EXTRATERRITORIAL ENFORCEMENT OF AUSTRALIAN ANTITRUST LEGISLATION: *AUSTRALIAN MEAT HOLDINGS PTY. LIMITED & ORS* v. *TRADE PRACTICES COMMISSION*

I. INTRODUCTION

Since World War Two the concept of a goods and services market has changed significantly from that of an individual country's market having limited interaction with the markets of other countries. Now there is a structure of an international, largely interdependent market. However, there has been a distinct change in economic power. Before World War Two and the General Agreement on Tariffs and Trade,[1] companies chiefly operated in the market of the country of incorporation with a little interaction with off-shore markets. Since World War Two and the G.A.T.T., some companies still operate in this way but the market is now dominated by the multinationals which transcend national boundaries and operate in the sphere of an international market.

This interdependence means that countries are greatly affected by the economic movements of other countries and their corporations. However, although the character of the market has changed, as has some of the legislation concerning the market, there has not been an international consensus upon how to deal with the conflict caused by these changes. This has led to tremendous friction, particularly in the area of extraterritorial enforcement of antitrust legislation.

This note discusses a recent Australian case, *Australia Meat Holdings Pty. Limited & Ors* v. *Trade Practices Commission*,[2] which highlights these

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[1] 30 October 1947 ("G.A.T.T.").

[2] Unreported High Court decision of Brennan, Dawson, McHugh JJ., 9 June 1989.

problems; it looks at the traditional bases of jurisdiction for antitrust legislation and the Australian position on this point; includes a study of the possible implications of the decision and especially the extraterritorial application of the *Trade Practices Act*[3] (the "Act"); and finally considers some possible solutions.

II. FIRST ASPECT OF CASE: CONTRAVENTION OF TRADE PRACTICES ACT

The Trade Practices Act prohibits restrictive trade practices and certain conduct which is misleading or deceptive, and protects consumers. Pengilly, a leading authority on Australian Trade Practices Law,[4] likened the Act to the United States' Sherman and Clayton Acts

> in many areas. It bans agreements, arrangements, and conduct which have anti-competitive repercussions, and this ban operates at both the horizontal and dealership level.

Pengilly and Ransom[5] described the Sherman and Clayton Acts as the United States "Magna Carta of free enterprise". The Trade Practices Act could be described similarly.

In the instant case the applicant, the Trade Practices Commission ("T.P.C.") alleged in the Federal Court of Australia[6] that, Australia Meat Holdings Pty. Ltd. & Ors ("A.M.H.") had contravened section 50 of the Act. The trial judge, Justice Wilcox (although the case went on appeal, the trial judge's findings are of the most significance for this note) held sub-section 50(1)(a) to be the relevant sub-section. It provides:

> 50. (1) A corporation shall not require, directly or indirectly, any shares in the capital, or any assets, of a body corporate if . . .
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> (a) as a result of the acquisition, the corporation would be, or be likely to be, in a position to dominate a market for goods and services.

The T.P.C. alleged that A.M.H. did this by buying all of the issued capital of Thomas Borthwick & Sons (Australia) Limited ("Borthwick") and thus allowing A.M.H. to dominate the "fat cattle market" in Northern Queensland. Justice Wilcox determined that this allegation was indeed correct [at 109, 112-113] and made an order accordingly.

The T.P.C. sought relief under section 81 of the Act which allows for a remedy if section 50 is contravened. Section 81 relevantly provides:

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[3] 1974 (Cth.).

[4] Pengilly, W., *Public Benefit in Anticompetitive Arrangements? An Experience Since 1944*; 23 Antitrust Bull. 187 (1978) at 187.

[5] Ransom, A. and Pengilly, W., *Restrictive Trade Practices: Judgements, Materials and Policy*; (1985) at 1105.

[6] *Trade Practices Commission* v. *Australia Meat Holdings Pty. Limited & Ors* ("*A.M.H.*") Unreported decision of Wilcox J., 12 August 1988. (All page references refer to this decision unless otherwise stated.)

