plants, a trend which was accelerated by the Arab oil crisis of 1973. Before long a substantial demand for uranium existed with the result that the world price of uranium escalated, although the US embargo against foreign uranium was not lifted until 1979.

3.8 In the interim, the Westinghouse Corporation was competing with other constructors in the business of constructing nuclear power plants for various utilities in the United States and elsewhere. One of the methods used by Westinghouse to encourage utilities to place contracts with them was to offer to undertake to supply the necessary uranium fuel for a certain period after construction had been completed. The fuel was apparently promised at fixed prices based on the low price for uranium concentrates which existed in the early 1970s. On one view, had Westinghouse been successful, it would have cornered the market.[8]

#### (b) Institution of Proceedings by Westinghouse

3.9 When the price of uranium escalated in the 1970s, it became apparent that Westinghouse would not be able to purchase uranium concentrates at the prices that it had set and accordingly it faced the possibility of very substantial losses. Westinghouse declined to make deliveries to some US public utilities in accordance with its contracts, with the result that it was sued by the utilities.

3.10 Westinghouse endeavoured to defend itself against the actions brought by the utilities on the basis that the uranium concentrate price increases were the result of a foreign cartel and that, accordingly, it should be released from its obligations under the contracts. In effect, Westinghouse claimed that its contracts had been frustrated by the actions of a cartel, even though the cartel's operations of necessity excluded the United States market because of the embargo on foreign uranium.[9]

3.11 The result of the actions against Westinghouse for its failure to make uranium deliveries, was a series of settlements involving some hundreds of millions of dollars. Westinghouse in turn, on 15 October 1976, brought proceedings in the US District Court under the Sherman and Wilson Tariff Acts against 29 foreign uranium producers, including four Australian companies, alleging that price fixing and boycott agreements in restraint of foreign commerce had caused the price of uranium in the United States to escalate from $6 to $41 per pound,[10] resulting in a substantial loss to Westinghouse, namely its liability to the various utilities. The Westinghouse claim was for treble damages totalling some *$US6 000 000 000 ($US 6 billion).*

#### (c) *US Government Policies and Investigations*

3.12 Also in 1976, the United States Justice Department empanelled a Grand Jury to investigate the circumstances surrounding the uranium cartel, with a view to deciding whether or not grounds for criminal prosecution existed. It seems[11] that the US was not so much concerned to protect its domestic market but to alter the price structure for the product on the international market: because, by virtue of its own policies in reducing its uranium stocks, it had forced Westinghouse into the international market. After the deliberations of the Grand Jury were completed, no proceedings were instituted by the

United States Government against any foreign producers, although a relatively minor charge was levelled at one US company.

### (d) Australian Government Responses to the Westinghouse Proceedings

3.13 Although US prosecutions did not eventuate, the investigations there gave rise to the possibility that Australian uranium producing companies might be prosecuted for engaging in conduct which was in accordance with and in effect required by Australia's uranium policies. To minimise that risk, and after fruitless requests to the US Administration to stop the Grand Jury proceedings, the Australian Government introduced the **Foreign Proceedings (Restriction of Certain Evidence) Act 1976**, which prevented the giving of evidence and information concerning documents in Australia for the purpose of proceedings in the United States.

3.14 The 1976 Act, which is detailed in Chapter 6, authorises the Commonwealth Attorney-General to prohibit the production of documents situated in Australia for the purposes of a foreign tribunal, or the giving of evidence relating to these documents by any Australian citizen or resident to such a tribunal. He may exercise these powers only when he is satisfied that a foreign tribunal is attempting to exercise jurisdiction contrary to international law or comity, or where a prohibition is in the national interest and relates to matters of Commonwealth power.[12] In the course of the Westinghouse proceedings, a number of applications were made by Westinghouse and several of the defendants for the production of documents or the giving of evidence pursuant to the Act. Most of these applications were denied.[13]

3.15 In 1980, the then Attorney-General Senator Durack described the Westinghouse proceedings as:

> 'an example, even if the most dramatic, of the particular difficulties experienced by foreign governments with private treble damages proceedings where United States extraterritorial jurisdiction was being asserted.'[14]

He further stated:

> 'Australia's national interest was jeopardised by the Westinghouse proceedings in that:—
>
> - In essence these proceedings, although privately instituted, represented a challenge to the Australian Government's sovereign authority to control and regulate the export of uranium from this country.
> - The enforcement against Australian companies of a judgment would have a seriously detrimental effect on Australia's trade and development, having regard to the large amount claimed. The threat of enforcement is already having a detrimental effect.'[15]

3.16 On 24 January 1979, a preliminary injunction was granted by the US District Court, restraining the 'defaulting defendants' in the Westinghouse action from transferring assets out of the United States pending settlement of damages claims. On 17 September 1979, the US District Court rejected the motion of the appearing defendants to defer a hearing on the assessment of damages until the trial of the action on the merits of the Westinghouse complaint (set for September 1981) and fixed 10 December 1979 as the date for a hearing for damages against the non-appearing defendants. The default judgments entered in the District Court for Illinois against the nine non-appearing defendants (including the four Australian companies) exposed them to a possible liability of 'quite staggering proportions'.[16]

3.17 The Australian Government responded by enacting the **Foreign Antitrust Judgments (Restriction of Enforcement) Act 1979**, under which the Attorney-General made orders prohibiting the enforcement in Australia of those judgments. These orders remained in force until after the settlement of the Westinghouse proceedings in 1981.



3.18 When the Bill was introduced in the Senate on 21 February 1979, the Australian Government's policy was expressed in the following terms:

> - Australia's national interest demanded rejection of Westinghouse's claims because they purported to give the antitrust and related laws 'a greater extraterritorial operation than that generally conceded in international law'.
> - The 1976 Act had been effective in preventing the Australian-based evidence from being used for the purpose of the United States proceedings.
> - A United States Grand Jury investigation into the cartel had concluded and no proceedings by the United States Justice Department had been instituted against any Australian company in consequence of that investigation.
> - The prospect of Westinghouse securing an assessment of the amount of the judgments in the near future and endeavouring to enforce the default judgments justified a legislative response.
> - It would be unsatisfactory to expect the defendants to rely on common law defences to any such enforcement action. Given that the Government was clearly of the view that the Westinghouse litigation was against the national interest, it was desirable that legislative and executive action should be taken to leave no doubt that a repugnant judgment would not be recognised or enforced in Australia.'[17]

According to the evidence of Mr Lawrence Maher, Melbourne Solicitor, "the legislation was unnecessary even if it had been of a much less order of magnitude than that which threatened. Even if there had been no treble damages component threatening, then I believe that not only would the legislation have been unnecessary but I think that one can confidently argue that the chances of any enforcement action by Westinghouse in Australia succeeding were, to say the least, very slight."[18] These views are not shared by the Attorney-General's Department which stated in evidence:

> "Westinghouse started before there was any legislation and we think—we may be wrong—that it was the existence of this legislation, among other things, which facilitated the settlement of the case because it showed to plaintiffs that the Australian Government was taking an interest.'[19]

3.19 As well, the Australian Government sought and obtained leave in October 1979 to present submissions in the appeal by the appearing defendants. The Government proceeded to file the two *amicus curiae* briefs. (The Australian Government did not file an *amicus curiae* brief in the default proceedings, although the UK Government did.)

3.20 The Australian Government also proceeded with the drafting of the so-called 'recovery back' (or 'claw back') bill, modelled along the lines of a UK Act, the **Protection of Trading Interests Act** 1980 (set out in Appendix V). That Act enables a British national or corporation against whom multiple damages in private antitrust proceedings have been recovered to recover back in United Kingdom courts so much of those damages as represents the non-compensatory element of the award. Although the Westinghouse proceedings were settled in the meantime, the Australian Government proceeded with its recovery back proposal and, on 11 June 1981, introduced the Foreign Antitrust Judgments (Restriction of Enforcement) Amendment Bill. This Bill is reviewed in Chapter 7.

### (e) Settlement of the Westinghouse Suit

3.21 Events in 1980 and 1981 resulted in settlement of the Westinghouse litigation. By the end of January 1981, three of the US defendants had announced they had settled the Westinghouse claim against them. Subsequently, it was announced on 18 March 1981 that three of the four Australian-based defendants had settled with Westinghouse: Conzinc Rio Tinto of Australia, Mary Kathleen Uranium and Pancontinental had agreed to make an undisclosed cash payment as part of a settlement involving CRA's London-based owner, Rio Tinto-Zinc Corporation Ltd, and other defendants. Both

CRA and MKU continued to deny any liability or wrongdoing and did not waive their jurisdictional objection to the suit.

3.22 It was announced that the agreement was conditional on completion of certain additional steps, including the obtaining of certain governmental consents and the entry of a Court Order dismissing the antitrust case against CRA and MKU. In announcing the settlement the companies stated that they were:

> 'influenced by the possible constraints which could be imposed on the future conduct of their business, the large amounts of executive time involved and the substantial legal costs due to the litigation.'[19]

3.23 Several weeks later, Queensland Mines Ltd. announced that it had changed its attitude and was joining in the settlement. It was reported in the Age of 14 May 1981, that the company had indicated a willingness to contribute $A894 000. It was also reported that the total settlement for all four Australian defendants exceeded $11 000 000.

3.24 On 16 September 1981, in an answer to a Question on Notice (No. 919) the following details were disclosed:

> 'Westinghouse Electric Corporation
> (Question No. 919)
> 'Senator Evans asked the Attorney-General, upon notice on 12 June 1981:
> '(1) Has the Attorney-General seen, is he otherwise aware of the statement in the joint Press release dated 18 March 1981 of Conzinc Riotinto of Australia Ltd and Mary Kathleen Uranium Limited that the companies' settlement agreement with Westinghouse Electric Corporation in relation to the Westinghouse uranium cartel litigation 'is conditional upon the completion of certain additional steps, including the obtaining of certain Government consents'.
> '(2) Has the consent of the Australian Government been sought in relation to that settlement.
> '(3) If so, (a) when was it sought; (b) has it been given; and (c) on what terms was the consent sought and given.
> 'Senator Durack—The answer to the honourable senator's question is as follows:
> '(1) Yes. I understand that the Government consents referred to in the statement did not relate to any consent by the Australian Government, but to the Governments of Canada and South Africa in relation to the supply of uranium under the settlement.
> '(2) and (3). The Australian companies involved in the settlement of the Westinghouse proceedings informed the Government that, should they decide to enter into the settlement agreement, they intended to apply to the Reserve Bank of Australia for approval under the Banking (Foreign Exchange) Regulations for the movement of funds to enable the terms of the settlement to be carried out.
> 'The Australian Government indicated to the companies that it would not object to the granting of such foreign exchange approval, if the proposed settlement satisfied certain national interest considerations. These were that:
> '(i) provisions be included in the settlement agreement—
> *requiring that the final judgment on issues of liability given against the Australian companies on 3 January 1979, and the preliminary injunction given in favour of Westinghouse Electric Corporation against the Australian companies on 24 January 1979, be vacated:*
> 'that there should be no implication from the settlement of wrong-doing on the part of the Australian companies:
> 'that the settlement of the proceedings should not be construed as a waiver by the Australian companies of their jurisdictional objections to the proceedings or as a submission to the jurisdiction to the Courts of the United States: and
> '(ii) none of the uranium to be supplied under the terms of the settlement agreement *(which in addition to the Australian companies included other defendants in the Westinghouse suit)* would come from Australia or Namibia or be supplied by an Australian company.



> 'The Government, upon being satisfied that these conditions had been met, indicated to the Australian companies, Conzinc Riotinto of Australia Ltd, Mary Kathleen Uranium Limited and Pancontinental Mining Limited on 16 March 1981 that it would not object to the granting of approval by the Reserve Bank pursuant to the Banking (Foreign Exchange) Regulations to any application made by those companies to the Reserve Bank for the movement of funds to enable the terms of settlement to be carried out.
>
> 'Queensland Mines Limited which subsequently decided to participate in the settlement agreement of 17 March 1981 was also informed of the Government's attitude prior to that decision.'[20]

### (f) Reflections on the Westinghouse Case

3.25 The Westinghouse case brought forcefully to Australia's attention the impact to both Government and business of the extraterritorial application of US trading laws, especially in treble damages suits under the antitrust laws. Despite firm Australian representations to the US Administration opposing US attempts to regulate the legitimate activities of Australian companies, the US Administration and courts showed no serious concern for Australia's expressed interests. It was not until after the **Foreign Antitrust Judgments (Restriction of Enforcement) Act** was enacted in 1979 that the Westinghouse case was settled out-of-court, even then involving over $11 000 000 payable by the Australian defendants (together with their extremely high legal costs). Future cases could involve even higher and equally unwarranted costs to Australian business.

3.26 Australian governmental concern should not be limited to the direct financial impact on Australian business (though that is of primary concern). The Westinghouse case showed that Australia's export trade, and the Government's own preference for orderly marketing arrangements for primary products, could be hindered by the unjustified extension abroad of US policies and laws. The continuing absence, despite the helpful but limited antitrust Agreement reached by the two governments in 1982, of any formal US governmental or judicial procedures for giving proper consideration to legitimate Australian interests before invoking or enforcing US laws, is a major reason why further Australian legislative responses need be considered. These are addressed in Chapters 6 and 7 of this Report.

## 2. Antitrust Investigation into Australian-US Ocean Freight Trade

3.27 In mid-1980, the US Department of Justice commenced an investigation into three shipping lines, including Associated Container Transportation (Australia) Limited. In the course of its investigation, the Justice Department requested information on confidential discussions between the shipping lines concerned and the Australian Meat and Livestock Corporation (AMLC) and other agencies.

3,28 Justice Brieant of the US District Court (New York) held that the information sought was protected by the 'Act of State' doctrine, arguing that the 'validity of foreign government actions are not in issue'. Notwithstanding the Australian Government's expressed concerns, and the spirit of the recently concluded antitrust Agreement, Justice Department appealed (successfully) against the decision.

3.29 On 23 February 1983, the then Australian Attorney-General, Senator Durack, announced that the Australian Government had intervened by way of *amicus curiae* in the appeal proceedings in the US Court of Appeals for the Second Circuit (New York). According to a press release issued by Senator Durack: 'The Australian Government

maintains that the inquiry by the US Department of Justice is an intrusion into Australian sovereignty and that it may adversely affect the ability of the AMLC to carry out its statutory functions'.

3.30 The *amicus curiae* briefs submitted by the Australian Government in this appeal and in the July 1982 proceedings in the US Court of Appeals for the District of Columbia (Washington), *in connection with the Justice Department's investigation into* three shipping conferences (the Australian/Eastern USA Shipping Conference, the New Zealand/US Atlantic and Gulf Shipping Lines Rate Agreement and the US Atlantic and Gulf/Australia New Zealand Conference)[21], requested the Courts to take into account the interests of the Australian Government, especially its concern that the investigation was in part directed at activities of the AMLC that were being carried out in accordance with Australian law and governmental policy.

3.31 The Attorney-General's press release of 23 February 1983 also pointed out that 'The Australian Government has a continuing interest to ensure a free flow of communications with affected Australian, American and other businessmen. These persons should not thereby be exposed to the risks of US antitrust investigation and prosecution'.[22] However, the US Department of Justice won its appeal against the decision of Justice Brieant (see para 3.28) and the investigation is currently proceeding. In reply to a Question Without Notice in the Senate on 18 May 1983, the Attorney-General, Senator Gareth Evans, (who had become Attorney-General in March following the general election) referred to this investigation and stated that departmental officers of his and other interested Departments are monitoring developments to ensure that Australia's national interest is protected—he added: 'Some recent developments in that respect are causing us concern'.[23]

3.32 The US Justice Department's actions against the three conference Lines (Farrell Lines, the Columbus Line and Associated Container Transportation (Australia) Limited) are seen by the Australian Government as a threat, not just to its laws and policies for the regulation of outbound shipping from Australia, but to the implementation of Australia's export policies, including minerals marketing.[24] The litigation had according to the Australian National Line been "both time consuming and expensive".[25]

3.33 The submission by the Australian Department of Trade to the Sub-Committee's inquiry pointed out with respect to the Australian-US Agreement, that it 'addresses itself to antitrust laws only, and does not cover the United States laws which Australia considers to conflict with Australian Government laws and policies, e.g. regulation of outbound shipping'.[26] Recognising that the Agreement did not strictly apply in the shipping conference case, the Committee would have hoped that the spirit of the Agreement had prevailed.

3.34 The US Justice Department investigation into alleged shipping conferences operating between Australia and the US by Australian companies was initiated prior to the signing of the US/Australia Agreement. For this reason, the Agreement does not technically apply to the investigation and it would be unreasonable to judge the success of the Agreement solely on the basis of this investigation. Nonetheless, there are aspects of the Pacific Shipping Case which raise doubts as to the ability of the Agreement to protect Australian trading interests. Such aspects are as follows.

3.35 First, when the US Justice Department appealed (successfully) against a court decision allowing the Australian defendants not to produce documents relating to confidential discussions with the Australian Government, neither it nor the State Department in their joint brief mentioned Australia's expressed concerns to the court.

3.36 Second, the Australian Government's *amicus curiae* briefs to two US Courts of Appeal, which argued that US civil investigative demands for communications between the Australian Government and Australian Shipping Corporations should be denied on



the grounds that they are protected by the Act of State doctrine at international law and under the Noerr-Pennington doctrine, were ignored by the appellate courts, which have since enforced the demands. The implication is that the kinds of protection envisaged in the US/Australia Agreement will not carry significant weight with US Courts; it is uncertain whether US Government reporting of Australian concerns to US courts pursuant to the Agreement would be significantly more persuasive.

3.37 Third, inadequate information has been provided to the Australian Government concerning investigations in the Pacific Shipping Case. A representative of the Attorney-General's Department pointed out, for example, in evidence before the Sub-Committee, that the Department of Transport had not received sufficient detailed information to know whether Australian national interests are prejudiced.[27] An explanation for this may lie in the confidentiality of private information leading to Justice Department inquiries under the Scott-Rodino Act. The implication remains that had the US Agreement applied in the Pacific Shipping Case, the information exchange, guaranteed in the Agreement, would not have been satisfied.

### 3. Cases Arising from other US Foreign Trade Laws

3.38 Although, to date, Australia has not directly been faced with problems from US laws other than antitrust discussed in Section 4 of Chapter I, the cases cited indicate clearly enough that problems of this kind could arise. Australia was not directly affected by the divisive issue of the attempted US embargo on the construction of the Soviet gas pipeline. Nevertheless, Australian firms could have been affected, as were European subsidiaries and licensees of United States-based parent companies.

3.39 One Australian company was, however, reported to be affected indirectly by the US Administration's policy. It was reported in the *Australian Financial Review* on 4 October 1982[28] that the Australian oil and gas group, Santos Ltd., had taken steps to remove itself from the dispute between the United States and Europe over the pipeline issue by agreeing to the transfer of a contract from France to the United States. The $US3 million Santos contract for gas compressors was transferred from Dresser France to a Dresser Inc. subsidiary in the United States as a result of the Reagan Administration's ban on the supply of equipment by US companies to European companies involved with the pipeline. A spokesman for Santos said that the company had been forced to take steps to ensure that the compressors were delivered on time.

3.40 A spokesman for the Dresser parent company in the United States was reported to have said that the company contracting out the compressors, the General Electric Co., had been forced to switch the contract because the Reagan Government's sanctions prevented it from providing the French company with certain specifications for the compressors. In a statement issued from its Connecticut headquarters, General Electric said that it would be unable to fill the Australian order on time if Dresser France made the compressors, because the Reagan ban prohibited US companies from providing energy-related technology, goods or information to European companies involved in the Soviet pipeline. Dresser France had helped supply the Soviet Union with a number of compressors for its pipeline.