> 81. (1) The court may, on the application of the Minister, the Commission or any person, if it finds, or has in another proceeding instituted under this Part found, that a person has contravened section 50, by order, give directions for the purpose of securing the disposal by the person of all or any of the shares or assets acquired in contravention of that section.
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> (1C) Where an application is made to the Court for an order under sub-section (1) or a declaration under sub-section (1A), the Court may, instead of making an order under sub-section (1) for the purpose of securing the disposal by a person of shares or assets or an order under sub-section (1A) that the acquisition by a person of shares or assets is void, accept upon such conditions (if any) as the Court thinks fit, an undertaking by the person to dispose of other shares or assets owned by the person.

Justice Wilcox ordered[7] under section 81(1) that AMH dispose of all of the issued shares of Borthwick to suitable purchaser(s), or under section 81(1C), dispose of specified abbatoirs. The result of either of these remedies would be the removal of A.M.H.'s market domination.

The case went on appeal to the Federal Court[8] on the matters of market definition and the operation of sub-sections 81(1) and (1C) of the Act.[9] Lastly it went on appeal to the High Court concerning the construction of sub-sections 81(1) and (1C).[10] Both appeals were dismissed. (As the matters on appeal are not directly relevant to this note, they will not be discussed in further detail.)

III. SECOND ASPECT OF CASE: EXTRATERRITORIAL JURISDICTION

A.M.H. is an important and instructive decision with regard to the operation of section 50 and section 81. Also, it is arguably the most important decision regarding the meaning of "market" since the early cases when the Act first came into operation.[11] It gives a more precise definition of the term and provides a more precise formula for determining the relevant market. It is also the seminal case concerning the extraterritorial application of these sections and allows an opportunity to draw inferences concerning the extraterritorial usage of other parts of the Act. Due to the orders Wilcox J. made, his comments concerning the extraterritorial application of the Act are not central to the decision.

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[7] Unreported Federal Court decision of Wilcox J., 12 August 1988.

[8] Unreported Federal Court decision of Davies, Sheppard & Pincus JJ., 3 March 1989.

[9] The appeal was dismissed by a majority of Davies and Sheppard JJ. The cross-appeal was allowed by all three judges.

[10] Unreported High Court decision on Brennan, Dawson and McHugh JJ., 12 August 1988.

[11] *Top performance Motors Pty. Ltd.* v. *Ira Berk (Queensland) Pty. Ltd.* (1975) 24 F.L.R. 286; *Trade Practices Commission* v. *Ansett Transport Industries (Operations) Pty. Ltd.* (1978) 32 F.L.R.

However, as there is a dearth of guidance upon this issue, his comments are very important.

Lane, an eminent authority on Australian Constitutional Law, defined extraterritoriality as:

> the attribute of a law that operates outside the territory of a particular legislature. The law affects conduct, matters or things beyond the limits of the enacting State.[12]

The potential for an extraterritorial application of the Act in *A.M.H.* lies in the fact that the sale was of a company incorporated in the United Kingdom, the shares were registered on the United Kingdom stock exchange, the vendor was English, and the sale was transacted primarily in the United Kingdom. However, Justice Wilcox decided not to apply the Act extraterritorially.

Justice Wilcox determined that section 50 covered the acquisition of shares in a foreign company trading in Australia [at 113]. The company bought was such a company. Section 4E of the Act defines market as "a market in Australia". Thus section 50 is targeted at acquisitions which will probably cause dominance in the Australian market. A.M.H.'s buying of Borthwick was in contravention of section 50.

One possible bar to section 50 applying to A.M.H. was that some of the relevant conduct occurred outside Australia (in the United Kingdom) and that section 50 does not expressly refer to such conduct. However, section 5(1) of the Act removes this potential bar:

> 5. (1) Parts IV and V extend to the engaging in conduct outside Australia by bodies corporate incorporated or carrying on business within Australia or by Australian citizens or persons ordinarily resident within Australia.

Section 50 is contained within Part IV of the Act. Thus, although some of the pertinent conduct occurred outside Australia, section 5(1) was interpreted [at 114] to mean the extraterritorial conduct A.M.H. was involved in, was covered by the Act.