3.41 The Sub-Committee was informed in evidence jointly by officers of the Attorney-General's Department and the former Department of Trade and Resources, that the US *Trading With the Enemy Act* could have—and, indeed, has had—direct implications for Australia's trade. The potential threat is all the more real in that, under US legislation, a US-owned company can be defined as one with a US-based ownership

of 25 percent (or even as little as 15 percent).[29] A senior officer of the Department of Trade and Resources, gave the following illustration:

> 'You could have a situation in which it was entirely legal for Australia to export, say to North Vietnam, and the export would take place. If that export was carried out by an American-owned company or a company in which there was American investment, the Americans might seek to assert that that company, because of its American relationship, had broken United States law. This issue has not arisen in respect of Australia. No company operating in Australia has been hauled before the United States courts and charged. But there are a number of cases on the United States statutes books in which non-Australian companies have had this problem.'[30]

3.42 The Sub-Committee was reminded that Australia has been concerned in one case involving the **Trading with the Enemy Act**. This involved the sale of coal to North Vietnam by a company in Australia with American connections. However, although the case was raised, it was not pursued in the United States to the point at which any charges were laid:

> 'But the question was certainly raised at one point. This caused a small problem for us in terms of exports of Australian coal to countries to which we might want to export vis-a-vis countries the United States preferred.'[31]

3.43 If such a case were to arise and be pursued by the US Treasury and Justice Departments, the consequences would be that the companies considered to be in breach of the Act would be listed and exports to them refused. There is also the possibility that those companies would be fined, assuming that they could be sued.[32]

3.44 Therefore, the question of extraterritoriality—as noted in Chapter 1—has important implications for Australia's foreign investment law and policy.

## ENDNOTES

1. The US Government continued at least until 1981 to endorse the Timberlane principle 'as the means by which sovereignty of other nations may be respected and comity given effect.'—the Attorney-General's Second Reading speech on the Foreign Antitrust Judgements (Restriction of Enforcement) Amendment Bill 1981 in Senate **Hansard**, 11 June 1981, pp.3067 ff.
2. Senate **Hansard**, 11 June 1983, p.3072.
3. See, for example, Senate **Hansard**, 11 June 1983, p.3072.
4. See J.H. Greenwell at **Eighth International Trade Law Seminar 1981**, p.155. Also see J. Owen and P.A. Bobeff, 'The Westinghouse Case—Its Implications', Australian Industries Development Association (AIDA) **Bulletin** No. 324, November 1980, p.2.
5. **Owen and Bobeff**, p.2.
6. **Owen and Bobeff**, p.2.
7. Ibid, pp.2-3. Also see the address by Senator Durack to the International Law Association (Australian Branch), Sydney, 23 April 1982 (p.1)—the Westinghouse proceedings gave rise to the possibility that Australian uranium producers might be prosecuted for engaging in conduct in accordance with Australia's uranium policies.
8. **Owen and Bobeff**, p.3.
9. **Owen and Bobeff**, p.3.
10. G. Triggs, 'Extraterritorial Reach of United States Anti-Trust Legislation' in **Melbourne University Law Review**, December 1979, pp.250, 268 (footnote 92).
11. **Evidence**, 26 July 1983 (Department of Trade), p.140.
12. See **G. Triggs**, pp.268-9.
13. See L.W. Maher, 'Antitrust Fall-Out: Tensions in the Australian-American Relationship', **Federal Law Review**, Vol. 13, 1982, p.107.
14. Press Release by the then Attorney-General, 'Release of Antitrust Documents', 5 October 1980, p.2.
15. Press Release by Attorney-General, 5 October 1980, p.203.
16. Address by the then Attorney-General to the International Law Association (Australian Branch), Sydney, 23 April 1982, p.2. At a hearing in the course of the proceedings on 20 June 1979, Judge Marshall referred to 'a strong possibility that the Westinghouse claim will reach well into the hundreds of millions of dollars in this case at least insofar as the defaulting defendants are concerned'.
17. See Second Reading Speech by Attorney-General Durack in Senate **Hansard**, 21 February 1979, pp.127-129.
18. **Evidence**, 25 July 1983, p.43.



19. **Evidence**, 26 July 1983, p.177.
20. Senate **Hansard**, 16 September 1981, pp.810-811.
21. In this case, the District Court Judge (Judge Green) made the opposite decision to Judge Brieant and allowed the US Justice Department access to information on discussions between the AMLC and the shipping conferences. The defendants appealed Judge Green's decision, but the Court of Appeals in Washington had not handed down its decision at the time of this report.
22. The Australian *amicus curiae* briefs as summarised in the then Attorney-General's press release of 23 February 1983, argue that the matter involves a consideration of the following legal arguments:
    - The Act of State doctrine.
    - The principles of International comity.
    - The Noerr-Pennington doctrine.
23. Senate **Hansard**, 18 May 1983, pp.519-520.
24. **Evidence**, 20 August 1982 (Department of Trade and Resources Submission, August 1982), p.695.
25. Letter from ANL to Committee, dated 7 October 1983.
26. **Evidence**, 20 August 1982 (Submission), p.695.
27. **Evidence** 26 July 1983, p.171.
28. Andrew McCathie, 'Santos Evades U.S. Ban', **The Australian Financial Review**, 4 October 1982, pp.1, 3.
29. **Evidence**, 20 August 1982 (Department of Trade and Resources), p.795; **Evidence**, 9 September 1982 (Attorney-General's Department), p.954.
30. **Evidence**, 20 August 1982, pp.795-896.
31. **Evidence**, 20 August 1982, p.796.
32. **Evidence**, 9 September 1982 (Attorney-General's Department), p.927.

CHAPTER 4

## AUSTRALIAN-UNITED STATES' BILATERAL AGREEMENT RELATING TO COOPERATION ON ANTITRUST MATTERS

### 1. Background to the Agreement

4.1 In 1981, the then Attorney-General, Senator Durack, made the following comments to the Senate concerning the apparent failure of the **Timberlane** principle to resolve difficulties between the United States and other countries arising from the extra-territorial application of US antitrust laws:

> 'The issue is not so much intervention. It is the Timberlane principle itself. It is fundamentally unworkable for the very reason that Judge Marshall gave. The judiciary has no expertise to decide these questions; questions as to the significance of a trading law to another country; as to the need for stabilisation of prices; as to the need to deal with an unforeseen emergency in the export market.
>
> 'Timberlane is not a principle which we can in point of sovereignty accept. We are not prepared to acknowledge that a United States court can judge, on the basis of its view of our national interest, whether it will exercise jurisdiction. For the reasons already given, we claim that there is no warrant for United States antitrust laws overreaching our own export laws and policies.
>
> 'In Australia's view, these conflicts over jurisdiction and sovereignty, on the one hand, and over national interests on the other, can only be worked out by governments.'[1]

4.2 It was this Australian stance which culminated in the negotiation and signature on 28 June 1982 of the Agreement between the Governments of Australia and the United States of America Relating to Cooperation on Antitrust Matters. Effectively, the United States now acknowledges the principle that:

> 'Certain conflicts go beyond comity and require that factors related to sovereignty be taken into account and accorded priority.'[2]

In the words of Senator Durack:

> 'The Agreement recognises the importance both Governments attached to the need for conflicts between national laws and policies to be resolved at the Government level.'[3]

4.3 In addition to its stance that national interests are non-justiciable, the Australian Government also held firmly to the position that the questions of US Government intervention in private antitrust proceedings, and the immunity of Australian enterprises from prosecution during the process of inter-governmental consultation, were matters for negotiation. This was despite a discouraging response from the United States in 1979 with respect to the negotiability of both these matters.[4]

4.4 In his speech to the Senate in 1981, the then Attorney-General repeatedly laid great stress on how central to the negotiations was the issue of private treble damages suits. In referring to the then continuing negotiations between the two Governments on the proposed consultative Agreement, he stated:

> 'Our ultimate objective remains. That is, to establish a detailed mechanism by which inter-governmental consultations can take place in advance. But that is not possible if any agreement arising out of such consultations can be undermined by private antitrust proceedings of the kind which I have described. We will continue our endeavours to overcome this problem.'[5]

4.5 In June 1981, after Australia's Prime Minister, Mr Fraser, expressed to President Reagan Australia's general concerns regarding United States antitrust enforcement, the two heads of government asked their respective Attorneys-General to endeavour to work out an agreement. The response from the US side, however, was not immediate and early in 1982 the then Attorney-General requested a high level meeting of officials, which took place in May. At that meeting the basic Agreement was finally worked out,



'within the framework of what both Attorneys-General had agreed'.[6] The draft Agreement was initialled on 18 May 1982, and was signed on 29 June 1982.

### 2. The Provisions of the Agreement[7]

4.6 Briefly, the Agreement provides:

Article 1—Notification

The United States Justice Department or the Federal Trade Commission will notify Australia of the details of an antitrust investigation which may have implications for Australian laws, policies or national interests and Australia may notify the United States of a policy which may have antitrust implications for the United States.

(Article 1.1 and 1.2)

Article 2—Consultations

Consultations may be held at the request of the notified Party with a view to avoiding conflicts between the laws, policies and national interests of both countries and for this purpose due regard shall be had to each countries' sovereignty and to considerations of comity.

(Article 2.1-5)

Consideration will be given by the US before it commences or continues antitrust actions to Australia's interests in specified circumstances relating to Australian exports, and Australia for its part will consider any harm to US interests which might arise from Australia's policies affecting US enforcement of its antitrust laws.

(Article 2.6)

Article 6—Private Antitrust Suits

The United States will, upon request by Australia, in private antitrust proceedings inform the court of the substance and outcome of its consultations with Australia (at which Australia will have expressed how its interests are or could be prejudiced by the proceedings).

4.7 The following excerpts from the paper 'United States/Australia Bilateral Antitrust Agreement' presented by Mr H.T. Bennett, Deputy-Secretary of the Attorney-General's Department, to the Tenth International Trade Law Seminar (Canberra 1983) illustrate the main provisions of the Agreement. This paper was an attachment to the Attorney-General's Department's submission to the Sub-Committee.

> It needs to be understood that the Agreement does not attempt to provide a comprehensive panacea to cure all problems to which antitrust enforcement has given rise in the past. Nor is the agreement a conflicts regime by reference to which the respective rights of the parties may be adjudicated upon . . .
>
> The recitals to the agreement mention specifically the need for conflicts to be resolved with mutual respect for each other's sovereignty and with due regard for considerations of comity . . .
>
> **Article 1** *inter alia* provides . . .
>
> the Australian Government with the option of notifying the United States Government of a policy which the Australian Government has adopted and which may have antitrust implications for the United States. Potential difficulties for Australian exporters can thereby be identified and avoided before exporters have become committed to . . . conduct that might otherwise become the subject of antitrust concern under United States antitrust laws. . . .
>
> Provision is also made for notifications concerning decisions by the Justice Department or the Federal Trade Commission to undertake an antitrust investigation. Each of these bodies is obliged to notify the Australian Government of any such decision that may have implications for Australian laws, policies or national interests. The acceptance of this obligation, coupled with the requirements of promptness and detail in paragraphs 3 and 4, is particularly welcomed by Australia in the light of its experience with the Uranium and Shipping Investigations. It is our hope, and indeed expectation, that these provisions will lead to full consultations being conducted well in advance of the issuance of compulsory process . . .

**Article 2** . . . is the centrepiece of the Agreement. In paragraphs 1 and 2 the Australian and United States Governments accept mutual obligations to communicate their concerns arising out of notifications under Article 1. Each is entitled to request consultations in respect of a notified matter of concern to it and the other is obliged to engage in such consultations . . . with due regard to each other's sovereignty and to considerations of comity.

The significance of paragraph 6 cannot be overstated . . . From the Australian point *of view considerable importance attaches to the recognition by the United States in sub*-paragraph (b) of paragraph 6 of the need to give the fullest consideration to the interests of Australia with respect to the conduct to which the proceedings or contemplated proceedings relate, or would relate. The sub-paragraph goes on to give some important examples of Australian interests . . .

**Articles 4 and 6** are best considered together, because collectively they go as far as it was possible to go in providing for the vexed question of how to stop private civil proceedings based on conduct which in inter-governmental consultations the United States Government has concluded should not be a basis for action under United States antitrust laws.

The first need in this connection is for a party to any such civil proceedings to be able to put *before the court acceptable evidence of the fact of the inter-governmental consultations and* their outcome. The agreement provides for this, first, by providing for a written memorialisation of the conclusion reached in the consultations and the basis for it . . .

Article 6 complements Article 4 by providing for the Government of the United States, on request, to report to the court on the substance and outcome of the consultations. This is a very significant advance on the position that has obtained and it is to be hoped that it will place the court in a position in which it is able to apply the balancing process provided in the **Timberlane** and **Mannington Mills** cases and so decline to exercise jurisdiction in proceedings relating to conduct which the United State Government has concluded should not be a basis for action under its antitrust laws . . .

*Before leaving Article 4 reference should be made to paragraph 2 of it, which is a formal* acknowledgement of each party's rights to protect its own interests in the event that it proves that a conflict cannot be avoided. Such a clause is, of course, basic to the Agreement. Both Governments saw it as necessary to have such a clause but it is to be hoped that in practice it will seldom be necessary to have recourse to it.

### 3. Australia's Position Under the Agreement

4.8 According to the then Australian Attorney-General, Senator Durack, what Australia gains chiefly under the Agreement is a 'binding commitment' by the United States *to consult with Australia before any official action is taken under United States* antitrust laws which might affect Australia's interests, and a recognition of the importance both Governments attached to the need for conflicts between national laws and *policies to be resolved at the Government level.*[8]

4.9 In giving evidence before the Sub-Committee, the Attorney-General's Department representative also stressed the importance to Australia of the commitment to *consult on the United States' side. He stated that it has been quite a central element in* Australian policy that where US antitrust laws conflict with Australia's trading policy, there is a need for governments at a very early stage to consult, before the commence*ment of an antitrust investigation:* 'It was felt that once the wheels of justice had begun to grind in the United States it was very difficult for any sensible accommodation to be reached.'[9] [However] 'it is not an agreement under which we, through consultations, endeavour to ascertain whether the implementation of an Australian Government policy would infringe United States antitrust laws. Nor is it in any sense an agreement under which there is any kind of notion of clearance of a particular policy. The essential feature is that both sides will look at the matter.'[10]

4.10 Article 2.6 of the Agreement is potentially a major step towards resolving potential conflicts between Australia and the United States arising from official US antitrust



investigations or from Australia's responses to them. For example, in the light of intergovernmental consultations, the US may, for its part, agree not to enforce its antitrust laws, even if the conduct in question would infringe those laws.'[11]

4.11 Thus, under Article 2.6(a) of the Agreement, the Australian Government, on its side, 'shall give the fullest consideration to modifying any aspect of the policy which has or might have implications for the United States in relation to the enforcement of its antitrust laws. In this regard, consideration shall be given to any harm that may be caused by the implementation or continuation of the Australian policy to the interests protected by the United States antitrust laws'.

4.12 Under Article 2.6(b), the US Department of Justice or the Federal Trade Commission, on their side, 'shall give the fullest consideration to modifying or discontinuing its existing antitrust investigation or proceedings, or to modifying or refraining from contemplated antitrust investigations or proceedings. In this regard, consideration shall be given to the interests of Australia . . . including, without limitation, Australia's interests in circumstances where . . . conduct [subject of the antitrust action]:

(1) was undertaken for the purpose of obtaining a permission or approval required under Australian law for the exportation from Australia of Australian natural resources or goods manufactured or produced in Australia;
(2) was undertaken by an Australian authority, being an authority established by law in Australia, in the discharge of its functions in relation to the exportation of Australian natural resources or goods manufactured or produced in Australia;
(3) related exclusively to the exportation from Australia to countries other than the United States, and otherwise than for the purpose of re-exportation to the United States, of Australian natural resources or goods manufactured or produced in Australia; or
(4) consisted of representations to, or discussions with, the Government of Australia or an Australian authority in relation to the formulation or implementation of a policy of the Government of Australia with respect to the exportation from Australia of Australian natural resources or goods manufactured or produced in Australia.'

In his Canberra press release on 29 June 1982 to mark the signing of the Agreement, Senator Durack remarked about Article 2.6(b):

> 'Hopefully they [the provisions] will lead to decisions by those [US] bodies not to institute or continue with prosecutions where this would be inappropriate having regard to Australia's national interests.'

4.13 With respect to the key issue of **private** treble damages suits, Article 6 would require that, when requested by the Australian Government, the Justice Department will appear in court in private antitrust suits brought against Australian companies. The Department will present a report to the judge presiding over the case describing any discussions the two governments have held on the controversy.[12] The court may then choose to take account of comity considerations, for example by adopting the **Timberlane** approach.

4.14 In his address in Washington on 29 June 1982 at the signing of the Agreement, Senator Durack was circumspect in his reference to this provision:

> 'The agreement is between governments and can only in any final sense provide a framework for the resolution of differences arising from government action. The important matter of United States government participation in private suits is dealt with in the agreement and the provision included is significant but it cannot provide a complete answer to the difficulties which may arise from those proceedings. I should say that in regard to those difficulties we remain concerned.'

The Committee shares this concern.

## 4. The US Position under the Agreement

4.15 In a statement released following the signing of the Agreement, the US Attorney-General, Mr William French Smith, emphasised that he was optimistic that 'this agreement will elevate relations between our two countries on antitrust matters to a higher plane and a more predictable path.'[12]

4.16 On the question of private antitrust suits, Mr French Smith noted that the Australian Government concern, repeated during the negotiations, that private suits were a greater problem than enforcement action of the US Government. He then commented as follows:

> 'By providing through this agreement for United States participation in certain private cases that implicate Australian government policies, we have indeed taken a very significant step toward minimizing such difficulties.'[13]

4.17 From the United States' point of view, it is clear that the chief advantage of the Agreement is the provision relating to Australian co-operation with US antitrust investigations (Articles 2.6 and 5). The US Attorney-General was quoted as saying that agreement to limit use of Australia's blocking laws (Article 5.2) was 'particularly helpful': 'We are all aware that other governments have enacted similar blocking legislation, we therefore hope and believe that this agreement will further our efforts to achieve accommodation with those nations as well.'[14] The US Attorney-General concluded that:

> 'While neither of our countries has sacrificed any part of its sovereignty or rights under international law by this agreement, we have agreed upon an excellent mechanism for channelling and containing potential differences. The United States will work diligently to ensure the usefulness of that mechanism to both nations'.[15]

## 5. Possible Operation of the Australia-US Agreement on Antitrust Matters

4.18 Mr H.T. Bennett of the Attorney-General's Department in his seminar paper commented as follows:

> 'The agreement that has been reached is, as I have already said, not a panacea. It is not a conflicts regime. It in no sense constitutes an abandonment by the United States of its policies for extraterritorial enforcement of its antitrust laws. But it does represent a significant step forward. It has created a greatly improved atmosphere of understanding between the two countries, and the importance of that cannot be overstated. It has provided a vehicle for the two countries to resolve their differences with mutual respect for each other and each other's policies.
>
> 'Hopefully the agreement will remove the need for resort to be had to legislation blocking evidence or preventing judgments from being recognised and enforced. In this and other respects it remains to be seen how the agreement works in practice, but it can be said at this stage that there are indications that both sides are wanting the arrangements to be successful.'[16]

4.19 Whether or not the Agreement works will depend on the willingness of both parties to make it work, especially their willingness, in each case, to see the other's point of view. Essentially, the success or failure of the Agreement will rely on adherence by the parties to the principle of comity, since neither party is bound by the joint consultations envisaged under the Agreement to desist from taking unilateral action.[17]

4.20 The Agreement does not provide any guarantee that the United States will not pursue a Department of Justice or Federal Trade Commission antitrust investigation. Even if both honour their commitment under the Agreement to engage in consultations relating to a particular case, the US Government may decide that the national interests of the United States outweigh 'considerations of comity' (see the preamble to the Agreement). The Australian Government for its part could well decide, in such circumstances, to use its 'blocking' legislation to prevent the transmission of information or



documents from Australia (provided it complied with Article 5.2 of the Agreement by providing notice of its intention to do so).

4.21 Further, there is no guarantee that US courts will be any more sympathetic to US Government intervention on behalf of a foreign government than they have shown themselves to be towards submissions made directly by the foreign governments concerned, as in the Westinghouse suit. When the Australian Government submitted its views in the Westinghouse antitrust proceedings, the Judge of the US District Court, Judge Marshall, commented: 'the judiciary has no expertise or perhaps even authority to evaluate the economic and social policies of foreign governments'. The US Court of Appeals strongly criticised the intervention of foreign governments in the case. This occurred despite reassurances by the US Department of State to the Australian Government that 'we are confident that its views will be given due weight'.[18]

4.22 Nevertheless, the Sub-Committee was told by the Attorney-General's Department that there is a real distinction between the Australian-US Agreement and similar agreements entered into by the United States with other countries (discussed in Chapter 5), which were described as being essentially co-operation agreements in which information is to be supplied. 'The distinctive feature of this agreement is that it is an accommodation agreement, the notion being that either party will endeavour to accommodate its laws or policies'.[19]

However, as the Committee has already noted, the successful operation of the Agreement will depend on continued goodwill and understanding between the two Governments and their officials.