Although Wilcox J. ordered remedies under section 81(1) and (1C), the TPC sought a remedy under section 81(1A) which provides for a divestiture of wrongly acquired shares and section 81(1A) which provides the court with the opportunity to declare that an acquisition is void. The Court refused to give a remedy. The section provides:

> 81(1A) (d) the shares or the assets to which the declaration relates shall be deemed not to have been disposed of by the vendor; and
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> (e) the vendor shall refund to the acquirer any amount paid to the vendor in respect of the acquisition of the shares or assets to which the declaration relates.

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[12] Lane, P. H., *A Manual of Australian Constitutional Law*; 1987.

The fundamental obstacles to such a declaration in this case [at 127] were that the issued capital of Borthwick, bought by A.M.H., constituted an English company. The company was incorporated outside Australia and the shares registered outside Australia. Secondly, the issued capital was sold by an English vendor, Thomas Borthwick & Sons (Pacific Holdings) Limited and Thomas Borthwick & Sons (U.K.) Limited. (The T.P.C. joined these two respondents with the parent of the two, Borthwicks plc, "the Borthwick respondents").

However, there was a further consideration. Section 81(1A) has a condition attached to it: the vendor of the relevant shares or assets must have been "involved in the contravention". Justice Wilcox determined that the Borthwicks respondents satisfied this criterion using section 75B(c) [at 115].

Thus, Justice Wilcox decided that the action in question was a breach of section 50 and that a remedy could be given under section 81(1A) against two of the respondents (Borthwicks Pacific Holdings and U.K.) [at 123]. However, although the legislation clearly gave the Court the jurisdiction to award a remedy under section 81(1A), Justice Wilcox decided not to do so [at 124].

Justice Wilcox made this determination because the vendors of Borthwicks took into account the result of a previous hearing before Justice Wilcox[13] where the T.P.C. moved for a mandatory interlocutory injunction requiring A.M.H. to withdraw its offer for the Borthwick shares alleging the sale would contravene section 50 of the Act. Justice Wilcox refused the injunction. In *A.M.H.* Justice Wilcox held this to be one of the reasons why he would not make an order against the Borthwick respondents: they relied on upon the discussion of divestiture which took place at the hearing for the injunction. Thus they did not consider that if the Act was subsequently held to be breached, by this particular acquisition, they would be affected as divestiture could only involve the buyer, not the seller [at 125].

Secondly, Justice Wilcox found that as the Borthwick respondents had already used the proceeds of the sale, it would be very difficult for them to repay the money if a declaration was made that the transaction was void and the money had to be repaid [at 126].

Thirdly, and more importantly, he refused to apply section 81(1A) because the relevant shares were held upon the London register and they were the shares of a company incorporated in the United Kingdom. A.M.H. had become the owner of the shares under the law of the United Kingdom. A remedy under section 81(1A) would allow the court to make an order voiding the sale of Borthwicks and to require the vendor to return the purchase money. Although the Act gave the Australian Court the power

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[13] Unreported Federal Court decision, Wilcox J., 25 January 1988.

to make such an order, Justice Wilcox held that the Court could not enforce it [at 124]]. Due to the two aforementioned connections with the United Kingdom, such a remedy could only be enforced if the vendor was willing to comply (it was not [at 136]), or if the United Kingdom courts were willing to recognize the validity of the relevant Australian law and enforce the judgment [at 128]. Justice Wilcox determined that it would not. The Australian Court was powerless to affect the title of the shares as they were held wholly in the United Kingdom under the United Kingdom law.

Thus Justice Wilcox highlighted the distinction between prescriptive and enforcement jurisdiction, and especially the fact that the two do not necessarily co-exist. Prescriptive jurisdiction is the power to make a law. Enforcement jurisdiction is the power to enforce the law. In *A.M.H.* Justice Wilcox recognized that parliament had used its prescriptive jurisdiction to make extraterritorial provisions in the Act. However, he did not consider the court had the power to enforce such provisions in these circumstances. This was because the shares were of a United Kingdom company, traded on the United Kingdom stock exchange and bought from a United Kingdom vendor.