## 6. Conclusions

4.23 The Australian-US **Agreement Relating to Cooperation on Antitrust Matters** provides, in the words of the former Australian Attorney-General, Senator Durack, 'a framework within which our two governments will in the future be able to resolve differences between them arising out of the enforcement of United States antitrust laws and Australian Government policies which may have antitrust implications for the United States'.[20] At the same time, the Committee would emphasise that the success of bilateral dispute settlement in general and of the Australia-US Agreement in particular will depend fundamentally on the ability of both parties to appreciate 'the differences in outlook and perception which characterize the policies of the participants and a willingness to give equal weight, equal credence to those perceptions'.[21]

4.24 The Committee agrees with the numerous witnesses, including the Attorney-General's and Foreign Affairs Departments and Professor Ryan, that the negotiation of this Agreement is a significant step towards resolving an issue which has been a major irritant in relations between the two countries over a number of years. The Committee considers that the Agreement, in addition to providing a diplomatic framework for consultation, establishes a prima facie obligation on both sides to act in good faith. For example, in signing this Agreement, Australia has agreed to co-operate with the United States in the field of restrictive business practices and not to block US official investigations or enforcement action undertaken in accordance with the antitrust laws, unless such investigations conflict with Australian national interest. The Agreement leaves each party free ultimately to protect its interests as it deems necessary (Article 4); but if either side fails to act in good faith, the Agreement will not work.

4.25 The Committee would point out in this context that, in view of the failure of US courts in a number of recent and important cases to apply the Timberlane principle and to admit into private antitrust proceedings a consideration of foreign policy matters, it is particularly important that Article 6 of the Agreement, relating to US Government intervention in such proceedings, can be made to work effectively.

4.26 As discussed in Chapter 2 of this report, it is widely agreed that US antitrust laws go beyond generally accepted principles of extraterritorial jurisdiction in seeking to protect the United States from what is regarded as 'unfair' competition from foreign trade and commerce. Consequently, unless the United States is willing to limit, or modify, the application of its laws where they conflict with other nations' trading laws and policies, as envisaged under the bilateral Agreement with Australia, it is likely that there will be a continuing build-up of 'blocking' legislation in a variety of countries against the extraterritorial application of US antitrust laws.

4.27 As pointed out in evidence, the Agreement can be described accurately as a breakthrough from the United States' point of view as well as Australia's.[22] Therefore, the United States would be aware that, if this Agreement cannot be made to work, the alternative is likely to be continuing international confrontation over the issue of the extraterritorial reach of its antitrust laws.

4.28 The Committee concludes that:

(a) the **Agreement between the Government of Australia and the Government of the United States of America Relating to Cooperation on Antitrust Matters** is a significant step towards resolving numerous difficulties that have arisen between the Australian and US Governments in the enforcement of US antitrust laws;

(b) a number of important questions relating to the extraterritorial application of other US laws, such as the **Export Administration Act**, have not been affected or resolved by the signing of the Agreement;

(c) it is important that Article 6 of the Agreement, relating to US Government participation in private antitrust proceedings, be made to work effectively; and

(d) it is important that both countries seek to implement both the letter and spirit of the Agreement and that the Australian Government regularly monitor its operation.

4.29 The Committee recommends that the **Agreement between the Government of Australia and the Government of the United States of America Relating to Cooperation on Antitrust Matters** be regularly monitored by the Australian Government to ensure that it is achieving its stated objectives.

### Endnotes

1. Senate **Hansard**, 11 June 1981, p.3073.
2. J. Greenwell, 'Extraterritorial Application of Canadian and Foreign Antitrust Laws' in **Eighth International Trade Law Seminar**, Canberra, 1981, p.169.
3. Press Release by the Attorney-General, Canberra, 29 June 1982. See **Evidence**, 9 September 1982 (Attorney-General's Department), pp.889-891.
4. Second Reading Speech, Foreign Antitrust Judgments (Restriction of Enforcement) Amendment Bill 1981 in Senate **Hansard**, 11 June 1981, p.3067, at 3070.
5. Second Reading Speech, in Senate **Hansard**, 11 June 1981, p.3074.
6. **Evidence**, 9 September 1982 (Attorney-General's Department), p.870.
7. The full text of the Agreement is included in Appendix III of this Report.
8. Press Release by the Attorney-General, Canberra, 29 June 1982. See **Evidence**, 9 September 1982 (Attorney-General's Department), pp.889-891.
9. Evidence, 9 September 1982 (Attorney-General's Department), p.871.
10. **Evidence**, p.872.
11. **Evidence**, p.872.
12. Statement by the US Attorney-General, Mr William French Smith, Department of Justice Press Release, 28 June 1982—see **Evidence**, 9 September 1982, p.898.
13. **Evidence**, 9 September 1982, pp.897-898.
14. **Evidence**, p.899.
15. **Evidence**, p.903.



16. United States/Australia Bilateral Antitrust Agreement in **Tenth International Trade Law Seminar**, Canberra, 1983; also set out as Attachment C to Attorney-General's Department submission Evidence, 26 July 1983.
17. See Article 4.2 of the Agreement (at Appendix III).
18. Quoted in Senate **Hansard**, 11 June 1981, p.3072.
19. **Evidence**, 9 September 1982, pp.955-956. Also see **Evidence**, 20 August 1982 (Department of Trade and Resources), pp.792-793.
20. Address by Senator Durack, Washington D.C., 29 June 1982.
21. B.R. Campbell 'The Canada-United States Antitrust Notification and Consultation Procedure' in **The Canadian Bar Review**, vol. LVI, 1978, p.494.
22. **Evidence**, 9 September 1982 (Attorney-General's), p.957.

## CHAPTER 5

## RESPONSES OF FOREIGN GOVERNMENTS TO THE EXTRATERRITORIAL REACH OF UNITED STATES LAWS

### 1. Objections of Foreign Governments

5.1 The objections of foreign governments to the extraterritorial reach of US laws are based on a number of grounds, first, as already mentioned, the jurisdiction claimed by US courts over acts committed abroad by non-US citizens goes beyond the accepted interpretation of territorial jurisdiction under international law. The Attorney-General's Department noted considerable concern being expressed by countries that we have fairly close relations with, such as the United Kingdom, New Zealand, Japan and West Germany. In some ways those countries have probably had more bad experiences than the Australian Government, because of their close proximity to the United States economy.[1]

5.2 Much criticism has also been directed at the uncertainty surrounding the scope and application of the 'effects' doctrine as first defined in 1945 in the **Alcoa** case and as applied in subsequent decisions by US courts.

5.3 When introducing into the UK Parliament the Protection of Trading Interests Bill 1979, the then UK Secretary for Trade, Mr Nott, made the following statement:

> 'Since that time (of the **Alcoa** case) this so-called "effects doctrine" has been applied and extended by the United States courts and regulatory agencies. Furthermore, in applying this doctrine the United States courts have paid comparatively little attention to the interests and policies of foreign Governments where these have been in conflict with those of the United States. Even if they had done so, it would, in my view, be fundamentally unsatisfactory for United States law unilaterally to pass judgment on economic problems which by their very nature are of concern to more than one country. The wide extent and fundamental uncertainty of this claimed reach of United States law through this pernicious extraterritorial effects doctrine has created uncertainty for international industry in this country and elsewhere. The views which I express on this subject are not held just by our Government; they are held and deeply felt in Canada, Australia, South Africa and other countries of the EEC.'[2]

5.4 The United States has been criticised (including by Australia) on the ground that US antitrust laws are used against alleged anti-competitive practices on the part of foreign businesses, while, at the same time, United States producers are permitted under other US laws to engage in non-competitive practices without incurring liability under the antitrust laws. Not surprisingly, United States governments have at times been accused by other governments of using antitrust and other laws relating to trade to promote US commerce over foreign competition, despite a public stance in favour of a free international market and against restrictive business practices. As the Department of Trade noted: The Sherman Act, the principal antitrust Act, originated in efforts to legislate to ensure perfect competition. But such perfection does not exist. Indeed the United States permits anti-competitive behaviour through the **Webb-Pomerene Act** and **Export Trading Company Act**. It needs to be recognised that international trade is not free, with nearly 50% of all international transactions subject to some form of trade restraint.[3]

5.5 Another criticism is that the extraterritorial application of US laws regulating foreign trading by US companies (including many foreign subsidiaries) and trading in US goods and technology is used as a vehicle for applying US foreign policy.



5.6 Objections to the extraterritorial reach of US laws focus on the question of private treble damages suits. According to the Department of Trade, 'private treble damage suits in particular can exacerbate the difficulties raised'[4]. The Department of Foreign Affairs claims the most serious problems arise from private suits brought pursuant to US antitrust laws.[5]

5.7 Finally, the United States Government has been criticised for allegedly failing to adhere in a consistent manner to official declarations that the principle of 'international comity'[6] would be given due regard in the enforcement of antitrust laws. The US Administration in 1978 discontinued any practice of court appearances on behalf of foreign governments in private antitrust suits, thereby placing the full burden on those governments and depriving them of a degree of influence in court proceedings. Further, the **Timberlane** attempt by some US courts to balance conflicts of interests between the United States and foreign governments appears not yet entrenched in US law.

5.8 Australia and other countries which have found themselves embroiled in disputes with the United States arising from the attempted extraterritorial application of its antitrust or other laws have vigorously defended their stance. They have drawn special attention to the 'effects' doctrine as applied by US courts, as exceeding in jurisdictional scope the foreign trading laws of other countries.[7] This point was stressed in the 1977 OECD report on **Restrictive Business Practices of Multinational Enterprises.**

5.9 Australia, under Part X of the **Trade Practices Act 1974,** regulates outwards shipping from this country. Under the **Australian Meat and Live-stock Corporation Act 1977** the relevant Minister may, upon the recommendation of the Corporation, designate the carriers of meat exports from this country and impose certain conditions relating to its carriage. Again, the Trade Practices Act (section 5) extends to 'the engaging in conduct outside Australia by persons in relation to the supply by those persons of goods or services to persons within Australia'. Australia, however, unlike the United States, does not attempt to regulate foreign commerce on the basis purely of an alleged adverse effect upon Australia's trade.

5.10 While the United States is not the only country which aims at applying the theory of 'effects' in its laws on restrictive business practices[8], there is little support in international state practice for the extension of the objective territorial principle to mere effects which do not form a constituent element of an offence.

5.11 Professor K. W. Ryan of the Faculty of Law, University of Queensland, notes that sub-section 98(2) of the **Act Against Restraint of Competition 1951** of the Federal Republic of Germany reads like a transcription of the 'Alcoa' rule[9]. It provides that the Act 'shall apply to all restraints of competition which have effect in the area in which this Act applies, even if they result from acts done outside such area'. A commentary on this Act, quoted by Professor Ryan, points out, however, that—

> 'As a public law rule, Section 98(2) authorises the competent German authorities to apply German substantive public laws, to take administrative measures against and impose quasi-criminal sanction on enterprises practising unlawful restraints of competition. The applicability of substantive German law means at the same time that the German courts and authorities have jurisdiction over domestic and foreign enterprises according to the rules of German international procedural law. The enforcement of public law provisions is, however, subject to the principle of territoriality and must, therefore, strictly be limited to German territory. Thus the participants of a foreign export cartel which affects exports to Germany could be subjected to an administrative or quasi-criminal proceedings in Germany, but the sanctions imposed could not be enforced outside Germany.'[10]

5.12 Ms Triggs observes that while the United States, the Federal Republic of Germany, the European Economic Community and some other states have adopted the 'effects' doctrine to expand the reach of their restrictive trade practices legislation, the

doctrine has not received support in the general practice of the international community:

> 'The fact that, in some instances, states have moved to legislate against United States attempts to enforce the Sherman and Clayton Acts extraterritorially suggests that the reverse is true.'[11]

5.13 The Committee concludes that the enactment of 'blocking' legislation against the extraterritorial application of judgments in US antitrust proceedings is justified by the special nature of the US antitrust laws and their interpretation by US courts.

## 2. Responses of Foreign Countries

5.14 A number of countries have felt it necessary to introduce legislation to 'block' the attempted enforcement of antitrust laws by US courts. Blocking legislation normally has two objectives: to prevent the taking of evidence and discovery of documents in the foreign country; and to prevent the enforcement there of any US judgement obtained notwithstanding the ban on such foreign evidence. Appendix IV provides details of the legislative responses by other countries.

5.15 In 1964, the United Kingdom enacted the Shipping Contracts and Commercial Documents Act, which authorised a Minister to make an order prohibiting a person in the United Kingdom from complying with the direction of a foreign tribunal to produce documents and also to prohibit any person in the United Kingdom who carried on the business of carriage of goods or passengers by sea from compliance with any foreign country measures to control the terms or conditions of such carriage. Such orders were to be issued only if it appeared to the Minister that the requirements or measures constituted an infringement of the jurisdiction which under international law belonged to the United Kingdom. Similar action had been taken in Canada as early as 1947, when the Ontario Parliament passed the Business Records Protection Act.

5.16 The Ontario Act resulted from the issue in 1947 of subpoenas by a United States court to some fifty Canadian pulp and paper companies in the course of a Sherman Act investigation, requiring them to produce records before a Grand Jury in New York. The English Act was passed following the issuing of subpoenas directing more than 150 shipping firms, domestic and foreign, to produce certain documents situated both in the United States and abroad to a Grand Jury which was investigating the shipping industry.

5.17 Again, in 1980, New Zealand enacted the **Evidence Amendment (No. 2) Act** which enables production of documentary evidence to be prohibited in certain circumstances, as under the Australian Act of 1976.

5.18 The Australian Department of Foreign Affairs stated that:

> 'in common with like minded countries such as the United Kingdom, Canada and France we have taken legislative counter-measures such as the enactment of the **Foreign Proceedings (Prohibition of Certain Evidence) Act 1976** and the **Foreign Antitrust Judgments (Restriction of Enforcement) Act 1979**. The Attorney-General has also referred to the possibility of introducing legislation to permit the "recovery back" of damages awarded under a foreign antitrust judgement.'[12]

This possibility is dealt with in more detail in Chapter 6.

## 3. The American Response to 'Blocking' Legislation

5.19 When faced with the enactment of 'blocking' legislation by Australia and other countries, the response of the then US Attorney-General, the Honourable Griffin B. Bell, was that he could see no excuse 'for deliberately enacting blocking legislation



solely to frustrate US antitrust laws without regard to the seriousness of the case or the national interest at stake'. He also emphasised:

> 'We are obligated to do all that we reasonably can to prosecute foreign private cartels which have the purpose and effect of causing significant economic harm in the United States in violation of anti-trust laws. To my mind there is fundamental United States interest in not having any citizens pay substantially higher prices for imports because private firms get together and rig international markets. There is also a fundamental United States interest at stake when private businesses, although foreign, get together to injure and perhaps destroy an American competitor.'[13]

5.20 However, there are in fact exemptions under United States antitrust laws which permit their exporters to engage in anti-competitive practices. Furthermore, statements such as that quoted above appear to overlook the key question of whether there is any justification for the unilateral assertion of jurisdiction by one country based only upon an adverse effect upon its trade to proscribe anti-competitive conduct in the international market, especially where that conduct results from national trading policies.[14]

5.21 The recent Australian-US Agreement Relating to Cooperation on Antitrust Matters differs from similar agreements with other countries entered into by the United States.[15] In particular, the US Attorney-General, Mr French Smith, in his address to mark the signing of the Agreement, emphasised that it imposes more concrete and detailed obligations than the earlier agreements entered into with Canada and the Federal Republic of Germany.[16]

## 4. The Canadian Agreement

5.22 The Canadian-US **Antitrust Notification and Consultative Procedure** (which came to be known as the Fulton Rogers Understanding) evolved primarily as a result of particularly strong Canadian reaction in the late 1950s to a series of United States antitrust actions collectively known as the Canadian Radio Patents cases.[17]

5.23 The Canadian Radio Patents cases consisted of civil antitrust suits filed in the United States, alleging that the defendants (General Electric, Westinghouse, and Philips) had engaged with others, through their subsidiaries, in an unlawful combination in restraint of the foreign commerce of the United States in breach of sections 1 and 2 of the Sherman Act. It was alleged that Canadian Radio Patents Limited, a Canadian Corporation, incorporated by United States owned Canadian subsidiaries, consisted of a patent pool which, through the initiation of patent infringement suits and the denial of licences, had effectively closed the Canadian market to United States domestic producers of home entertainment apparatus. United States home entertainment producers with manufacturing subsidiaries in Canada were alleged to have sealed off the Canadian market. The Canadian Radio Patents cases ended in consent decrees which enjoined the defendants from participating, by themselves or through their subsidiaries, in any agreement which directly or indirectly restricted the export of United States goods.

5.24 The initiation of the cases and the subsequent decrees caused an uproar in Canada, and the **Antitrust Notification and Consultation Procedure** emerged from subsequent discussions. It was agreed that, in the future, discussions would be held between the two Governments, '. . . when it becomes apparent that the interests of one of our countries are likely to be affected by the enforcement of the antitrust laws of the other. Such discussions would be designed to explore means of avoiding the sort of situation which would give rise to objections or misunderstandings in the other country'.[18]

5.25 Under the informal procedures agreed upon, each government undertook to notify the other prior to the institution of any suit involving the interests of a national of

the other country, and to allow for consultations between the two governments in such situations. As well, each country undertook to keep the other informed of developments in pending cases. Each state, however, reserved the right to proceed as it saw fit and the mere fact that consultations might be held on a particular issue was not to imply approval of subsequent actions.[19]

5.26 The provisions relating to notification and consultation and the exchange of information are therefore somewhat similar in content and intent to those of the recently signed Australia-US Agreement.

5.27 The Canadian experience with the **Antitrust Notification and Consultation Procedure** would appear to be relevant to assessing how the Australia-US Agreement might work. The Canadian Arrangement contains no commitment, for example, with respect to US official intervention in private antitrust suits; and it was negotiated in similar circumstances to the Australia-US Agreement, and with the similar goal of preventing tensions arising between the two countries.

5.28 An examination of how the consultation procedure has worked appears to show that 'despite almost two decades of bilateral contact in the field of antitrust regulation, frustration and misunderstanding still persist'.[20] This judgment is based on the situations that developed in the case **'United States v. Amax Inc., Amax Chemical Corp., Duval Corp., Duval Chemical Corp., National Potash Co., Potash Co. of America'** (1976),[21] and in the Westinghouse antitrust suit against the so-called uranium cartel.

5.29 In the former case, a federal grand jury indictment and a companion civil suit filed in June 1976 in the US District Court of Illinois alleged that the Government of Saskatchewan (a major potash producing province) had instituted a potash prorationing scheme and pricing arrangement in violation of the Sherman Act with the encouragement and consent of eight potash producers, most of which were US firms with potash mining interests in Saskatchewan and the State of New Mexico. In the course of pre-trial proceedings, among those named as unindicted co-conspirators were a former premier and minister and numerous Saskatchewan civil servants. Reaction in Canada was swift and angry. Provincial government spokesmen rejected the right asserted by the United States to control the activities of potash producers in the province and warned that the true purpose of this action was to make any Canadian resource developed by a company with United States shareholders subject to American laws respecting production and sale, rather than Canadian laws.[22]

5.30 Again, similarly to the Australian Government, the Canadian Government reacted to the Westinghouse litigation by enacting 'blocking' legislation (the **Uranium Information Security Regulations**) which prohibited any person from releasing any written matter or documentation relating to any phase of uranium mining, refining, or marketing, unless required to do so by Canadian law or unless with the consent of the Minister of Energy, Mines and Resources. As well, it was prohibited to give any oral evidence which might reveal the contents of any communication to which the regulations applied.[23]

5.31 According to B.R. Campbell, Canadian and American officials insist that the Procedure was resorted to in both the potash and uranium cases. However, although the Canadian Government wanted very much to avoid these investigations, it apparently failed in both cases to achieve this end: 'While it is true that the undertaking between Canada and the United States is serving to "lower temperatures", the original intent, from the point of view of Canadian officials, was that the arrangement should remove confrontation by improving upon each state's appreciation of the other state's point of view'[24]. Campbell emphasises that the fundamental reason why the procedure has not worked as well as was hoped originally is because 'the need for the procedure was perceived in completely different terms by both states involved and both states had



a basic misunderstanding dividing Canadian and American antitrust policy ... The Canadian Government saw the procedure as a means whereby the American Government would learn to avoid the extraterritorial application of law. The American Government, accepting the extraterritorial reach of antitrust law as rational and necessary, believed the procedure would lessen tensions by keeping Canada informed and in mind'.[25]

5.32 Following meetings held between 1977 and 1979, as a result of which it was agreed to establish a continuing consultative mechanism to provide more extensive consultation and co-operation in antitrust matters, Canadian and US officials drafted a proposed Understanding which provides for a mechanism of notification and consultation to allow one country to take into account the national interests of the other before proceeding with antitrust enforcement actions and decisions, and for co-operation in obtaining access to information in the other country relevant to antitrust investigations, subject to national interest considerations, national law and assurances of confidentiality. The proposed Understanding would supersede existing bilateral antitrust arrangements. The proposed Understanding, like the Australia-US Agreement, is not to be a legally binding instrument but it will constitute a political undertaking by both sides to notify, consult and co-operate with each other whenever proposed enforcement action by one government appears likely to raise issues of concern to the other.[26]

5.33 It is also possible that the revised Understanding may include provisions relating to US Government intervention in private antitrust suits similar to Article 6 of the Australia-US Agreement.

## 5. The German Agreement

5.34 The **Agreement Between the Government of the United States of America and the Government of the Federal Republic of Germany Relating to Mutual Co-operation Regarding Restrictive Business Practices**, which was signed 23 June 1976 and entered into force 11 September 1976, is of a rather different nature, the emphasis being on 'the regularization of co-operation' between the two countries' antitrust authorities (preamble to the text of the Agreement).

5.35 Under Article 2(1) of the Agreement, 'Each party agrees that its antitrust authorities will co-operate and render assistance to the antitrust authorities of the other party ...', and the other provisions relate mainly to the specific procedures to be followed by the two parties in implementing this co-operation. Article 3 limits the scope of the co-operation set out in Article 2, by making compliance under the terms of the Agreement non-binding, when, for example, 'compliance would be inconsistent with its security, public policy or other important interests' (4(1)(b)).

5.36 The parties also undertake not to interfere 'with any antitrust investigation or proceeding of the other party' (Article 4(1)), and the confidentiality of information transmitted under the terms of the Agreement is to be 'maintained in accordance with the law of the party receiving such information, subject to such terms and conditions as may be established by the complying party furnishing such information ...' (Article 5).

5.37 Professor Ryan suggested that the agreement with Germany, while of many years standing, was not as comprehensive or as formal as the Australian agreement.[27]

## 6. UK Protection of Trading Interests Act

5.38 The legislative response by the United Kingdom, to minimise any adverse impact of US trading laws being applied to UK interests, has been the most comprehensive by any foreign country to date. The **Protection of Trading Interests Act 1980** allows the Government to prohibit any compliance with a foreign court order to which the Act

may be applied. Further, even if a US court succeeds in acquiring sufficient evidence, passes judgment on a UK defendant, and obtains compliance, the penal element of any damages thereby paid can be recovered against assets of the US plaintiff within UK jurisdiction. The entire Act is attached as Appendix V.

5.39 The 'recovery back' or 'claw back' provisions were the model for Australia's Foreign Antitrust Judgments (Restriction of Enforcement) Amendment Bill 1981, which—in an amended version—is being considered by the Australian Government. 'Claw back' legislation is detailed in Chapter 6.

## 7. Multilateral Efforts

5.40 In the multilateral context Australia has actively participated in discussions concerning the extraterritorial impact of US laws in the Organisation for Economic Co-operation and Development (OECD) and United Nations Conference on Trade and Development (UNCTAD). The OECD Committee of Experts on Restrictive Business Practices, for instance, is concerned with the competition policies of OECD countries, their operations domestically and with respect to other members, and the co-ordination of those policies as regards international restrictive business practices, particularly those affecting international trade. For further detail, see Chapter 6, Section 4. Most recently, the OECD Committee has commenced a study of the possibility of the development of an international framework for the resolution of conflicts between competition and trade policies.

5.41 Within UNCTAD, the UN Conference on Restrictive Practices was convened by the UN General Assembly in 1978, and met in 1979 and 1980. An Australian delegation attended both meetings and participated in the drafting of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices which were adopted unanimously by the UN General Assembly in 1980. Australia supports the Principles and has since been actively involved in the work of the UNCTAD Intergovernmental Group of Experts on Restrictive Business Practices set up to provide institutional machinery for the Set of Principles and Rules. These efforts are discussed in more detail in the next chapter.

5.42 The Attorney-General's Department did not see much hope for a solution at the multilateral level:

> Probably one of the problems is that until the Western countries have reasonably similar views about the appropriate role for their domestic antitrust legislation, it is going to be very hard for them to agree in any binding way to restrict their extraterritorial activities.[28]

5.43 Australia has participated in the OECD Committee and has made a detailed statement to one of the working parties about the Agreement concluded with the United States on antitrust matters.[29]

### Endnotes

1. **Evidence**, 26 July 1983, p.156.
2. **Hansard**, *House of Commons*, 15 November 1979, pp.1535-6.
3. **Evidence**, 25 July 1983 (submission), p.S145.
4. ***Evidence**, 25 July 1983, p.S145*
5. **Evidence**, 25 July 1983 (submission), p.S155.
6. For a definition and treatment of comity see G.B. Bell (former US Attorney-General) "International Comity and the Extra-territorial Application of Antitrust Laws" *in* **The Australian Law Journal**, Vol. 51, December 1977, p.801. The inconsistency between the US expressed commitment to comity, on the one hand, and the reluctance of American courts to give full weight to foreign interests—together with the Administration's reluctance to intervene in cases on behalf of foreign interests—on the other hand, was noted by former Attorney-General Durack in his Second Reading Speech on the Foreign Antitrust Judgments (Restriction of Enforcement) Amendment Bill 1981. The Attorney-General's Department noted that the US Government refused to intervene when requested by Australia in the Westinghouse case and in the spurious 1981 attempt by the Western Australian Conservation Council against ALCOA to apply US environmental protection laws in Australia—**Evidence**, 9 September 1982, p.875.
7. For example, see Second Reading speech by the then Attorney-General, Senator Durack, on the Foreign Antitrust Judgments (Restriction of Enforcement) Bill 1981, Senate **Hansard**, 11 June 1981, pp.3067 ff.
8. See, for example, paragraphs 5.11 and 5.12; also the 1977 OECD Report pp.37-40 concerning Dutch, Swiss, French and EEC versions of "effects" doctrines.
9. K.W. Ryan in **Fifth International Trade Law Seminar**, Canberra, 1978, p.112.
10. **K.W. Ryan**, p.112 (footnote 46), quoting from an OECD commentary.
11. G. Triggs, 'Extraterritorial Reach of United States Anti-Trust Legislation' in **Melbourne University Law Review**, December 1979, p.263.
12. **Evidence**, 25 July 1983 (submission), p.S159.
13. An address delivered to the American Bar Association, Chicago, 8 August 1977, published in **The Australian Law Journal**, vol. 51, Dec. 1977, pp.802-803.
14. See J.H. Greenwell, in **Eighth International Trade Law Seminar**, Canberra, 1981, p.156.
15. **Evidence**, 9 September 1982 (Attorney-General's Department submission), pp.955-956.
16. **Evidence**, p.898.
17. **United States v. General Electric Company, Westinghouse Electric Corporation, N.V. Philips (1962). For a detailed examination of the understanding between Canada and the U.S., and the cases which gave rise to them, see B.R. Campbell, 'The Canada-United States Antitrust Notification and Consultation Procedure in The Canadian Bar Review**, vol. LVI, 1978, p.460.
18. **Canadian House of Commons Debates**, 1959, p.617, 619 (from ministerial statement on the understanding).
19. **Campbell**, p.462.
20. **Campbell**, p.486.
21. N.D. Ill., 6 May 1977.
22. **Campbell**, pp.486-487.
23. **Campbell**, p.490.
24. **Campbell**, pp.490-491.
25. **Campbell**, p.494.
26. Castel, 'The Extraterritorial Application of Canadian and foreign laws ...' in **Eighth International Trade Law Seminar**, Canberra, 1981, pp.127-129.
27. **Evidence**, 26 July 1983, p.110.
28. **Evidence**, 26 July 1983, p.188.
29. See Attachment 'E' to the Attorney-General's Department's Submission, in **Evidence**, 25 July 1983, pp.S58ff.

## CHAPTER 6

## POSSIBLE WAYS TO REDUCE THE ADVERSE IMPACT OF UNITED STATES EXTRATERRITORIAL LAWS

### 1. Introduction

6.1 As noted earlier particular concern has been expressed in recent years, in Australia and elsewhere, about the extraterritorial application of United States anti-trust laws and the application and possible renewal of the US Export Administration Act.

6.2 In his submission, Mr Flint summarised the possible responses by states to the potential threat of the extraterritorial enforcement of foreign laws. He notes that such responses may include:

(a) diplomatic protest;
(b) amicus curiae brief to the court claiming jurisdiction;
(c) an international treaty providing machinery to inform and consult;
(d) legislative barriers to the production of documents, the giving of evidence and the enforcement of extraterritorial judgments;
(e) 'claw back' legislation to permit the recovery of all or part of extraterritorial judgments paid by Australian companies;
(f) legislation authorising the giving of directions to defy US Government orders concerning trade.[1]

Later in this Chapter, the Committee assesses each of these response options, including options (e) and (f) which have been implemented in UK law and are being considered by Australian authorities.

6.3 Another, supplementary, approach is for Australian business to press its concerns among its American counterparts—which may have some common interests—and thereby seek legislative changes within the US.

6.4 Mr Flint points out that Australia has available all of these defences, except (f). He believes that consideration should be given to vesting such a power in a Minister of the Crown and suggested that the legislative grant of such a power could be supported by a number of constitutional powers—interstate and overseas trade and commerce, corporations, external affairs, etc. A precedent exists in Section 1 of the UK **Protection of Trading Interests Act 1980**, and parallel state legislation could be enacted to support the various legislative remedies.[2]

6.5 Mr Flint emphasised that the decision to submit to US extraterritorial laws involves an abdication of sovereignty and that, while that decision may be made for political reasons, it is important that Australia have available the legal weapons to reject submission if she so wishes.[3]

### 2. Possible Changes to United States Antitrust Laws

6.6 Numerous witnesses referred to the extent to which antitrust laws are effectively entrenched in the US business ethic and in its legal system. For example, Professor Ryan said:

> There is no possibility, I would have thought, of a change of the domestic legislation in the United States to remove this type of action (treble damage suits) and therefore the question of countervailing measures in Australia obviously does need consideration.[4]

6.7 For reasons explained below, however, the Committee concludes that there is a longer term possibility that the US Administration may become sufficiently concerned by international criticism of, and reactions to, its extraterritorial laws that it may



eventually moderate their application. The Committee therefore encourages the sorts of diplomatic representations referred to in the Foreign Affairs' submission:

> Representations have also been made to members of the United States Congress urging them to take account of the interests of foreign governments in the context of US laws having extra-territorial effect. Representations drawing attention to Australian concerns arising from the review of the Export Administration Act (HR Bill 3231) is a case in point.[5]

6.8 As noted elsewhere in this Chapter, in the light of the foreign blocking legislation and the several bilateral consultative agreements, US officials may be more critical than in the past about the need to review the extraterritorial application of US laws.

6.9 In August 1981, the annual meeting of the American Bar Association passed a resolution recommending to the President and Congress:

- 'that any independent federal regulatory agency shall take a law enforcement or regulatory action which the President considers involves important potential conflicts of law and policy between the United States and foreign nations:
  - (a) involving non-national individuals or enterprises, including foreign subsidiaries of United States parent enterprises, located outside of the United States, or
  - (b) involving the issue of subpoenas or investigative requests for service outside the United States (or seeking information located outside of) only after notifying and allowing a period of two weeks for consultations with the United States Department of State or whichever other agency the President considers appropriate, except in unusual circumstances;
- 'that in the light of those consultations, when the President determines it to be appropriate, Foreign Governments involved will be given an opportunity to consult with the United States Government officials during a two week period to allow the views of those Governments to be taken into account before the law enforcement or regulatory action is taken;
- 'that each agency should nominate an official to consult in the preparation of Presidential guidelines about actions which require notification and consultation and to establish and operate internal procedures to ensure that the appropriate notification is given;
- '.... that a bi-partisan commission consisting of twenty members including Senators, Members of the House of Representatives, members of the executive branch and members of the private sector should be appointed to look into the internal application of United States antitrust laws. The Commission should report in eighteen months time, and among other aspects, should examine:
  - 'the application of the United States antitrust laws in foreign commerce;
  - 'the effect of the application of the United States antitrust laws on United States relations with other countries;
  - 'the jurisdiction and scope of the application of the United States antitrust laws to foreign conduct and foreign parties; and
  - 'the appropriate mechanisms by which the courts and antitrust enforcement agencies may be informed of and may take into account, the foreign relations implications of antitrust enforcement actions.'[6]

6.10 Under President Carter, a Bill (S.1010) was introduced in the US Senate in April 1979 for the establishment of a Commission to examine the international application of US antitrust laws. The Bill passed through the Senate on 30 September 1980; but it was not sent to the House and lapsed with the end of the 96th Congress.

6.11 Two new Bills, S. 432 and Hs. 2454, were subsequently introduced in the 97th Congress, modelled along the same lines as the previous Bill. The establishment of the proposed Commission was prompted as much by a concern for the impact of the extraterritorial application of laws on US trade as by a concern for their effects on US foreign relations. The legislation was referred to the House of Representatives Judiciary and Foreign Affairs Committees. If enacted, it would result in the appointment of a Commission which would be required to report after twelve months on the internal implications of the application of US antitrust laws.[7]

6.12 The two bills would establish wide terms of reference for the proposed Commission to examine the impact of the antitrust laws on the ability of United States enterprises to compete effectively in overseas markets, and to examine how these laws inter-relate with those of other nations. The Australian Industries Development Association (AIDA), which within the United States has actively supported the establishment of the Commission, believes that, whether or not the Commission is established to examine antitrust exclusively, the Commission, by the very nature of its work, would be required to look to areas other than where US laws have an extraterritorial impact.[8]

6.13 However, no further hearings on the Bill have been held, and apparently no further action has been taken in the current Congress towards setting up the proposed Commission.

6.14 The Committee hopes that there will be a wide-ranging and fruitful examination of all the issues involved in the extraterritorial jurisdiction claimed under the US antitrust and other legislation. The Committee also hopes that, in the course of such an investigation, the views of foreign governments and their objections to the extraterritorial reach of the laws will be given due weight. The Committee has observed that this view is shared by many Americans with expertise in the field of antitrust law.

6.15 During hearings held on S.432 on 3 December 1981 before the US Senate Committee on the Judiciary, a number of eminent witnesses testified that there was an urgent need for the Congress to examine, not just the antitrust laws, but the whole area of the extraterritoriality of American legislation. The American Bar Association and, at times, representatives of the Justice and State Departments have supported this view. In his opening statement, the Chairman of that Committee, Senator Strom Thurmond, stated that:

> 'There is a growing concern that the application of our antitrust laws has prevented US firms from competing effectively in international markets. The aim of the Commission would be to investigate this perceived problem and to suggest an appropriate response. This bill would place under one authority the examination and discussion of international antitrust issues. It would also provide a signal to the business community here and abroad that we are deeply sensitive to these issues.'[9]

6.16 Further, in a statement before the Committee on the Judiciary, Mr Davis R. Robinson, Legal Adviser, United States Department of State, stressed the adverse effects of the laws on the United States' foreign relations. He told the Committee that S. 432 addressed a part of a problem that had occupied, in his view, a surprising amount of time during his initial four months as the legal adviser.[10]

6.17 In its submission to the Sub-Committee in 1982, the American Chamber of Commerce in Australia made the following statement:

> 'The American Chamber of Commerce in Australia, together with the overwhelming majority of spokesmen for American business abroad, strongly opposes the extraterritorial reach of United States domestic laws. The Chamber advocates that such laws—and particularly antitrust legislation—end at US frontiers.
>
> 'At a meeting in Jakarta in October last year, the Asia-Pacific Council of American Chambers of Commerce (APCAC), which is an umbrella organization embracing some 12 AmChams in the region including AmCham Australia, called for a Presidential task force to review and rewrite all US antitrust legislation as it applies to the competitiveness of American business abroad.
>
> 'In urging urgent legislative action in this regard, the Chamber has not hesitated to point out that such legislation is frequently offensive to host governments and disadvantages American companies in an intensely competitive international marketplace.'[11]

6.18 The statements quoted above demonstrate that the problems posed by the extraterritorial reach of US laws are also of concern to Americans, both inside and outside the Government.



6.19 While moves to establish the proposed Study Commission on the antitrust laws appear to have lapsed, it was announced in early April 1983 that President Reagan, in a move to improve the United States' competitiveness in world trade, had placed before Congress for comment a four-point 'package', including a proposal to abolish triple damage awards in certain private antitrust cases (**The Weekend Australian**, 2-3 April 1983, p.17). The Republican Party Platform on which President Reagan stood in 1980 provides that, over time, US law should be modified to ease the international controversy over the extraterritorial application of US laws[12]. Congressional attitudes however seem less favourably disposed to modifying US law (see further paragraphs 1.46 and 6.13).

### 3. Private Enterprise Efforts Towards Resolving the Issues

6.20 The Committee believes that, in addition to direct high level government-to-government contacts, continuing efforts should be made to publicise Australia's objections to the extraterritorial reach of the United States laws as widely as possible. As the American Chamber of Commerce in Australia pointed out in its evidence to the Sub-Committee, Australian political leaders and diplomats are in a good position to do this when overseas.[13]

6.21 The Committee suggests that this is something Australian businessmen with contacts in the United States should also be attempting to do in their own interests, as has the Australian Industries Development Association (AIDA).

6.22 The Committee notes that AIDA has declared its intention to work towards the passing in Congress of the relevant legislation which will establish a Presidential Commission, to review all areas of commercial law. In conjunction with similar organisations in other countries, AIDA intends to work towards ensuring that a persuasive case is made to the Commission, so that it can fully appreciate the problems which arise for Australian companies and for international trade and commerce in general.[14]

6.23 The Committee recommends that Australian businessmen and their Assocations continue and strengthen their efforts to seek changes in US attitudes.

### 4. Multilateral Efforts Towards Resolving the Issues

6.24 Given that regulation of US foreign trade and trading companies can effect a significant part of world trade, and given also the willingness of the US Government, as illustrated by the Soviet gas pipeline issue in 1982, to use its laws extraterritorially to achieve a foreign policy goal was considered more important than good US relations with its allies, a long term resolution to extraterritoriality conflicts may be possible only through an internationally acceptable set of guidelines limiting the unrestrained extraterritorial enforcement of national laws. Multilateral regulation is also needed for transnational enterprises beyond the control of any one state.[15]

6.25 The following excerpt from the Foreign Affairs Department's submission outlines Australia's participation in multilateral efforts to formulate acceptable trading law guidelines:

> In the multilateral context Australia has actively participated in discussions concerning the extra-territorial impact of US laws in the OECD and UNCTAD. The OECD Committee of Experts on Restrictive Business Practices, for instance, is concerned with the competition policies of OECD countries, their operations domestically and with respect to other members, and the coordination of those policies as regards international restrictive business practices, particularly those affecting international trade. Most recently, the Committee has commenced a study of the possibility of the development of an international framework for the resolution of conflicts between competition and trade policies.

Within UNCTAD, the UN Conference on Restrictive Practices was convened by the UN General Assembly in 1978, and met in 1979 and 1980. An Australian delegation attended both meetings and participated in the drafting of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices which were adopted unanimously by the UN General Assembly in 1980. Australia supports the Principles and has since been actively involved in the work of the UNCTAD Intergovernmental Group of Experts on Restrictive Business Practices set up to provide institutional machinery for the Set of Principles and Rules.[16]

6.26 Assuming the problem of jurisdictional conflicts arising from the extraterritorial application of state laws is not likely to disappear, the Committee believes that international agreement on the recognition and enforcement of foreign judgments in the field of economic law must be achieved. This subject was discussed, for example, at the Conference of Commonwealth Law Ministers at Barbados in 1980, in the context of a proposed Commonwealth scheme for the recognition and enforcement of foreign judgments.