Justice Wilcox was also strongly persuaded by the fact that the Secretary of State had made an order on 23 March 1988 under sub-section 5(4)[14] of the *Protection of Trading Interests Act* 1980 (U.K.) relating to section 81(1A) of the Act. The result of the order meant that any decision made under sub-section 81(1A) would not be enforced by a United Kingdom court [at 135].

Further, Justice Wilcox was totally persuaded by the expert testimony of Professor Crawford concerning whether a judgment in this matter would be enforced in a United Kingdom court. Professor Crawford said it would not be [at 128]. He advanced the argument (among others) that a United Kingdom court would not enforce a foreign judgment based on a public law, such as the Act. He also looked at the *Administration of Justice Act* 1920 (U.K.) and the *Foreign Judgements (Reciprocal Enforcement) Act* 1933 (U.K.). He said they only allowed for the enforcement of a foreign judgment in civil proceedings for payment of money [at 133]. Justice Wilcox elaborated on this with reference to English and Australian case law.[15] He determined that the law was settled on this point.

Lastly, and perhaps most importantly, Justice Wilcox held that it was not necessary to make an order against the Borthwick respondents under section 81(1A) because an alternative remedy was available. Accordingly he ordered A.M.H. either to dispose of all of the shares it

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[14] Section 5 of the Act makes provision for protecting United Kingdom trade practices against any foreign judgments awarded against them.

[15] *Attorney-General of New Zealand* v. *Ortiz* [1984] 1 A.C. 1; *Her Majesty's Attorney-General in and for the United Kingdom* v. *Heinemann Publishers Australia Pty. Ltd.* 78 A.L.R. 449; 62 A.L.J.R. 344.

acquired in Borthwicks, section 81(1); or dispose of specified abbatoirs, section 81(1C).

In summary, there were three major steps in *A.M.H.* in the prescriptive versus enforcement dichotomy. One: A.M.H.'s conduct outside Australia was relevant. The Court held that the Act had the prescriptive jurisdiction to cover it. Section 50(1) was breached. That section is in Part IV. Section 5(1) extends section 50(1) to extraterritorial conduct. Two: for a remedy to be given under section 81(1A), the vendor had to be "knowingly concerned" in the transaction, section 75B(1)(c) [at 115]. Justice Wilcox determined that the Borthwick respondents satisfied the Act on this question [at 123]. Thus the court had the prescriptive jurisdiction to make an order under section 81(1A). Three: the crux of the problem was that although the Court held that it had prescriptive jurisdiction of these two counts, it held it did not have the enforcement jurisdiction to make an order under section 81(1A), and thus did not do so.

IV. ANALYSIS OF A.M.H.

A. TRADITIONAL BASES OF JURISDICTION

It is internationally recognized that every state generally has jurisdiction over all acts occurring in its territory, nationals in and out of its territory, non-national citizens and property in the territory. Also it has jurisdiction over crimes and torts with a prescribed element occurring within the territory and the rest of the crime or tort without. It has no jurisdiction over an act done within the territory by a state or its sovereign. (Although the commercial activities of a state or a sovereign do not necessarily enjoy this immunity.) It has no jurisdiction to exercise its executive, legislative or judicial power within another state (other than upon the very limited grounds described supra and infra). Justice Wilcox recognized this, quoting Lord Russell of Killowen[16] [at 118]:

> the presumption against the extra-territorial application of a statute "is a rule based on international law by which one sovereign power is bound to respect the subjects and the rights of all other sovereign powers outside its own territory".

There are several bases of jurisdiction used in Australia and overseas. However, even today, there is no international accord over which are the best for an extraterritorial situation. Thus it is necessary to analyse state practice. Some states tend to follow historical bases of jurisdiction with little variation, like Australia, whilst others, like the United States have adapted the traditional bases so as to allow the courts an extra-territorial scope so wide that many other countries have complained and in some cases, adopted retaliatory measures against it. The bases are:—

[16] In *R.* v. *Jameson* [1896] 2 Q.B. 425 at 430.

Nationality—States have jurisdiction over all their nationals, whether they be within the territorial jurisdiction or not. It involves a problem with enforcement. Although a state might be able to prosecute under a law, there might be trouble in having an award enforced if the national is outside the jurisdiction. This is because another state's court might be needed to help enforce the award, and this cooperation can be difficult to obtain. For this reason states tend to prefer the territoriality doctrine.