6.27 The resolution of jurisdictional conflicts might however, be more effectively achieved through wider bodies such as OECD and UNCTAD. As noted above, Australia has participated in such fora as the OECD Restrictive Business Practices Committee, partly as an attempt to persuade the United States to give more consideration to the interests of other countries when applying its antitrust laws extraterritorially.[17]

6.28 The Committee recommends that the appropriate Commonwealth Departments give high priority to ensuring active Australian participation in international attempts, such as those within the OECD and UNCTAD, to reach broadly acceptable arrangements to avoid or resolve conflicts in the application of national trading laws. In due course consideration should be given to elevating consideration of the issue of extraterritoriality within the OECD to ministerial level.

### 5. Assessment of Options Already Tried

6.29 Paragraph 6.2 of this Chapter listed options available to Australia for responding to threats from extraterritorial enforcement of foreign trading laws. Options (a) to (d) comprised responses in large part already attempted. The Committee wishes to assess their effectiveness before examining the other two—untried—options of further 'blocking' legislation.

#### (a) Diplomatic Protests

6.30 Australia has, on numerous occasions since the extraterritoriality problem became an issue of concern to the Australian Government, made representations to the US Administration or Congress:

(a) urging official intervention in treble damage cases to advise the court of foreign government interests;

(b) explaining its objections to the extraterritorial application of US laws and how they can adversely interfere with Australian business;

(c) urging review of US extraterritorial laws.[18]

6.31 The US response to these representations unfortunately seems often to have been inadequate: not only have US legislative reviews been unproductive to date but no reply at all has been received to the important Australian diplomatic note set out in Appendix VI. Moreover, the US Government discontinued any practice of advising courts of foreign governmental interests in private antitrust suits.[19]



6.32 It appears to the Committee, therefore, that while diplomatic efforts must continue they are unlikely by themselves to result in substantial changes in US attitudes and laws.

#### (b) Amicus Curiae Briefs

6.33 These briefs have been prepared largely by US lawyers acting for the Australian Government and have now been submitted to US courts in both the Westinghouse and shipping cases.[20] While in each case the brief argued that US courts had no jurisdiction or should not exercise jurisdiction, such argument was not accepted by the courts In the Westinghouse case the brief apparently had no effect at all and the parties eventually were prepared to settle out of court rather than risk adverse judgments. It is too early to speculate what judicial notice will be taken of the Australian Government brief in the shipping case.

6.34 Given the reluctance of some US judges, notably Justice Marshall,[21] to attempt to balance foreign national interests against US interests, it seems unlikely to the Committee that amicus curiae briefs can be truly effective. However, insofar as they formally present Australia's concerns they—like diplomatic representations—should be continued.

6.35 The Committee recommends that diplomatic representations be pursued and intervention in the US judicial system, such as the filing of amicus curiae briefs, be undertaken where appropriate.

#### (c) International Treaty for Consultation

6.36 As the Committee noted in Section 4 of this Chapter, multilateral arrangements to provide for avoidance or resolution of jurisdictional conflicts will become necessary assuming that unilateral national controls of foreign trade continue to extend and to clash with one another. However, as was also noted, the progress towards effective multilateral arrangements is very slow and has to date been limited to attempted definitions of national jurisdiction, which have not addressed conflict situations or resolutions of them. While international bodies have produced draft codes of business practice and trading policy, emphasising the jurisdictional competence of the host state, the problem of conflicting jurisdictions has yet to be dealt with fully. Thus the **Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices**, approved by the United Nations in 1980, establishes as one of its general principles collaboration between governments 'at bilateral and multilateral levels' to facilitate the control of restrictive business practices. The Committee hopes that the multilateral standards will assist not only bilateral accommodations but the preparedness of countries such as the US with controversial trading laws to modify their own laws accordingly.

6.37 The Committee concludes that while multilateral efforts are unlikely to be successful in the short term they are likely to be the most effective long term solution and should be pursued.

#### (d) Legislative Barriers to Compliance with Foreign Court Orders

6.38 Two Australian laws—the **Foreign Proceedings (Prohibition of Certain Evidence) Act 1976** and the **Foreign Antitrust Judgments (Restriction of Enforcement) Act 1979**—were enacted as legislative barriers, to block foreign court orders for discovery, taking of evidence as well as final judgments. These Acts, enacted in response initially to the Westinghouse proceedings, are discussed in Chapter 3, paragraphs 3.13 to 3.18.

6.39 While most witnesses appeared to support this legislation, Mr Maher criticised the 1976 Act on numerous grounds, notably that an Australian court would be unlikely to accede to the request or order of a foreign court seen as exceeding its jurisdiction. He suggested, in effect, that neither the 1976 nor 1979 Acts were necessary or desirable responses. Concerning the 1979 Act, by which the recognition and enforcement of foreign antitrust judgments can be blocked by the Attorney-General, Mr Maher argued that—

> it is inconceivable that any attempt by Westinghouse to issue proceedings in Australia to enforce any specific monetary default judgment would not have resulted in an intervention by the Commonwealth Attorney-General to contend that Australian government policy required any such enforcement action to fail. The case law strongly indicates that an Australian court would defer to the foreign policies of the executive government.
>
> The Australian-based companies defending any such action would have been entitled to dispute, according to Australian conflicts of laws rules and international law, the jurisdiction asserted by the United States District Court.
>
> To the extent that any such judgement consisted of a multiple damage component, such component would, in all likelihood, be characterised as penal and there is abundant authority to the effect that Australian courts will not enforce foreign penal judgments.[22]

6.40 Professor Ryan agreed in principle with Mr Maher:

> "I am not completely convinced it was necessary in legal terms because I think that the Australian courts might well have ruled in any case that they would not give effect to a foreign judgment which was of a penal character and I think that it could well be argued that it was of a penal character. But since there is an element of doubt about the matter I think it was appropriate that legislation should be enacted removing any possibility of dispute on that particular point."[23]

6.41 The Committee does not wish to take issue with Mr Maher's careful concern for the Australian common law and the prospect that it alone could have protected the Australian defendants. Rather, the Committee considers that there were—and are—broader issues of national importance which justify the 1976 and 1979 Acts in particular:

(a) the need to deter expensive litigation based on foreign laws regarded by the Government as extending beyond foreign competence to Australia or affecting nationals over which Australia has undoubted jurisdiction and responsiblity;
(b) the need to avoid or reduce the lengthy and expensive involvement of Australian business in such unfounded litigation including its having to rely on common law defences;
(c) the need to overcome any risk that an Australian national could be financially crippled by a treble damages judgment; and
(d) the need to preserve Australia's sovereignty and national interests, including the Government's freedom to pursue its trading policies to the benefit of Australian exporters.

The Committee notes, for example, the evidence of several witnesses that it was not until after the enactment of the 1979 Act that the Westinghouse case was settled[24]. The Committee is confident that the Act will continue as a deterrent to unfounded litigation based on extraterritorial laws.

6.42 The Committee concludes that the **Foreign Proceedings (Prohibition of Certain Evidence) Act 1976** and the **Foreign Antitrust Judgments (Restriction of Enforcement) Act 1979** serve a useful purpose as part of a range of legal deterrents against unacceptable attempts to apply US laws in Australia.

6.43 Nevertheless, the Committee is mindful that, e.g. a US court judgment might be enforced in the United States against an Australian company with some "presence" there (for example if it were a subsidiary of a US corporation). It is in this type of context that further Australian legislation, to recover back damages paid pursuant to a



foreign judgement, might be desirable. Other problems not covered by existing Australian legislation are the risk of a foreign judgment in other than an antitrust case being enforced in Australia (beyond the scope of the 1979 Act) and the application in Australia of foreign executive orders such as those under the Export Administration Act.

6.44 After its assessment in this Section of the limitations inherent in all Australian response options already attempted, the Committee concludes that existing responses do not adequately resolve Australia's concerns with US extraterritorial laws.

### 6. 'Recovery Back' or 'Claw Back' Legislation

6.45 According to a recent news release by the Attorney-General, Senator Evans:

> the new Australian Government would continue the approach of the previous government in this area, in seeking to protect its trading laws and policies . . . Work on legislation of this kind had been commenced by the previous Government and was now the subject of inter-departmental discussions . . . Consideration was being given to including the following matters in the legislation:
>
> - the recovery back of damages which an Australian defendant is forced to pay under a foreign antitrust judgement that is not enforceable in Australia;
> - the recovery back of costs incurred in defending private antitrust suits where multiple damages may be awarded and where the only jurisdictional basis for the suit is the alleged adverse effect upon the foreign commerce of another State;
> - agreement with other countries for the reciprocal enforcement of recovery back judgements;
> - provisions that would enable the Attorney-General to prohibit Australian citizens or businesses from complying in Australia with certain foreign actions, decisions or judgements.[25]

6.46 'Claw back' legislation works as follows. If an Australian company is held liable to a US firm for violating US laws and is ordered to pay damages, the judgment is then enforced against assets of the Australian company located within the United States. Under a 'claw back' statute, the Australian company could recoup all or part of those damages against Australian assets of the American plaintiff. For example, the intended effect of the 1981 Bill[26] was to amend the **Foreign Antitrust Judgments (Restriction of Enforcement) Act** so that where an order has been made under that Act prohibiting the enforcement of a foreign antitrust judgment, an Australian defendant may take proceedings in Australia to recover from the foreign plaintiff any amount which has been recovered under that foreign antitrust judgment, including the non-punitive first third of treble damages (not so with the UK Act). As discussed in Chapter 5, the United Kingdom enacted legislation of similar purpose in March 1980—the United Kingdom's **Protection of Trading Interests Act.**

6.47 One view is that legislation such as the Foreign Antitrust Judgments (Restriction of Enforcement) Amendment Bill, introduced in the Senate in 1981 and referred to in Chapter 3, might be the best way for countries to make clear to the United States their attitude to the excessive reach of United States antitrust laws.

6.48 It has been suggested, also, that in the absence of a radically different approach by the US courts, it would be necessary for legislation to be enacted in the United States to overcome the problems arising from the right to bring such an action. The enactment of foreign recovery-back legislation might be one way to induce legislative amendment of the US laws[27]. Whether such amendments soften or harden the traditional US approach might, however, be uncertain.

6.49 The decision not to proceed with the 1981 Bill was made following the successful negotiation of the Agreement under which the parties undertook to refrain from automatic resort to blocking legislation (see Article 4). The Attorney-General of the United

States, Mr French Smith, on the occasion of the signing of the Agreement, said that agreement to limit use of Australia's blocking laws was 'particularly helpful'.[28]

6.50 Nevertheless, Australia might still be faced despite the Agreement with the difficulties arising from another Westinghouse-type private treble damages action. Therefore, there are grounds for proposing that the Australian Government should proceed to enact a 'claw back' bill, and to have that law in place beforehand to help deter any such action. As noted previously, the conclusion of the Australian-United States' Agreement Relating to Cooperation on Antitrust Matters did not allay Australia's concerns about the problem of private treble damages suits.[29]

6.51 The Department of Trade's evidence was that the US Administration would not be surprised by any recovery-back legislation:

> 'There was no doubt also that the decision not to proceed with the 1981 "recovery-back" Bill through the Parliament was also partly a reflection of our spirit of co-operation in relation to not wishing to appear to be acting so dramatically opposite to the Agreement by introducing a Bill shortly after the signing of the Agreement. But the Americans, I think, understood then and understand today that the recovery back Bill is an important part of what you would call, I suppose, our defensive mechanism.'[30]

6.52 One apparent reason favouring enactment of 'claw back' legislation is that the 1976 and 1979 'blocking' Acts, limited in their scope to Australia, were not considered adequate to protect the Australian defendants in the Westinghouse private antitrust proceedings. Therefore, the US courts could still reach assets of the Australian companies within the United States. Court orders could also affect future transactions within the United States, a major market for uranium. Also, with default judgments entered against the Australian firms, the provisions blocking the gathering of evidence in Australia were of little value: given that Australian defendants would not risk recognising court jurisdiction by making appearances, default judgments could be obtained against them without any evidence being led by the plaintiff.

6.53 However, the Committee notes some arguments against the introduction of 'claw back' legislation:

(a) The US plaintiff might not have sufficient assets in Australia available for recovery or, if it did, such recovery could be disruptive to Australian business in general.

(b) A claw back action by an Australian firm would be time consuming and would not deal with the underlying commercial realities: trade with the United States would still be hampered.

(c) The United States might enact retaliatory legislation of its own creating a chess game environment of counterposed legislation (one could envision double or triple claw back Acts).[31]

6.54 The Committee notes, however, that the United States Government has not proceeded or announced any intention to enact its own retaliatory legislation against the claw back legislation or proposed legislation of the UK, Australia and other nations. On the contrary, the Committee considers that the build up of 'blocking' legislation among countries otherwise friendly to the United States has tended to encourage a greater willingness to compromise and, indeed, has fuelled critical debate within the United States over the extraterritorial reach of its laws. As for the other counter-argument (a), the Committee considers the disruptive risk to Australian companies that could be financially ruined by antitrust treble damages awards as worse than any disruption to US business in Australia.

6.55 The Committee also notes that the Australian Government Departments most closely associated with the extraterritoriality questions—Attorney-General's, Foreign



Affairs and Trade[32]—regard the introduction and passage of Australian claw back legislation as a legitimate response which can be explained to the US authorities:

(a) CHAIRMAN—your judgment would be that through the prowess of our diplomatic channels we would be able to sell such legislation in a proper manner to Washington?
Mr Nicholson [Foreign Affairs Department]—I think we could explain it in a way that it would understand, yes.

(b) Senator HILL—Given that the clawback Bill has been around here for some considerable time and that we have in the meantime entered into this Agreement, do you believe the Americans are under the impression that the clawback Bill will not proceed pending that in practice the Agreement is found to work satisfactorily?
Mr Nicholson—No. I do not think they are under any apprehension of that sort.
Senator HILL—They would not believe that we were reneging on any form of deal if the new Government went ahead at this stage with the clawback Bill?
Mr Nicholson—No, I do not think that. They would regard the putting in place of such defensive measures as being contrary to the Agreement that we have entered into with them, but which does not cover the field completely and which deals with it in a different way. But I think it is important to explain, to remind them, to make clear that we have our interests to protect and these are measures that can be taken, can be put in place, to protect them, and that as a sovereign country it is reasonable for us to do that . . .
Senator HILL—So from Australia's point of view that precedent would tend to indicate that there would be no serious foreign relation consequences in Australia proceeding with its clawback Bill?
Mr Nicholson—I think that is a fair comment.

(c) CHAIRMAN—Do you see an enactment of legislation similar to the 1981 Bill . . . as an advantage or disadvantage? Do you think there is a possibility that it could react against Australia or do you see it as a part of an overall weaponry that a country should have?
Mr Kennedy [Attorney-General's Department]—I think that it is always useful for a country to have what I might term a complete arsenal of legal defences available to it. If it thinks those legal defences are in its national interests, I think—I am speaking personally—that there is a lot to be said for enacting that legislation at a time when there is no immediate crisis. It gives the Parliament a chance to consider it with due deliberation. It means that you do not heighten any crisis. You also then have ... legislation which can be used, irrespective of whether Parliament is sitting at the time the crisis arrives.

## ENDNOTES

1. **Evidence**, 9 September 1982, submission pp.925-926.
2. **Evidence**, p.926.
3. **Evidence**, pp.927-8.
4. **Evidence**, 26 July 1983, p.106.
5. **Evidence**, 25 July 1983, p.S159.
6. Press release by the then Attorney-General, Senator Durack, 17 August 1981.
7. See AIDA **Bulletin** No. 336, December 1981, p.4.
8. AIDA **Bulletin** p.4.
9. **Hearing** . . . on S.432 . . ., U.S. Government Printing Office, Washington D.C., 1982, p.1.
10. **Hearing** . . . **on s.432**, p.37.
11. **Evidence**, 2 June 1982 (Submission No. 12), pp.340-1.
12. **Evidence**, 24 May 1982, (Professor Albinski) p.48.
13. **Evidence**, 2 June 1982, p.431.

14. AIDA Bulletin, No. 336, December 1981, p.4.
15. G. Triggs in **Fifth Annual International Trade Law Seminar**, 1978, p.100.
16. **Evidence**, 26 July 1983, pp.S159-160.
17. **Evidence**, 26 July 1983, p.192 (Attorney-Generals), p.148 (Trade).
18. ***Evidence**, 25 July 1983*, Submission (Foreign Affairs), pp.S159-60; many of the Australian Government's arguments are set out in the diplomatic note set out in Appendix VI. The Australian Government also intervened with amicus curiae briefs in the Westinghouse and conference shipping cases.
19. In a Note in 1978 to foreign governments, (see Evidence, 9 September 1982—Attorney-General's—p.874) the US Administration announced that henceforth it would not be intervening as amicus curiae in private suits against foreign defendants (it refused Australia's requests to so intervene in the Westinghouse and the 1981 Alcoa case); reliance instead on US courts to take account of foreign interests has not been well-placed at least from the foreign perspective—see Section 5 of Chapter 2.
20. For an example of an Australian *amicus curiae* brief, see Attachment "F" to the Attorney-General's Department brief (**Evidence**, 25 July 1983, pp.S71ff).
21. See paragraph 53 of Chapter 2.
22. **Evidence**, 25 July 1983, submission No. 2, *pp.S131-2*.
23. **Evidence**, 26 July 1983, pp.104-105.
24. For example, see **Evidence**, 26 July 1983 (Attorney-General's) pp.177-8.
25. Press statement dated 27 June 1983, Washington D.C. (in Attachment B to Attorney-General's Submission).
26. See generally Second Reading Speech on the 1981 Bill—Senate **Hansard** 11 June 1981, p.3067 ff.
27. See **Eighth International Trade Law Seminar**, Canberra, 1981, p.178.
28. **Evidence**, 9 September 1982 (Attorney-General's) p.899.
29. See generally Chapter 4, especially Sections 3, 5 and 6; in particular see **Evidence**, 9 September 1982 (p.895) (Attorney-General's speech at signature ceremony for the Agreement).
30. **Evidence**, 26 July 1983, p.133; see also paragraph 52 of this Chapter.
31. See T.W. Dunfie, 'Uranium Shows the Need for a Trade Law Treaty' in **Sydney Morning Herald**, 23 March 1981.
32. **Evidence**, 26 July 1983, pp.81 and 83. (Foreign Affairs), pp.150-153 (Attorney-General's) and p.133 (Trade).



## CHAPTER 7

## CONCLUSIONS: FURTHER AUSTRALIAN LEGISLATIVE RESPONSES

### 1. Introduction

The conclusion reached by the Committee in Chapter 6 is that the Australian Government should introduce further legislation to counter the effects of unacceptable assertions of foreign jurisdiction over Australian nationals or those doing business in Australia, so as to allow recovery back of damages paid pursuant to a foreign judgement and to block foreign executive orders which would unjustifiably deprive Australian business of import or re-export opportunities.

7.2 Such legislation would be additional to the **Foreign Proceedings (Prohibition of Certain Evidence) Act 1976**, by which the Attorney-General may prohibit the production of documents and the giving of evidence for a foreign tribunal, and the **Foreign Antitrust Judgments (Restriction of Enforcement) Act 1979** whereby the Attorney-General may declare that certain foreign judgments are not to be recognised or enforced in Australia or that a reduced amount only of damages may be paid on a foreign judgement.

7.3 Other States—Denmark, Belgium, Finland, France, the Federal Republic of Germany, the Netherlands, New Zealand, Norway, the Philippines, South Africa, Sweden and Switzerland—have also passed similar legislation, often in response to specific matters such as alleged shipping conferences. The United Kingdom has taken, and Canada proposed to take, further and more comprehensive legislative action in response not only to the execution of foreign antitrust judgments, but also to the assertion of jurisdiction over foreign nationals in circumstances of an essentially political or policy nature such as those, for example, made under the United States **Export Administration Act**.

### 2. U.K. Protection of Trading Interests Act

7.4 A detailed examination of the United Kingdom **Protection of Trading Interests Act 1980**, and comparison with Australian legislation, are warranted to consider whether it provides an appropriate precedent for further Australian legislation. (Text of the Act appears at Appendix V). Its salient provisions are concerned with four matters: overseas measures affecting United Kingdom trading interests, documents and information required by overseas courts and authorities, the enforcement of certain overseas judgments, and the recovery back of overseas judgments for multiple damages.

#### (a) Overseas Measures Affecting United Kingdom Trading Interests

7.5 A provision unique to the United Kingdom legislation, which has as yet no complete Australian counterpart, provides:

'1.—(1) If it appears to the Secretary of State—

(a) that measures have been or are proposed to be taken by or under the law of any overseas country for regulating or controlling international trade; and

(b) that those measures, in so far as they apply or would apply to things done or to be done outside the territorial jurisdiction of that country by persons carrying on business in the United Kingdom, are damaging or threaten to damage the trading interests of the United Kingdom, *the Secretary of State may by order direct that this section shall* apply to those measures either generally or in their application to such cases as may be specified in the order.

(2) The Secretary of State may by order make provision for requiring, or enabling the Secretary of State to require, a person in the United Kingdom who carries on business there to give notice to the Secretary of State of any requirement or prohibition imposed or threatened to be imposed on that person pursuant to any measures in so far as this section applies to them by virtue of an order under subsection (1) above.

(3) The Secretary of State may give to any person in the United Kingdom who carries on business there such directions for prohibiting compliance with any such requirement or prohibition as aforesaid as he considers appropriate for avoiding damage to the trading interests of the United Kingdom.'

7.6 The Secretary's powers under the section are wide and could extend, for example, to blocking a US trade embargo under the Export Administration Act. They cover measures for the control of international trade including business of any description. *The section is notable in that it avoids reference to jurisdiction and refers simply to* measures damaging the trading interests of the United Kingdom. The result is that although there may be no technical violation of British jurisdiction, action can be taken wherever a measure prejudices British trading interests. This is a particularly important change in emphasis from, for example, earlier British and Australian legislation. It is a preferred approach because the debate as to traditional bases of jurisdiction has proved sterile and does not, in any event, provide a solution for future unforeseen conflicts of jurisdiction. For the Secretary of State simply to declare that British established trading interests are threatened is much more pertinent to resolving such disputes on a balance of interests approach as taken in the Timberlane and Mannington Mills cases.

7.7 It should also be noticed that the legislation relies upon either a territorial or nationality basis of jurisdiction as orders are limited to persons in the United Kingdom who carry on business there. No attempt is made to apply the order requiring notice to non-nationals doing business elsewhere. Section 3(3) of the United Kingdom Act provides that non-nationals are not bound by an order prohibiting compliance with foreign measures in relation to 'anything done or omitted outside the United Kingdom'. As the legislation does not operate extraterritorially against non-nationals it conforms with the traditional jurisdictional principles of international law.

7.8 The legislation may, nonetheless, apply to the extraterritorial acts of British nationals. This is an acceptable assertion of jurisdictional competence over nationals wherever they may be. However, as the British Government argued in a diplomatic note defending this legislation, the Secretary of State has a discretion as to when to make an order and he would be expected to take into account all interests including those of international comity. For reasons of policy, it may sometimes be wise to allow the State which has territorial jurisdiction over a non-national to apply its jurisdiction even where the State of nationality has a concurrent jurisdiction.

17.9 Where, however, other reasons of policy exist, such as damage to trading interests, the State of nationality may prefer, instead, to prohibit its nationals from complying with foreign orders. The resulting clash of jurisdictions will normally be resolved through implementation of the doctrine of sovereign compulsion. United States courts have applied this doctrine by refraining from enforcing orders against a foreign national within their territorial jurisdiction who has been required to act in an offending manner by the State of which he is a national. Were the Australian Government, for example, to prohibit compliance with orders under the Export Administration Act by Australian nationals doing business in the United States the United States courts may accept a sovereign compulsion defence and decline enforcement of an order.

7.10 Such United States case law as exists on this issue indicates that the defence will *be applied where the national is genuinely bound or required to act*, as distinct from instances in which he is merely authorised or encouraged to act. It is not possible, however, to state with certainty that United States courts will accept the defence in all



cases, particularly where political or economic policies affecting vital State interests are involved. For this reason, a prohibition order against a United Kingdom national doing business in the United States may expose that national to sanctions in two jurisdictions. *Were Australia to enact similar legislation which could extend to prohibiting* compliance by Australian nationals doing business in the United States with measures considered prejudicial to Australian trading interests, this (small) risk of double jeopardy could perhaps be addressed by legislative provision allowing variation or rescission of mandatory prohibition orders.

**(b) Documents and Information Required by Foreign Courts and Authorities**

7.11 Under Section 2 of the UK Act the Secretary of State may direct persons within the United Kingdom not to comply with requirements by foreign Courts, tribunals or authorities to produce commercial documents or information located outside the territorial jurisdiction of such authorities. Section 2 applies if a foreign demand or request is prejudicial to British sovereignty. As with Section 1, it does not depend upon a prior finding of an invalid assertion of jurisdiction and is to be preferred for the same reasons as indicated above. The power may also be exercised to block 'fishing expeditions' under Section 2(3). Retention in Section 2 of the criterion of British sovereignty is necessary as requests for evidence are unlikely to prejudice trading interests within the terms of Section 1 as measures of a regulatory nature are likely to do.

7.12 The Australian **Foreign Proceedings (Prohibition of Certain Evidence) Act 1976** *is similar in effect to Section 2. Restrictions will be imposed where the Attorney-*General considers that the foreign tribunal is acting inconsistently with international law or comity, or where restrictions are necessary in the national interest. The criterion of national interest gives the Attorney-General the power to consider a wide range of factors of a policy nature which are not embraced in the juristic concept of jurisdiction. Presumably he would be able to impose restrictions whenever he considered that requests for information or documents constituted an unacceptable 'fishing' expedition. As the respective powers under the United Kingdom and Australian legislation are comparable with respect to the prohibition of evidence, no further Australian legislation on this issue is warranted.

**(c) Restriction of Enforcement of Certain Foreign Judgments**

7.13 Section 5 of the United Kingdom legislation prohibits the registration under the **Administration of Justice Act 1920** or the **Foreign Judgments (Reciprocal Enforcement) Act 1933** of three kinds of judgments. The first such judgment is one for multiple damages, an amount which is defined as one achieved by multiplying the sum assessed as compensation. Such awards are seen in British law as penal in character and therefore unenforceable. The second such judgment is one based on a provision or rule of law which appears to the Secretary of State:

'to be concerned with the prohibition or regulation of agreements, arrangements or practices designed to restrain, distort or restrict competition in the carrying on of business of any description or to be otherwise concerned with the promotion of such competition'.

This criterion reflects the general principle that States are not obliged to enforce the public economic policies of other States.

7.14 The **third** judgment to attract the power of prohibition is a judgment on a claim for contribution in respect of damages awarded in judgments falling within either the first or second categories. During the Parliamentary debate on the legislation, refusal to allow United Kingdom Courts to enforce compensatory elements of multiple damage actions was justified on the ground that private treble damage actions are *per se* objectionable.[1]

17.15 Again, Section 5 does not depend upon any prior finding that the foreign Court did not have the appropriate jurisdiction. Rather, the section was seen by the British Government as a 'clarification of British law'.[2]

7.16 Section 5 is similar in purpose to Australia's **Foreign Antitrust Judgments (Restriction of Enforcement) Act 1979**. The Australian legislation is, by contrast, confined to judgments in antitrust law. The Attorney-General may declare that certain judgments are not to be recognised or enforced, or, where the judgment is for a specified amount of money, he may declare that it shall be reduced. The power arises where a foreign Court gives a judgment under an antitrust law and where

'the Attorney-General is satisfied that-

(i) the Court, in giving that judgment, exercised jurisdiction or powers of a kind or in a manner inconsistent with international law or comity and the recognition or enforcement of the judgment in Australia would or might be detrimental to, or adversely affect, trade or commerce with other countries, the trading operations of a trading or financial corporation formed within the limits of the Commonwealth or any other matter with respect to which the Parliament has power to make laws or to which the executive powers of the Commonwealth relate; or

(ii) it is desirable for the purpose of protecting the national interest in relation to trade or commerce with other countries, the trading operations of trading or financial corporations formed within the limits of the Commonwealth or any other matters with respect to which the Parliament has power to make laws or to which the executive powers of the Commonwealth relate that the judgment should not be recognised or enforceable in whole or in part in Australia'.

7.17 Thus the Attorney-General has the necessary power if he finds that the exercise of jurisdiction is inconsistent with international law or comity and that recognition or enforcement of it would prejudice Australian trade or commerce in certain ways. As noted, the need to establish that the exercise of jurisdiction is invalid is in contrast with the United Kingdom legislation which does not require such a prior finding. When considering future Australian legislation in this area it may be useful to eliminate this restriction on the Attorney-General and to adopt the narrower and more precise technique of the United Kingdom legislation. The reason such a reform is recommended is that in certain cases it may be difficult to show a violation of international law. Further, it seems better on principle to state precisely what aspects of the foreign judgment are objectionable in Australia such as judgments for multiple damages.

7.18 If the Attorney-General does not find a violation of international law under Section 5 he may, nonetheless, prohibit the enforcement of a foreign antitrust judgment in the national interest in relation to trade and commerce. This renders criticism of the earlier restriction less potent as the Attorney-General has a very wide discretion to consider all matters pertaining to the national interest, rather than merely questions of technical law.

### (d) Recovery of Multiple Damage Awards

7.19 The unique and controversial aspect of the United Kingdom legislation is Section 6 which allows the recovery of multiple damage awards by certain 'qualifying defendants'. Such defendants are defined as:

- A citizen of the United Kingdom and Colonies;
- A body corporate incorporated in the United Kingdom or in a territory outside the United Kingdom for whose international relations Her Majesty's Government in the United Kingdom are responsible; or
- A person carrying on business in the United Kingdom.

7.20 It is further necessary that the qualifying defendant has paid the amount of damages either to the party in whose favour the offending judgment is given or to another party who is entitled as against the qualifying defendant to a contribution in respect of the damages.



7.21 The qualifying defendant may recover so much of the multiple damages paid by it:

> 'as exceeds the part attributable to compensation; and that part shall be taken to be such part of the amount as bears to the whole of it the same proportion as the sum assessed by the court that gave the judgment as compensation for the loss or damage sustained by that party bears to the whole of the damages awarded to that party'.

The qualifying defendant, may, in other words, recover the non-compensatory or penal part of any damages paid by him, from the party in whose favour the original judgment was given. It is not necessary that this party is within the jurisdiction of the Court nor is it necessary to show that there has been any violation of British jurisdiction. It should be noted that the right to recovery is a right which may be enforced by the courts and is not subject to ministerial discretion.

7.22 There are two exceptions to the right of recovery, each of which is consistent with international law regarding territorial jurisdiction. The first arises where the qualifying defendant was ordinarily resident in the State where the award was given at the time when the original proceedings were instituted. The second arises where 'the qualifying defendant carried on business in the overseas country and the proceedings in which the judgment was given were concerned with activities exclusively carried on in that country'.

7.23 The United States objected to the second exception for two reasons; first, that the remedy was available to non-British corporations, and secondly, that it was difficult to show that activities were 'exclusively' carried on in a particular State and thus not entitled to the benefit of Section 6[3]. The British Government rejected both arguments on the respective grounds that foreign corporations doing business in the United Kingdom were entitled to protection by British Courts and that in the case of subsidiaries their activities are likely to be within the State of incorporation and for this reason they ought not to have the benefit of recovery provisions.[4]

## 3. Australia-UK Comparison

7.24 Australia does not have any legislative provision such as section 6 of the United Kingdom legislation which permits the recovery back of damages gained in foreign antitrust actions by Australian nationals or persons doing business in Australia. In 1981 a Bill was, however, introduced to amend the **Foreign Antitrust Judgments (Restriction of Enforcement) Act 1979,** but it lapsed at the end of the Thirty-Second Parliament.

7.25 Section 5 of the 1981 Bill provided that a defendant in antitrust proceedings may recover the judgment damages from the plaintiff who has enforced the foreign judgment. Recovery may take place in two instances. The first arises where the Attorney-General has made an order under the Act that the judgment shall not be recognised or enforced in Australia and where the plaintiff recovered an amount pursuant to that judgment in a foreign country. The second instance arises where the defendant may recover from the plaintiff a sum which exceeds or is equal to the specified amount recoverable under an order made under Section 2(d) of this Act where a defendant has paid that amount in execution of a foreign judgment.

7.26 Those who could have claimed under this provision were Australian citizens other than those ordinarily resident in the foreign country in which the judgment was given, companies incorporated in a State or Territory, and the Commonwealth, a State or Territory. The Committee was advised that the bill is an unusually complex and confusing document and a preliminary recommendation is that if it were to be reintroduced, its language and mechanisms should be simplified.

7.27 The bill varied from Section 6 of the United Kingdom legislation in the important respect that it allows recovery of the full amount of the damages without reducing them by an amount which is compensatory rather than penal. Indeed, it is recommended that, to the extent that the United Kingdom limits recovery, it ought not be followed in Australia. This is because to concede the first third of the damages is to prejudice Australia's argument that the exercise of jurisdiction is, in the first instance, contrary to international law. Ungainly though it is, the Australian proposal is to be preferred as no such concession is made.

7.28 The United Kingdom **Protection of Trading Interests Act 1980** is more extensive than the existing Australian legislation in two respects:

(a) It allows the qualifying defendant to recover the non-compensatory part of damages paid by him from the plaintiff in whose favour the original judgment was given. As the Australian Bill would have permitted recovery of the entire amount of damages this proposal is to be preferred to the United Kingdom approach.

(b) The United Kingdom legislation gives the Secretary of State power to prohibit compliance with measures of an overseas country which damage British trading interests. It is this aspect of the British legislation which provides the most useful precedent for future legislative action in Australia to counteract the possible effects of, for example, United States orders under the Export Administration Act 1979 and Regulations.

7.29 The Secretary of State has invoked his powers under Section 1 of the United Kingdom legislation in two instances. The first arose in response to the United States embargo on the export or re-export of equipment containing United States—manufactured components of equipment made outside the United States under United States licences or by overseas subsidiaries of United States companies. In the **Protection of Trading Interests (US Re-Export Control) Order 1982** the Secretary of State directed that Section 1 of the **Protection of Trading Interests Act 1980** should apply to certain measures considered damaging to British trading interests.

7.30 The second instance arose in relation to United States investigations into the collapse of the Laker Skytrain. The Order of 27 June 1983 banned two British airlines, British Airways and British Caledonian, from providing witnesses or documents for the United States Justice Department in its antitrust investigations into allegations that these airlines and certain United States airlines conspired to force Sir Freddie Laker out of business. The Order is based upon a finding that the United States investigations are damaging to United Kingdom trading interests.

7.31 Although Australian interests were only indirectly affected by the application of the United States Export Administration Act and Regulations in the Santos Case, it would be unwise to assume that other and more serious instances will not occur in the future. The United Kingdom **Protection of Trading Interests Act 1980** is an example of the measures that can be taken to protect Australian interests.

## 4. Other Possible Legislative Responses

### (a) Recovery Back of Defendants' Costs

7.32 The Committee is concerned that even in such spurious suits as the **Western Australian Conservation Council** case where the United States Court declined jurisdiction, the legal costs incurred in defending such actions are substantial—at least $300 000 for the defendants in that instance. There are no provisions under the Sherman or Clayton Acts under which a successful defendant can recover its costs. The result is that the vexatious litigant in private treble damage actions risks losing only his own costs.



7.33 For this reason and because Australia does not recognise the foreign jurisdiction in such cases, the Committee believes that the legislation which it has recommended should also enable defendants to recover their legal costs: both when they successfully defend the action; and, as is very frequently the case, when the court exercises jurisdiction and awards penal damages against the defendant. Such legislation might provide that wherever the Attorney-General makes an order under the **Foreign Antitrust Judgments (Restriction of Enforcement) Act 1979** that certain foreign judgments are not to be recognised or enforced in Australia, the defendant shall have a right to recover all legal costs incurred. The provision would operate in much the same way as the recommendation on the recovery of penal damages. It could be supplemented by reciprocity provisions allowing recovery of costs in the jurisdictions of other countries that were party to any reciprocal scheme of the type referred to in (b) below.

### (b) Reciprocal Enforcement of "Recovery Back" Orders

7.34 In Chapter 6 of the Report the Committee referred to a statement by the Attorney-General that consideration was being given to legislation covering *inter alia* agreement with other countries for the reciprocal enforcement of recovery back judgments. For example, Australia and the UK might agree for their respective courts to enforce recovery back judgments of the other's courts where the plaintiff's assets were in one country but not the other. The Committee hopes that such a lengthy and complex task should not be needed as an addition to Australia's existing blocking laws and the possible recovery back legislation. It would be an unfortunate situation for Australia-US relations if Australia considered it had to go to such lengths to block US judgments. The Committee recommends that consideration be given to reciprocal enforcement of recovery back orders only if Australian interests are further threatened or damaged by foreign judgments.

## 5. Conclusions and Recommendations

7.35 The Committee concludes that, because of the limitations in the scope of the Agreement concluded with the United States in 1982 and because of certain subsequent adverse applications of US laws to Australian interests, there is a need, notwithstanding the Agreement, for Australian residents and those doing business in Australia to be protected from the extraterritorial application of those laws.

The Committee recommends that the Attorney-General introduce legislation into the Parliament:

I (a) to prohibit compliance by Australian residents or those doing business in Australia with orders of a foreign country which might damage Australia's trading interests;

(b) to enable the full recovery in Australia of damages paid by Australian residents or by those doing business in Australia pursuant to a foreign judgment which is declared to be unenforceable or not to be recognised under the **Foreign Antitrust Judgments (Restriction of Enforcement) Act 1979**;

(c) to allow for the recovery of defendants' costs, even in unsuccessful defences provided the judgment is unenforceable or not to be recognised pursuant to the **Foreign Antitrust Judgments (Restriction of Enforcement) Act 1979**; and

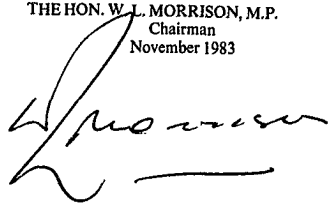
II the Attorney-General in drafting such legislation—

(a) give emphasis to considerations such as the protection of Australian trading interests or national sovereignty; and

(b) avoid dependence upon a prior finding that a foreign country or court has asserted jurisdiction contrary to international law.

7.36 If in future Australian interests are seriously threatened by *foreign judgments*, the Committee recommends that the Australian Government give consideration to entering into agreements with other countries for the enforcement in each other's jurisdiction of recovery back orders.

THE HON. W. L. MORRISON, M.P.
Chairman
November 1983



## Endnotes

1. 973 *Parl. Deb., H.C. (5th SER)* 1548, 1566.
2. A. V. Lowe, 'Blocking Extraterritorial Jurisdiction: British Protection of Trading Interest Act 1980', (1981) 75 A.J.I.L. 257, 276.
3. US Diplomatic Note to United Kingdom, No. 56, at 2-3, 9 November 1979.
4. United Kingdom Diplomatic Note to United States, No. 225, at 2, 27 November 1979.



## DISSENT BY SENATOR R. HILL, SENATOR A. W. R. LEWIS, MR W. P. COLEMAN, M.P., MR R. F. SHIPTON, M.P., AND MR S. A. LUSHER, M.P. TO THE REPORT OF THE JOINT COMMITTEE ON FOREIGN AFFAIRS AND DEFENCE 'AUSTRALIAN/UNITED STATES' RELATIONS: THE EXTRATERRITORIAL APPLICATION OF UNITED STATES LAWS'

We dissent from the recommendation of the majority of the Committee that further legislation in terms as set out in the majority report be now introduced to protect Australian interests against the extraterritorial effect of US laws.

The bilateral agreement between the Government of Australia and the Government of the United States of America relating to Cooperation on Antitrust Matters, dated 29 June 1982 (hereinafter referred to as 'the bilateral agreement'), placed a new emphasis upon consultation in an effort to overcome difficulties in relation to the extraterritorial application of US trade laws.

To introduce additional blocking legislation without further provocation is unnecessarily to move from that spirit of cooperation to legislative confrontation and therefore, to say the least, premature.