Passive Personality or Protective Principle—This is where a national is injured outside the state by a national of another state, the state of the injured national tries to punish the injurer.

Universality—Some crimes are internationally recognized to be so heinous and against the entire human race that any state may assert jurisdiction over the defendant, even if the state hearing the case has no direct connection. Examples include piracy, slavery, drug trafficking, war crimes and international terrorism.

These three bases for extraterritorial jurisdiction have not been applied to antitrust laws in an extraterritorial context so they will be discussed no further. The following bases of territoriality and "effects" have been applied to antitrust laws extraterritorially.

Territoriality—Under this principle, a state has the power to legislate and enforce laws in relation to actions and omissions occurring within its national boundaries. This is an excellent basis for jurisdiction when the situation takes place wholly within one country. However, since World War Two, in the economic sphere there has been a tremendous increase in international trade and changes in economic power which means that states and companies have become internationally more intertwined and interdependant than before. Due to this development, it has become clear that territoriality principles will no longer be applicable to many antitrust situations.

The "Effects Doctrine"—Territoriality has been extended to include the "effects doctrine". Historically, the doctrine derived from the *S.S.Lotus* case.[17] The court recognized the delimitations of territorial jurisdiction:

> Now the first and foremost restriction imposed by international law upon a State is that . . . it may not exercise its power in any form in the territory of another State [at 23],

but expanded the ambit so that a court would have jurisdiction over acts or omissions which occur outside the state but whose effects are felt within the state:

> If one of the constituent elements of the offence, and more especially, its effects, have taken place there [state affected].

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[17] *France* v. *Turkey* 1927 P.C.I.J., ser.A., No. 10.

The court had to determine whether Turkey had jurisdiction on the basis that the effect of the collision of a French and Turkish ship was experienced by Turkish nationals. The court concluded that it did.

More than two decades later, the United States' courts also expanded the traditional territoriality principles. They used a doctrine similar to that of *S.S. Lotus* but in the context of antitrust legislation. The seminal case is *United States* v. *Aluminium Co. of America*[18] ("Alcoa"). Justice Learned Hand stated that it is: "settled law . . . that any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders . . . which the state reprehends . . ." (at 443). He also said there has to be intention and causation as well (at 444). He determined that in the instant case these elements were present thus the relevant provisions of the Sherman Act applied.

The *Alcoa* approach was refined in *Timberlane*.[19] The court followed a "balancing of interests" test with a basis in comity to determine if the court had jurisdiction. The test has been approved of in other United States courts.[20] The approach has also received support from the United States Department of Justice and Congress which can be seen in the *Restatement (Revised) of Foreign Relations Law of the United States*.[21]

The court proposed that the following elements would be relevant:

> The elements to be weighed include [1] the degree of conflict with the foreign law or policy, [2] the nationality or allegiance of the parties [3] and the locations or principle places of business of corporations, [4] the extent to which enforcement by either state can be expected to achieve compliance, [5] the relative significance of effects on the United States as compared with those elsewhere, [6] the extent to which there is explicit purpose to harm or affect American commerce, [7] the forseeability of such effects, [8] and the relative importance to the violations charged of conduct within the United States as compared with conduct abroad . . . Having assessed the conflict, the court should then determine whether the contacts and interests of the United States are sufficient to support the exercise of extraterritorial jurisdiction.

Some states do support a doctrine based on effects as well.[22] However, the approach has been heavily criticized by many other states. In 1980

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[18] 148 F.2d 416 (2d. Cir. 1945).

[19] *Timberlane Lumber Co.* v. *Bank of America* 549 F.2d 597, 609-13 (9th Cir. 1976).

[20] *Mannington Mills* v. *Congoleum Corp.*, 595 F. 2d 1287, 1297 (3rd Cir. 1979); *Dominicus Americana Bohio* v. *Gulf & Western Indus.*, 473 F. Supp. 680, 687 (S.D.N.Y. 1979).