### Background

Australia has two Acts: the **Foreign Proceedings (Prohibition of Certain Evidence) Act 1976** and the **Foreign Antitrust Judgments (Restriction of Enforcement) Act 1979** passed to protect Australian interests against the extraterritorial effect of US antitrust legislation. Both were enacted in response to and during the course of the Westinghouse proceedings.

Australia had open to it the additional option of the legislative alternatives now recommended by the Committee. In fact, the then Government had introduced into the Parliament a bill designed to achieve such objects in the form of a bill to amend the **Foreign Antitrust Judgments (Restriction of Enforcement) Act 1979.**

The Government however did not proceed with the bill but rather pursued finalisation of what is now the bilateral agreement.

The Committee is of the opinion that the bilateral agreement 'is a significant step towards resolving numerous difficulties that have arisen between the Australian and US Governments in enforcement of US antitrust laws' and with that opinion we agree. However, notwithstanding the bilateral agreement and the decision of the previous government not to proceed with further blocking legislation, the majority of the Committee recommends that the introduction of such legislation is now desirable.

### Arguments Against the Recommendation for 'Clawback' Legislation

The most important of the recommendations of the Committee is to introduce what is commonly known as 'clawback' legislation. The majority of the Committee recommends as follows:

> 'The Attorney-General introduce legislation into the Parliament—
> to enable full recovery in Australia of damages paid by Australian residents or by those doing business in Australia pursuant to a foreign judgment which is declared to be unenforceable or not to be recognised under the **Foreign Antitrust Judgments (Restriction of Enforcement) Act 1979.**'

Four arguments of the majority can be identified and require answers.

- First it is argued that the bilateral agreement does not adequately protect Australians from private suits for treble damages.

The then Attorney-General (Senator the Hon. P. Durack, Q.C.) conceded that the bilateral agreement is not on its face an absolute answer to such claims. However, the bilateral agreement contains a unique procedure for consultation between governments to take place in the event of private antitrust suits and the Government of the United States to then report to the Court on the substance and outcome of the consultation. Upon that report the Court will be able to take the Australian national interest into account in balancing (pursuant to the Timberlane principle) the interests of the US against the foreign interests.

If the consultative procedures have led to the conclusion that the US private trading interests are outweighed by Australian national intersts, the Court will be likely to support that conclusion. It furthermore offers a solution to overcoming Justice Marshall's reservation as the role of the judiciary in balancing national interests—that would be the responsibility of the consulting State parties. The imaginative solution offered is therefore based upon consultation. As case for its application is yet to arise and subject to the discussion of the Pacific Shipping Case hereunder it remains untested.

- Secondly, the Committee received evidence of the Departments of Trade and Foreign Affairs that such legislation would not detrimentally effect relations between Australia and the US.

However, and contrary apparently to the understanding of certain officers of the Departments, the bilateral agreement was negotiated on the basis of being a more desirable alternative to further legislation. In Press Release 17/83, dated 29 June 1983, the former Attorney-General, Senator P. Durack, Q.C., states of the Agreement:

> 'On behalf of the then Australian Government, I assured the US Government that we would not proceed with any further blocking legislation unless the Agreement proved less successful than we hoped.
>
> Unless therefore there is some pressing need for the legislation to protect an Australian company or companies who are facing a treble damages judgment, it would be better for the Government to let the Agreement work itself out for the time being.'

- Thirdly, the Committee argued that the bilateral agreement will prove unsuccessful because previous attempts at such agreements, and the Committee particularly deals with the experience of Canada, have proven unsuccessful.

The bilateral agreement between the United States and Australia is however much wider in application than bilateral agreements between the US and other countries. Furthermore, it specifically seeks to deal with the vexed problem of the private suit. Certainly it will be necessary for it to be supported by a change in US spirit. However, taking into account bills introduced into the last two Congresses to review US extra-territorial antitrust laws and the positive statements of the US Attorney-General on signing the bilateral agreement, that 'this agreement will elevate relations between our two countries on antitrust matters to a higher plane and more predictable path', there is some evidence of a change of attitude and more cooperative spirit.

- Fourth, the Committee argued that the bilateral agreement does not appear to be proving successful in relation to the antitrust investigation into Australian-US Ocean Freight Trade (the Pacific Shipping Case).

Technically that case predated the bilateral agreement and it is not therefore relevant to whether the letter of the agreement is being observed. However it is fair to see whether it discloses a changed attitude. Some witnesses thought that it did not, whilst others acknowledged that it did, evidence a changed spirit. To attempt to draw conclusions from the case at this intermediate stage would appear premature. Certainly it could not be said to prove a breakdown of the bilateral agreement even in spirit.

We therefore conclude that to enact clawback legislation at the present time would be unnecessarily provocative and whilst Mr Bennett of the Attorney-General's Department might be right that there is merit in enacting such legislation 'at a time when there



is no immediate crises' that logic is outweighed by the understanding reached between governments and the lack of substantive evidence of a breakdown of that understanding. We feel reinforced in our views by the very cogent legal argument of Mr L. Maher, and to some extent supported by Professor K.W. Ryan, that existing Australian legislation notably the **Foreign Antitrust Judgments (Restriction of Enforcement) Act 1979** may not have been necessary in law, Australian interests being protected by existing common law.

The extra territorial effect of US laws has been an area which has put the otherwise close relations between Australia and the US under considerable stress from time to time. The bilateral agreement is a positive constructive attempt to relieve the stress of past experiences and should, in our opinion, be given fair opportunity to work.

We therefore dissent from this recommendation.

**The Argument against Legislation to Prohibit Compliance in Australia with Certain Orders**

The majority of the Committee recommend introduction of legislation:

> 'to prohibit compliance by Australian residents or those doing business in Australia with orders of a foreign country which might damage Australia's trading interests.'

This recommendation is not so much concerned with application of US antitrust laws but rather orders issued under such US laws as the **Export Administration Act** often for foreign policy reasons. To enact the recommended blocking legislation for use against an ally appears to us to be somewhat drastic without evidence of substantial necessity. There do not appear to be Australian experiences to warrant such an action. Certainly it appears that Santos Ltd was indirectly effected in the US application of that law in relation to the construction of the Siberian pipeline but such a law would not in any event have resolved the difficulty Santos faced (because it was not the subject of an order under the US Act).

We dissent from this recommendation.

**The Argument Against Recovery of Defendants' Costs**

The majority of the Committee recommend introduction of legislation:

> 'to allow for the recovery of defendants' costs, even in unsuccessful defences provided the judgment is unenforceable or not to be recognized pursuant to the **Foreign Antitrust Judgments (Restriction of Enforcement) Act 1979.**'

The US concept that a successful defendant is unable to obtain costs against an unsuccessful plaintiff in antitrust suits does appear contrary to normal Australian litigation experiences. However, the Committee's recommendation that the defendant if he is successful and even if unsuccessful should then be able to obtain such costs in an Australian court appears fraught with difficulty. Awards of costs are generally discretionary and it is hard to imagine how a court in another jurisdiction and without the benefit of evidence could reach a proper conclusion.

We dissent from this recommendation.

Senator R. Hill
Senator A. W. R. Lewis
Mr W. P. Coleman, M.P.
Mr R. F. Shipton, M.P.
Mr S. A. Lusher, M.P.
November 1983

## DISSENT BY THE HON. R. J. GROOM, M.P., TO THE REPORT OF THE JOINT COMMITTEE ON FOREIGN AFFAIRS AND DEFENCE 'AUSTRALIAN-UNITED STATES' RELATIONS: THE EXTRA TERRITORIAL APPLICATION OF UNITED STATES LAWS'

I dissent from those recommendations in the report which call for the introduction of legislation to protect Australian commercial interests from the extraterritorial application of United States laws.

I wish to express my particular concern at the recommendation that there be legislation to prohibit Australians, in some instances, from complying with the orders of foreign courts, the jurisdiction of which they are subject because of their commercial activities in those countries.

The introduction of legislation of the type suggested would conflict with clear assurances given to United States authorities by the former Attorney-General, Senator Durack. In a press release on 29 June 1983, Senator Durack said:

> 'On behalf of the then Australian Government, I assured the United States Government that we would not proceed with any blocking legislation unless the Agreement proved less successful then we hoped.'

The bilateral agreement entered into between USA and Australia in 1982 was a positive constructive attempt to overcome the problems which are the subject matter of this report..

The agreement should not be undermined by hasty legislation but should be given a reasonable opportunity to work.

The Hon. R. J. Groom, M.P.
November 1983





### CONDUCT OF THE INQUIRY

In September 1981 the previous Committee requested the Sub-Committee on the Pacific Basin to consider and report upon the following terms of reference:

### AUSTRALIAN-UNITED STATES' RELATIONS

In its submission to the Inquiry (May 1982), Foreign Affairs suggested that:

> The Sub-Committee could perhaps also inquire into the longstanding problem in the relationship of the extra-territorial application of United States Law, particularly antitrust Law. This has posed serious problems not only for Australia but for other allies of the United States as well. The Westinghouse case, which for a long time was the major manifestation of our difficulties in antitrust, was settled last year and, as described earlier, there is a more understanding and cooperative attitude by this Administration in relation to antitrust proceedings. However, investigations by other United States regulatory authorities are continuing or pending (e.g. the shipping investigation) and the vexed question of private treble damages suits remains unresolved.[1]

A public hearing was held with Attorney-General's and Trade on 20 September 1982 which dealt exclusively with the issue of extraterritoriality. A report on the first part of the reference, entitled The ANZUS Alliance, was tabled in the Parliament on 25 November 1982. In that report the Committee noted:

> Another important issue on which the Australian Government has been outspoken is the extraterritorial reach of US laws. The Australian Government has sought and recently obtained a bilateral agreement with the United States, the aim of which is to avoid future irritants to Australian-US relations in this area through government-to-government consultation.[2]

The Joint Committee again referred the inquiry to the Sub-Committee on the Pacific Basin on 24 May 1983, and it was decided to give priority to an investigation into 'The Extraterritorial Application of United States Legislation.'

Ms Gillian Triggs, of the Law Faculty of Melbourne University was appointed as Specialist Adviser to the sub-committee. Public hearings were held in Melbourne on 25 July and in Canberra on 26 July and 22 September. A list of the witnesses who appeared at the hearings is at Appendix II.

ENDNOTES:
1. Evidence—Foreign Affairs, 20 August 1982, p.560.
2. Parliamentary Paper No. 318/1982, p.70.

## WITNESSES WHO APPEARED AT PUBLIC HEARINGS.

Attorney-General's Department:
Mr P. Kennedy, First Assistant Secretary, Business Affairs Division;
Mr G.D. Cox, Acting Principal Legal Officer, International Trade Law Branch.

Australian Industries Development Association (*now Business Council of Australia*):
Mr G.D. Allen, Director;
Mr R. Chambers, Member of the Legal Committee;
Mr R.G. Skea, Assistant to Mr Chambers;
Mr J. Browne, Member of the Legal Committee;
Professor R. Baxt, Member of the Legal Committee.

Department of Defence:
Dr M. McIntosh, Industry Policy and Planning Branch.

Department of Foreign Affairs:
Mr I. Nicholson, Assistant Secretary, Maritime Law and Treaties Branch;
Mr R.G. Starr, Acting Assistant Secretary, Americas Branch;
Mr C.D. Mackenzie, Foreign Affairs Officer, Economic Division;
Mr N.D. Campbell, Acting Head, Treaties Section.

Department of Trade:
Mr G.J. Hall, Principal Adviser, Trade Policy Division;
Mr J.E.D. McDonnell, Assistant Secretary, Trade Policy Branch;
Mr G.M. Brennan, Assistant Director, Trade Policy Branch.

Private Citizens:
Mr L.W. Maher, 4 Panorama Avenue, Lower Plenty, Victoria;
Professor K.W. Ryan, 15 Orkney Street, Kenmore, Queensland.





## AGREEMENT BETWEEN THE GOVERNMENT OF AUSTRALIA AND THE GOVERNMENT OF THE UNITED STATES OF AMERICA RELATING TO COOPERATION ON ANTITRUST MATTERS

The Government of Australia and the Government of the United States of America,

Recognizing that conflicts have arisen between the interests reflected in United States antitrust laws and policies and those reflected in Australian laws and policies, and that such conflicts may arise in the future;

Recognizing the need for such conflicts to be resolved with mutual respect for each other's sovereignty and with due regard for considerations of comity;

Considering that intergovernmental consultations may facilitate the resolution of such conflicts;

Desiring to establish an appropriate bilateral framework for conducting consultations; and

Considering that, in the absence of conflicts, cooperation between the Governments of Australia and the United States is desirable in the enforcement of antitrust laws,

Have agreed as follows:

### ARTICLE 1

Notification

1. When the Government of Australia has adopted a policy that it considers may have antitrust implications for the United States, the Government of Australia may notify the Government of the United States of that policy. If practicable, such a notification shall be given before implementation of the policy by persons or enterprises.
2. When the Department of Justice or Federal Trade Commission of the United States decides to undertake an antitrust investigation that may have implications for Australian laws, policies or national interests, the Government of the United States shall notify the Government of Australia of the investigation.
3. A notification under paragraph 2 of this Article shall be effected promptly and, to the fullest extent possible under the circumstances of the particular case, prior to the convening of a grand jury or issuance of any civil investigative demand, subpoena or other compulsory process.
4. The content of a notification made pursuant to paragraph 1 or 2 of this Article shall be sufficiently detailed to permit the notified Government to determine whether the matter may have implications for its laws, policies or national interests.
5. Notifications undertaken in accordance with paragraphs 1 and 2 of this Article shall be transmitted through diplomatic channels.

### ARTICLE 2

Consultations

1. When it appears to the Government of Australia through notification pursuant to paragraph 2 of Article 1 that the Department of Justice or Federal Trade Commission of the United States has commenced, or is likely to commence, an antitrust investigation or legal proceeding that may have implications for Australian laws, policies or national interests, the Government of Australia shall communicate its concerns and may request consultations with the Government of the United States. The Government of the United States shall participate in such consultations.
2. When it appears to the Government of the United States through notification pursuant to paragraph 1 of Article 1 that a policy of the Government of Australia may have significant antitrust implications under United States law, the Government of the United States shall communicate its concerns and may request consultations with the Government of Australia. The Government of Australia shall participate in such consultations.
3. Either Party may seek consultations with respect to potential conflicts which come to its attention other than by notification.
4. Both Parties during consultations shall seek to identify any respect in which:
   (a) implementation of the Australian policy has or might have implications for the United States in relation to the enforcement of its antitrust laws; and
   (b) the antitrust enforcement action by the Department of Justice or the Federal Trade Commission of the United States has or might have implications for Australian laws, policies or national interests.

5. Both Parties during consultations shall seek earnestly to avoid a possible conflict between their respective laws, policies and national interests and for that purpose to give due regard to each other's sovereignty and to considerations of comity.

6. In particular, in seeking to avoid conflict:

(a) the Government of Australia shall give the fullest consideration to modifying any aspect of the policy which has or might have implications for the United States in relation to the enforcement of its antitrust laws. In this regard, consideration shall be given to any harm that may be caused by the implementation or continuation of the Australian policy to the interests protected by the United States antitrust laws; and

(b) the Department of Justice or the Federal Trade Commission of the United States, as the case may be, shall give the fullest consideration to modifying or discontinuing its existing antitrust investigation or proceedings, or to modifying or refraining from contemplated antitrust investigations or proceedings. In this regard, consideration shall be given to the interests of Australia with respect to the conduct to which the proceedings, or contemplated proceedings, relate, or would relate, including, without limitation, Australia's interests in circumstances where that conduct:

(1) was undertaken for the purpose of obtaining a permission or approval required under Australian law for the exportation from Australia of Australian natural resources or goods manufactured or produced in Australia;

(2) was undertaken by an Australian authority, being an authority established by law in Australia, in the discharge of its functions in relation to the exportation from Australia of Australian natural resources or goods manufactured or produced in Australia;

(3) related exclusively to the exportation from Australia to countries other than the United States, and otherwise than for the purpose of re-exportation to the United States, of Australian natural resources or goods manufactured or produced in Australia; or

(4) consisted of representations to, or discussions with, the Government of Australia or an Australian authority in relation to the formulation or implementation of a policy of the Government of Australia with respect to the exportation from Australia of Australian natural resources or goods manufactured or produced in Australia.

7. Each Party during consultations shall provide as detailed an account as possible, under the particular circumstances, of the basis and nature of its antitrust investigation or proceeding, or its national policy and its implementation, as the case may be.

ARTICLE 3

Confidentiality

Documents and information provided by either Party in the course of notification or consultations under this Agreement shall be treated confidentially by the receiving Party unless the providing Party consents to disclosure or disclosure is compelled by law. The Government of the United States shall not, without the consent of the Government of Australia, use information or documents provided by the Government of Australia in the course of notification or consultations under this Agreement as evidence in any judicial or administrative proceeding under United States antitrust laws. The Government of the United States shall not, however, be foreclosed from pursuing an investigation of any conduct which is the subject of notification or consultations, or from initiating a proceeding based on evidence obtained from sources other than the Government of Australia.

ARTICLE 4

Procedure after Consultations

1. When consultations have been held with respect to an Australian policy notified pursuant to paragraph 1 of Article 1, and the Department of Justice or the Federal Trade Commission of the United States, as the case may be, concludes that the implementation of that policy should not be a basis for action under United States antitrust laws, the Government of Australia may request a written memorialization of such conclusion and the basis for it. The Government of the United States shall, in the absence of circumstances making it inappropriate, provide such a written



memorialization. Where a written memorialization has been provided, the Government of the United States shall expeditiously consider requests by persons or enterprises for a statement of enforcement intentions with respect to proposed private conduct in implementation of the Australian policy, in accordance with the Department of Justice's Business Review Procedure or the Federal Trade Commission's Advisory Opinion Procedure, as may be appropriate in the case.

2. If, through consultations pursuant to this Agreement, no means for avoiding a conflict between the laws, policies or national interests of the two Parties has been developed, each Party shall be free to protect its interests as it deems necessary.

ARTICLE 5

Cooperation in Antitrust Enforcement

1. When a proposed investigation or enforcement action under the antitrust laws of one nation does not adversely affect the laws, policies or national interests of the other, each Party shall cooperate with the other in regard to that investigation or action, including through the provision of information and administrative and judicial assistance to the extent permitted by applicable national law.

2. The mere seeking by legal process of information or documents located in its territory shall not in itself be regarded by either Party as affecting adversely its significant national interests, or as constituting a basis for applying measures to prohibit the transmission of such information or documents to the authorities of the other Party, provided that in the case of United States legal process prior notice has been given of its issuance. Each Party shall, to the fullest extent possible under the circumstances of the particular case, provide notice to the other before taking action to prevent compliance with such legal process.

ARTICLE 6

Private Antitrust Suits in United States Courts

When it appears to the Government of Australia that private antitrust proceedings are pending in a United States court relating to conduct, or conduct pursuant to a policy of the Government of Australia, that has been the subject of notification and consultations under this Agreement, the Government of Australia may request the Government of the United States to participate in the litigation. The Government of the United States shall in the event of such request report to the court on the substance and outcome of the consultations.

ARTICLE 7

Entry into Force

This Agreement shall enter into force upon signature by both Parties, and shall remain in force unless terminated upon six months notice given in writing by one of the Parties to the other.

IN WITNESS WHEREOF the undersigned, duly authorized thereto by their respective Governments, have signed this Agreement.

DONE in duplicate at Washington this twenty-ninth day of June, 1982.

For the Government of Australia:

Peter Durack
Attorney-General

For the Government of the United States of America:

William French Smith
Attorney-General

By direction of the Federal Trade Commission:

James C. Miller, III
Chairman

APPENDIX IV

## LEGISLATIVE RESPONSES TO UNITED STATES ASSERTION OF EXTRATERRITORIAL ENFORCEMENT JURISDICTION:

Prepared by Ms G. Triggs, Specialist Adviser to the Sub-committee

AUSTRALIA:

Foreign Proceedings (Prohibition of Certain Evidence) Act 1976
Foreign Proceedings (Prohibition of Certain Evidence) Amendment Act 1976
Foreign Antitrust Judgments (Restriction of Enforcement) Act 1979
Bill for an Act to amend the Foreign Antitrust Judgments (Restriction of Enforcement) Act, June 1981.

BELGIUM:

Law of 27 March 1969, as amended, and Decree of 6 February 1979, concerning the regulation of marine and air transport.

CANADA:

*(Ontario)*

Business Records Protection Act 1947

*(Quebec)*

Business Concerns Records Act 1964
Combine Investigation Act 1970, as amended, Sections 31(5), 31(6), 32(1).
Bill for a Foreign Proceedings and Judgments Act 1980.

DENMARK:

Act No. 254 of 8 June 1967 on capital limitation of Danish shipowners' freedom to give information to authorities of foreign countries.

FINLAND:

Law prohibiting a shipowner in certain cases to produce documents, 4 January 1968.

FRANCE:

Commercial Documents Act 1968-80 and Decree No. 81550 of 12 May 1981, concerning the transmission of information of an economic, commercial or technical nature to foreign individuals or legal persons.

FEDERAL REPUBLIC OF GERMANY:

Law on federal duties in matters concerning shipping, 24 May 1965, and Decree of 14 December 1966 on the transmission of shipping documents to foreign authorities.

ITALY:

Shipping Documents Act 1980

NETHERLANDS:

Economic Competition Act 1956, Article 39, as amended.

NEW ZEALAND:

Evidence Amendment Act 1980

NORWAY:

Act No. 3 of 16 June 1968 authorising the King's Council to prohibit shipowners to transmit information to authorities of foreign countries.

PHILIPPINES:

Presidential Decree No. 1718 of 21 August 1980, providing for incentives in the pursuit of economic development programs by restricting the use of documents and information vital to the national interest in certain proceedings and processes.



SOUTH AFRICA:

Protection of Business Act 1978, as amended.

SWEDEN:

Ordinance regarding the prohibition in certain cases for shipowners to produce documents concerning the Swedish shipping industry, 13 May 1966.

SWITZERLAND:

Penal Code Article 276

UNITED KINGDOM:

Shipping Contracts and Commercial Document Act 1964, and the Shipping Contracts (Foreign Measures) Order, 1968.
Protection of Trading Interests Act 1980 and the Protection of Trading Interests (U.S. Re-export Control) Order 1982.

28 September 1983

# THE PROTECTION OF TRADING INTERESTS ACT 1980 (U.K.) (1980 C. 11)

## PRELIMINARY NOTE

This Act, which came into force on receiving the Royal Assent on 20th March 1980, provides protection for persons in the United Kingdom from certain measures taken under the laws of overseas countries when those measures apply to things done outside such countries and their effect would be to damage the trading interests of the United Kingdom, or would be otherwise prejudicial to the sovereignty or security of the United Kingdom. The Act also provides for the non-enforcement of certain foreign judgments and enables recovery to be made of foreign awards of multiple damages. The Act repeals the Shipping Contracts and Commercial Documents Act 1964, Vol. 31, p. 675 (s. 8 (5), *post*).

S. 1, *post*, provides a number of means by which the Secretary of State for Trade may counter measures which are taken or proposed to be taken by or under the law of overseas countries for regulating or controlling international trade, and which are or would be damaging to the trading interests of the United Kingdom. First, he may make orders specifiying the measures concerned. Second, he may make further orders requiring persons in the United Kingdom who carry on business there to notify him of any requirements or prohibitions imposed or threatened to be imposed on them under such measures. Third, he may prohibit compliance with such measures. International trade is widely defined to include any business activity.

S. 2, *post*, provides that where a person in the United Kingdom has been or may be required to produce to a court, tribunal or authority of an overseas country commercial documents outside that country or to furnish commercial information the Secretary of State may give directions prohibiting compliance with that requirement. The section specifies the circumstances in which a direction may be given, which are broadly comparable to the circumstances in which a United Kingdom court would refuse a request made by an overseas court for evidence under the Evidence (Proceedings in Other Jurisdictions) Act 1975, Vol. 45, p. 482.

S. 3, *post*, provides penalties for failure to comply with the requirements imposed under ss. 1 and 2, *post*. It provides for a maximum fine of £1,000 on summary conviction and for an unlimited fine on conviction on indictment.

S. 4, *post*, provides that in proceedings under the Evidence (Proceedings in Other Jurisdictions) Act 1975, Vol. 45, p. 482, United Kingdom courts shall not comply with a request made by a court of an overseas country when the Secretary of State has given a certificate that the request infringes United Kingdom jurisdiction or is otherwise prejudicial to United Kingdom sovereignty.

S. 5, *post*, provides that the following judgments given by courts of overseas countries shall not be enforceable in the United Kingdom: (i) judgments for multiple damages within the meaning of s. 5 (3); (ii) judgments based on competition laws which have been specified by an order made by the Secretary of State: and (iii) judgments on claims for contributions in respect of damages awarded by a judgment falling within (i) or (ii) above.

S. 6, *post*, enables United Kingdom citizens, United Kingdom corporations and other persons carrying on business in the United Kingdom to recover sums paid under foreign judgments for multiple damages in excess of the compensation for the loss of the person in whose favour the judgment was given. It also permits courts in the United Kingdom to entertain such proceedings even if the defendant to them is not within the United Kingdom.

S. 7, *post*, enables Orders in Council to be made providing for the enforcement in the United Kingdom of judgments given under laws of overseas countries corresponding to s. 6, *post*.

## ARRANGEMENT OF SECTIONS

Section





*An act to provide protection from requirements, prohibitions and judgments imposed or given under the laws of countries outside the United Kingdom and affecting the trading or other interests of persons in the United Kingdom* [20th March 1980]

**1. Overseas measures affecting United Kingdom trading interests**

(1) If it appears to the Secretary of State—

(a) that measures have been or are proposed to be taken by or under the law of any overseas country for regulating or controlling international trade; and

(b) that those measures, in so far as they apply or would apply to things done or to be done outside the territorial jurisdiction of that country by persons carrying on business in the United Kingdom, are damaging or threatening to damage the trading interests of the United Kingdom,

the Secretary of State may by order direct that this section shall apply to those measures either generally or in their application to such cases as may be specified in the order.

(2) The Secretary of State may by order make provision for requiring, or enabling the Secretary of State to require, a person in the United Kingdom who carries on business there to give notice to the Secretary of State of any requirement or prohibition imposed or threatened to be imposed on that person pursuant to any measures in so far as this section applies to them by virtue of an order under subsection (1) above.

(3) The Secretary of State may give to any person in the United Kingdom who carries on business there such directions for prohibiting compliance with any such requirement or prohibition as aforesaid as he considers appropriate for avoiding damage to the trading interests of the United Kingdom.

(4) The power of the Secretary of State to make orders under subsection (1) or (2) above shall be exercisable by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament.

(5) Directions under subsection (3) above may be either general or special and may prohibit compliance with any requirement or prohibition either absolutely or in such cases or subject to such conditions as to consent or otherwise as may be specified in the directions; and general directions under that subsection shall be published in such manner as appears to the Secretary of State to be appropriate.

(6) In this section "trade" includes any activity carried on in the course of a business of any description and "trading interests" shall be construed accordingly.

**2. *Documents and information required by overseas courts and authorities***

(1) If it appears to the Secretary of State—

(*a*) that a requirement has been or may be imposed on a person or persons in the United Kingdom to produce to any court, tribunal or authority of an overseas country any commercial document which is not within the territorial jurisdiction of that country or to furnish any commercial information to any such court, tribunal or authority; or

(*b*) that any such authority has imposed or may impose a requirement on a person or persons in the United Kingdom to publish any such document or information,

the Secretary of State may, if it appears to him that the requirement is inadmissible by virtue of subsection (2) or (3) below, give directions for prohibiting compliance with the requirement.

(2) A requirement such as is mentioned in subsection (1) (*a*) or (*b*) above is inadmissible—

(*a*) if it infringes the jurisdiction of the United Kingdom or is otherwise prejudicial to the sovereignty of the United Kingdom; or

(*b*) if compliance with the requirement would be prejudicial to the security of the United Kingdom or to the relations of the government of the United Kingdom with the government of any other country.

(3) A requirement such as is mentioned in subsection (1) (*a*) above is also inadmissible—

(*a*) if it is made otherwise than for the purposes of civil or criminal proceedings which have been instituted in the overseas country; or

(*b*) if it requires a person to state what documents relevant to any such proceedings are or have been in his possession, custody or power or to produce for the purposes of any such proceedings any documents other than particular documents specified in the requirement.

(4) Directions under subsection (1) above may be either general or special and may prohibit compliance with any requirement either absolutely or in such cases or subject to such conditions as to consent or otherwise as may be specified in the directions; and general directions under that subsection shall be published in such manner as appears to the Secretary of State to be appropriate.

(5) For the purposes of this section the making of a request or demand shall be treated as the imposition of a requirement if it is made in circumstances in which a requirement to the same effect could be or could have been imposed; and

(*a*) any request or demand for the supply of a document or information which, pursuant to the requirement of any court, tribunal or authority of an overseas country, is addressed to a person in the United Kingdom; or

(*b*) any requirement imposed by such a court, tribunal or authority to produce or furnish any document or information to a person specified in the requirement,

shall be treated as a requirement to produce or furnish that document or information to that court, tribunal or authority.

(6) In this section "commercial document" and "commercial information" mean respectively a document or information relating to a business of any description and "document" includes any record or device by means of which material is recorded or stored.

**3. Offences under ss.1 and 2**

(1) Subject to subsection (2) below, any person who without reasonable excuse fails to comply with any requirement imposed under subsection (2) of section 1 above or knowingly contravenes any directions given under subsection (3) of that section or section 2 (1) above shall be guilty of an offence and liable—

(*a*) on conviction on indictment, to a fine;

(*b*) on summary conviction, to a fine not exceeding the statutory maximum.

(2) A person who is neither a citizen of the United Kingdom and Colonies nor a body corporate incorporated in the United Kingdom shall not be guilty of an offence under subsection (1) above by reason of anything done or omitted outside the United Kingdom in contravention of directions under section 1 (3) or 2 (1) above.

(3) No proceedings for an offence under subsection (1) above shall be instituted in England, Wales or Northern Ireland except by the Secretary of State or with the consent of the Attorney General or, as the case may be, the Attorney General for Northern Ireland.

(4) Proceedings against any person for an offence under this section may be taken before the appropriate court in the United Kingdom having jurisdiction in the place where that person is for the time being.

(5) In subsection (1) above "the statutory maximum" means—

(*a*) in England and Wales and Northern Ireland, the prescribed sum within the meaning of [section 32 of the Magistrates' Courts Act 1980] (at the passing of this Act £1,000);

(*b*) (*applies to Scotland*);

and for the purposes of the application of this subsection in Northern Ireland the provisions of [the said Act of 1980] relating to the sum mentioned in paragraph (*a*) shall extend to Northern Ireland.

**4. Restriction of Evidence (Proceedings in Other Jurisdictions) Act 1975**

A court in the United Kingdom shall not make an order under section 2 of the Evidence (Proceedings in Other Jurisdictions) Act 1975 for giving effect to a request issued by or on behalf of a court or tribunal of an overseas country if it is shown that the request infringes the jurisdiction of the United Kingdom or is otherwise prejudicial to the sovereignty of the United Kingdom; and a certificate signed by or on behalf of the Secretary of State to the effect that it infringes that jurisdiction or is so prejudicial shall be conclusive evidence of that fact.



**5. Restriction on enforcement of certain overseas judgments**

(1) A judgment to which this section applies shall not be registered under Part II of the Administration of Justice Act 1920 or Part I of the Foreign Judgments (Reciprocal Enforcement) Act 1933 and no court in the United Kingdom shall entertain proceedings at common law for the recovery of any sum payable under such a judgment.

(2) This section applies to any judgment given by a court of an overseas country, being—

(a) a judgment for multiple damages within the meaning of subsection (3) below;

(b) a judgment based on a provision or rule of law specified or described in an order under subsection (4) below and given after the coming into force of the order; or

(c) a judgment on a claim for contribution in respect of damages awarded by a judgment falling within paragraph (a) or (b) above.

(3) In subsection (2) (a) above a judgment for multiple damages means a judgment for an amount arrived at by doubling, trebling or otherwise multiplying a sum assessed as compensation for the loss or damage sustained by the person in whose favour the judgment is given.

(4) The Secretary of State may for the purposes of subsection (2) (b) above make an order in respect of any provision or rule of law which appears to him to be concerned with the prohibition or regulation of agreements, arrangements or practices designed to restrain, distort or restrict competition in the carrying on of business of any description or to be otherwise concerned with the promotion of such competition as aforesaid.

(5) The power of the Secretary of State to make orders under subsection (4) above shall be exercisable by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament.

(6) Subsection (2) (a) above applies to a judgment given before the date of the passing of this Act as well as to a judgment given on or after that date but this section does not affect any judgment which has been registered before that date under the provisions mentioned in subsection (1) above or in respect of which such proceedings as are there mentioned have been finally determined before that date.

**6. Recovery of awards of multiple damages**

(1) This section applies where a court of an overseas country has given a judgment for multiple damages within the meaning of section 5 (3) above against—

(a) a citizen of the United Kingdom and Colonies; or

(b) a body corporate incorporated in the United Kingdom or in a territory outside the United Kingdom for whose international relations Her Majesty's Government in the United Kingdom are responsible; or

(c) a person carrying on business in the United Kingdom,

(in this section referred to as a "qualifying defendant") and an amount on account of the damages has been paid by the qualifying defendant either to the party in whose favour the judgment was given or to another party who is entitled as against the qualifying defendant to contribution in respect of the damages.

(2) Subject to subsections (3) and (4) below, the qualifying defendant shall be entitled to recover from the party in whose favour the judgment was given so much of the amount referred to in subsection (1) above as exceeds the part attributable to compensation; and that part shall be taken to be such part of the amount as bears to the whole of it the same proportion as the sum assessed by the court that gave the judgment as compensation for the loss or damage sustained by that party bears to the whole of the damages awarded to that party.

(3) Subsection (2) above does not apply where the qualifying defendant is an individual who was ordinarily resident in the overseas country at the time when the proceedings in which the judgment was given were instituted or a body coporate which had its principal place of business there at that time.

(4) Subsection (2) above does not apply where the qualifying defendant carried on business in the overseas country and the proceedings in which the judgment was given were concerned with activities exclusively carried on in that country.

(5) A court in the United Kingdom may entertain proceedings on a claim under this section notwithstanding that the person against whom the proceedings are brought is not within the jurisdiction of the court.

(6) The reference in subsection (1) above to an amount paid by the qualifying defendant includes a reference to an amount obtained by execution against his property or against the property of a company which (directly or indirectly) is wholly owned by him; and references in that subsection and subsection (2) above to the party in whose favour the judgment was given or to a party entitled to contribution include references to any person in whom the rights of any such party have become vested by succession or assignment or otherwise.

**7. Enforcement of overseas judgment under provision corresponding to s. 6**

(1) If it appears to Her Majesty that the law of an overseas country provides or will provide for the enforcement in that country of judgments given under section 6 above, Her Majesty may by Order in Council provide for the enforcement in the United Kingdom of judgments given under any provision of the law of that country corresponding to that section.

(2) An Order under this section may apply, with or without modification, any of the provisions of the Foreign Judgments (Reciprocal Enforcement) Act 1933.

**8. Short title, interpretation, repeals and extent**

(1) This Act may be cited as the Protection of Trading Interests Act 1980.

(2) In this Act "overseas country" means any country or territory outside the United Kingdom other than one for whose international relations Her Majesty's Government in the United Kingdom are responsible.

(3) References in this Act to the law or a court, tribunal or authority of an overseas country include, in the case of a federal state, references to the law or a court, tribunal or authority of any constituent part of that country.

(4) References in this Act to a claim for, or to entitlement to, contribution are references to a claim or entitlement based on an enactment or rule of law.

(5) The Shipping Contracts and Commercial Documents Act 1964 (which is superseded by this Act) is hereby repealed, *together with paragraph 18 of Schedule 2 and paragraph 24 of Schedule 3 to the Criminal Law Act 1977 (which contain amendments of that Act)*.

(6) Subsection (5) above shall not affect the operation of the said Act of 1964 in relation to any directions given under that Act before the passing of this Act.

(7) This Act extends to Northern Ireland.

(8) Her Majesty may by Order in Council direct that this Act shall extend with such exceptions, adaptations and modifications, if any, as may be specified in the Order to any territory outside the United Kingdom, being a territory for the international relations of which Her Majesty's Government in the United Kingdom are responsible.





## AUSTRALIAN NOTE TO THE DEPARTMENT OF STATE

The Embassy of Australia presents its compliments to the Department of State and has the honour to draw the Department's attention to the serious concerns of the Government of Australia in relation to certain extraterritorial aspects of the Export Administration Act, 1979, currently under review, which have the effect of asserting United States jurisdiction over persons and commercial transactions outside the United States.

This Embassy has on a number of occasions expressed the view that the extraterritorial application of certain United States laws, particularly antitrust laws, are contrary to widely accepted principles of international law regarding the extent of national jurisdictional competence and to international comity. Consistent with this view the Australian authorities are unable to accept that the provisions of the Export Administration Act should apply to companies registered and carrying on business in Australia. Nor can they accept any interpretation of the Act which attempts to confer United States jurisdictional competence over goods and technology of United States origin located in Australia and therefore subject to Australian laws and policies. Australia does not believe that the use of submission clauses is a legitimate exercise of national jurisdictional competence. In short, the Government of Australia would regard the extraterritorial application of such provisions of the Export Administration Act to companies registered and carrying on business in Australia, or to goods, technology or information located in Australia as an interference with matters within Australian jurisdictional competence.

The Act as it is currently drafted also fails to recognise the important contribution of predictable trading laws to stable trade relations. Given the sensitive nature of international economic relations, the imposition by the United States of unilateral economic sanctions which may conflict with the laws and policies of allies such as Australia could impair those relations. The difficulties raised by conflicts and uncertainties of this sort also have implications for the ability of allies to adhere to the principle of national treatment of multinational enterprises embodied in the OECD Guidelines for Multinational Enterprises.

Indeed, failure to provide in the Act for taking into account international economic factors and more particularly the primacy of the laws and policies of other States within their own territorial jurisdictions, may compel those States to take remedial measures to restrict the impact of unilateral assertion of extraterritorial jurisdiction over enterprises registered and carrying on business in their territory. It may also serve to have a chilling effect on the environment for investment by United States companies in Australia and other States, and encourage Australian and other foreign companies to look to countries other than the United States for imports of high technology and related products.

The policy embodied in the Administration's proposed amendments to section 3 of the Act to minimize the impact of foreign policy controls on commercial activities in allied or friendly countries is noted. Other proposed amendments to the Act, however, do not adequately reflect that policy. They do not alleviate the concerns of the Government of Australia that companies registered and carrying on business in Australia may be seriously disadvantaged in the future if the Act and the Administration's proposed amendments remain in their present form. Nor do they contribute to the objective of achieving and maintaining a stable international trading environment. Indeed, the amendments represent a widening of the scope for the Government of the United States to impose unilateral restraints on international trade, which could adversely affect the international economic interests of Australia and other allies.

The Australian authorities are particularly concerned that the provisions of the Administration's proposed amendments dealing with sanctity of contracts do little to ease the unsettling effect of the Act on trade conducted in accordance with United States laws and regulations prior to the imposition of foreign policy controls. It is understood that the amendments, as they are currently drafted, provide that the guarantee of sanctity of contracts may be withdrawn in cases where the United States perceives that contracts might conflict with "the under-lying purpose of the controls". The Embassy draws the Department's attention in this context to the refusal of the United States Government to exempt from the foreign policy controls of the current Act the supply of equipment for a major gas pipeline in Australia to Santos Limited, an Australian company. Within the scope of the present Act it should be possible to devise a mechanism that would enable exemptions to be made in the case of specific contracts, so that so far as practicable third parties outside the primary focus of the controls are not prejudiced. The Government of

Australia believes that such a mechanism could go some way towards minimizing the potential conflict of the Act with the national interests of allies.

Mindful of the importance that the Government of the United States attaches for national security reasons to controls on exports of high technology and related products with military potential, the Government of Australia believes that consultation and cooperation between close allies, rather than unilateral action under the Act which may induce conflicts of jurisdiction, would be a preferable approach. As the Department of State will be aware, the Government of Australia has complemented United States measures by applying similar controls over exports.

The Embassy of Australia would be grateful if the Department of State would arrange for the contents of this Note to be conveyed to the appropriate Congressional Committees which are conducting hearings on the review of the Export Administration Act.

The Embassy of Australia avails itself of this opportunity to renew to the Department of State the assurances of its highest consideration.

23 May 1983