[21] Adopted on May 14 1986. 63 A.L.I. Proc. 140 (1987).

[22] These include the Federal Republic of Germany: *Act Against Restraints of Competition* 1957 s. 98(2); Greece: *Greek Monopolies and Competition Act* 1977; Switzerland: *Swiss Cartel Act* 1964; and the European Economic Community, for example in *Dyestuffs Decision*, 12 J.O. Comm. Eur. (No. L. 195) (1969), [1965-1969 Transfer Binder] Common Mkt.Rep. (CCH) 9314, at 8694 (July 24, 1969); *Imperial Chemical Industry* v. *E.E.C.*, 11 Common Mkt. 1.R. 557, 629 (1972).

forty-one British Commonwealth governments' legal departments criticized this style of test in the antitrust sphere.[23] In Australia Durack (Australian Attorney-General) said: "we criticize . . . an effects test which is so wide, so vague and so uncertain."[24]

Firstly, it has been criticized because the doctrine can become difficult to apply (compare the tangible physical effects of a collision between two ships—*S.S. Lotus*) to the amorphous area of economic effects in an extraterritorial context. As one British scholar said:

> Once we move out of the sphere of direct physical consequences, however, to employ the formula of "effects" is to enter upon a very slippery slope; for here the effects within the territory may be no more than an element of alleged consequential damage which may be more or less remote.[25]

Secondly, comity, advocated in *Timberlane* as the foundation for the balancing of interests test which it applied needs to be defined. It has proved a nebulous concept and one that different countries give different interpretations to. However, a definition of the Attorney-General for the United States in 1977, G. B. Bell, which is oft-quoted is:

> "Comity" is a very small word that stands for a very large principle. Comity is a way of saying fair play—that each of two parties will yield to the one which has interests that are clearly paramount. It is a word signifying a concern for common courtesy and decency in conduct toward others.[26]

This is a good foundation for an "interests" test (if such a test was to be accepted), but guidelines for it must be found. Also, perhaps "good faith" considerations should come into play here. Durack said:[27]

> But comity is not in itself sufficient where there is a conflict of two national laws. A deference by one sovereign which is entirely discretionary is not sufficient. In the absence of a supranational authority there needs to be a rule of international law requiring good faith consideration in order to ascertain which law of each sovereign is the more appropriate.

Thirdly, in retaliation to the United States assertion of extraterritorial jurisdiction based on the aforementioned principles, and the hefty treble

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[23] [1980] Antitrust & Trade Reg. Rep. (B.N.A.) A-10.

[24] Re Australia's position on United States Antitrust Enforcement 13 (1981); Australian Attorney-General's Department Press Releases 1981-2.

[25] Jennings, "Extraterritorial Jurisdiction and the United States Antitrust Laws", 33 Brit. Y.B. Int'l L. 146, 159 (1957).

[26] In an address delivered to the American Bar Association Assembly Luncheon at Chicago on 8 August 1977. 51 Austl. L.J. 801 (1977) at 801.

[27] P. Durack in his address to the American Bar Association in New Orleans, United States on 12 August 1981.

damages provisions which can result in antitrust cases, many states, including Australia have taken the severe measure of enacting "blocking statutes" and "claw-back" legislation.[28] These problems with the "effects doctrine" will be returned to when solutions to the problems are discussed.

B. AUSTRALIAN POSITION ON EXTRATERRITORIALITY AND THE TRADE PRACTICES ACT

The Commonwealth Constitution is not explicit upon the point of whether Australian acts can be given extraterritorial provisions. However, there is a wealth of authority to support the Australian Industrial Courts and the Federal Court's conclusions that the Act could have an extra-territorial effect. The common law and section 21 of the *Acts Interpretations Act*[29] support them. Also, the *Statute of Westminster*[30] and the *Statute of Westminster Adoption Act*[31] have been interpreted to mean that the Commonwealth has the power to legislate in relation to extraterritorial activities as long as the legislation falls under one or more heads of power of the Commonwealth Constitution and has a nexus with Australia.[32] (The *Australia Acts*[33] do not affect this.) The legislation must also express a clear intention to apply outside Australia's usual territorial jurisdiction and the law must be "for the peace, order and good government of the Commonwealth with respect to" one or more heads of constitutional power.[34] However, it does not need not be shown that the law is enforceable extraterritorially or that it complies with international law for it to be valid in Australia.

In *AMH* Justice Wilcox recognized that there is a presumption that "a statute is to be construed as limited in its operation to the territory or the nationals of the state which enacts it" [at 114], quoting from Justice Windeyer in *Meyer Heine* [at 43]. He went on to say that whether an act applies extraterritorially is a question of interpretation whether the

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[28] Belgium, Canada, Denmark, Germany, Italy, The Netherlands, New Zealand, Norway, The Philippines, Sweden, and the United Kingdom have all enacted this kind of legislation. In Australia: *Foreign Proceedings (Prohibition of Certain Evidence) Act* 1976 (Cth.); *Foreign Antitrust Judgements (Restriction of Enforcement) Act* 1979 (Cth.); replaced by: *Foreign Proceedings (Excess of Jurisdiction) Act* 1984 (Cth.).

[29] 1901 (Cth.).

[30] 1931 (Imp.) s. 3.

[31] 1942 (Cth.) s. 3.

[32] Held by Barwick C.J. in *Robinson* v. *Western Australian Museum* (1977) 16 A.L.R. 623; 51 A.L.J.R. 806 at 811. This interpretation was also held possible by using the external affairs power of the Commonwealth Constitution—section 51(xxix).

[33] 1986 (Cth. & U.K.).

[34] S. 51 of the *Commonwealth of Australia Constitution Act* 1900 (Cth.) Held in *R.* v. *Foster; Ex parte Eastern and Australian Steamship Co. Ltd.* (1959) 103 C.L.R. 256 at 267, 279, 300-1, 307.

Also held in *Meyer Heine Pty. Ltd.* v. *China Navigation Co. Ltd.* (1966) 115 C.L.R. 10 at 23. However a majority of the High Court held that section 4 of the applicable legislation, the *Australian Industries Preservation Act* 1906 (Cth.), could not be applied extraterritorially as there was not a clear parliamentary intention that it should do so.

The House of Lords held similarly in *In re Westinghouse Electric Corp. Uranium Contract Litigation*, [1978] 2 W.L.R. 81.

prima facie presumption, that the Act does not extend to penalize acts done outside Australia, by foreigners has been displaced" [at 114], quoting from Justice Windeyer in *Meyer Heine* [at 43].[35] He did not discuss nexus, heads of power etc. but by implication, he held that parts of the Act do apply extraterritorially due to section 5.

It is firstly necessary to determine if the Act's extraterritorial provisions are valid under the Commonwealth Constitution.[36] Section 4(1) extends corporation to include foreign corporations. This is valid under section 51(xx), the foreign corporations power. Section 51(i) is the source of power for legislating for trade and commerce between other countries. Section 51(xxix) is the external affairs power. It was held by the High Court in *N.S.W.* v. *Cth.*[37]: "matters or things geographically situated outside Australia" and "any person or place outside and any matter or thing . . . outside the boundaries of the Commonwealth" can be held subject to this power. The extraterritorial provisions of the Act are clearly for "the peace, order and good government of the Commonwealth", which is a prerequisite for section 51 to apply. As Justice Wilcox recognized, the requisite legislative intent to have parts of the Act applying extraterritorially was also present.

Thus far there the case law has provided limited guidance upon the extraterritorial application of the Act. There have only been two decisions which discussed the issue. The first was in *Wells* v. *John R. Lewis Pty. Ltd.*[38] The case left open more questions than it answered. The defendant's business was to publish directories and distribute them within Australia and overseas. The defendant posted requests to companies in Australia and the United States requesting payment for subscriptions to the directory, allegedly in breach of section 64(3) of the Act.[39] The extraterritorial conduct that the Industrial Court had to consider was that United States' consumers were affected.

The Court looked at section 64(3) and other parts of the Act [at 17, 137-9] and came to the conclusion that section 64(3) is not limited to conduct affecting Australian consumers only. In fact, the only consumers in question were the American ones and the court made a ruling concerning them. The Court gave an extremely wide interpretation and did not place any limits on it. For example, it is unclear whether the section could

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[35] Similarly held by Kitto J. at 23 and Menzies J. at 38.

[36] Commonwealth of Australia Constitution Act 1900 (Cth.) ("Constitution").

[37] *New South Wales* v. *Commonwealth (Seas and Submerged Lands Act)* (1975) 135 C.L.R. 337 at 221, 265 & 275.

[38] (1975) A.T.P.R. 40-007. In that case the defendant Australian company tried to obtain money from American companies in the United States for entries in a directory. It was held that the conduct was in breach of Part V, sub-section 64(3).

[39] Section 64(3) A corporation shall not assert a right to payment from any person of a charge for the making in a directory of an entry relating to the person or to his profession, business, trade or occupation unless the corporation knows or has reasonable cause to believe that the person has authorized the making of the entry.

apply to a situation where only overseas consumers were affected, or to where 5,000 overseas consumers were affected and only 5 Australian ones. The Court possibly went even further than many other countries have gone when applying their antitrust laws extraterritorially.

The Court somewhat vaguely discussed the term "market". The Court recognized that section 5(1) applies to Part V and thus to section 64(3) [at 17, 137]. However, it went on to say that there is no such provision in Part V and thus in section 64(3) itself. The next step it made is that section 64(3) could thus apply even where an effect is not felt in the Australian market. With respect, this seems to go against the entire purpose of the Act.

The decision was a little unclear and did not provide the illumination necessary upon this point. It has not been dealt with on these points in a subsequent case, and notably not in *A.M.H.* In light of *A.M.H.* it is unlikely that a subsequent court would give the Act as wide an extra-territorial interpretation as the Industrial Court in *Wells.*

The Court also looked at section 5 and gave it a very wide but vague interpretation. It said the section could apply to conduct engaged in offshore which could decrease competition or mislead Australian consumers. The Industrial Court determined that section 5 did give Parts IV and V an extraterritorial application. This was subject to the Act being capable of being interpreted as being about conduct engaged in outside Australia which might reduce competition within the Australian market or mislead Australian consumers.[40] (Although the court decided the Act had an extraterritorial application, it did not need the assistance of an overseas court to enforce its remedy.[41])

The next and major decision was *A.M.H.* where it was also held that prima facie section 5 had an extraterritorial effect. However, if the court wanted to make a declaration that the transaction was void and make an order pursuant to that finding, it would have needed the assistance of a court of the United Kingdom. It did not think it would receive this co-operation, found a different solution and followed that. Thus *A.M.H.* highlighted the possibility of a dichotomy between prescriptive and enforcement jurisdiction.

C. IMPLICATIONS

As shown above, Justice Wilcox acknowledged that the Act gave the Court the prescriptive jurisdiction to apply it extraterritorially, but not the enforcement jurisdiction. *A.M.H.* raises more issues than it answers. There is not enough guidance in the decision to make the outcome of subsequent litigation with an extraterritorial aspect a certainty. The

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[40] *Id.* at 237.

[41] Cf. *A.M.H.* where if the court had made an order declaring the transaction void under section 81(1), the assistance of a court of the United Kingdom would have been required.

decision recognizes that section 5(1) of the Act gives an extraterritorial application to Parts IV and V. However, it only discusses this in relation to section 50(1). Thus the outcome concerning the other sections in those parts is uncertain. Also, the decision does not discuss the possibility of sections outside Parts IV and V giving the Act an extraterritorial application. It is submitted that such sections do exist.

For example, sub-section 5(2) extends section 47 (which regulates exclusive dealing) and section 48 (which regulates resale price maintenance) extraterritorially:

> those sections extend to the engaging in conduct outside Australia by any persons in relation to the supply by those persons of goods or services to persons within Australia.

The sub-section has not come under judicial scrutiny yet. It is a little unclear whether this sub-section is to be superimposed on top of sub-section 5(1) or if it could operate as an alternative to sub-section 5(1). If the latter interpretation is possible, there is not the limitation of section 5(1) where the body corporate must be incorporated or carrying on business in Australia or be a citizen or ordinarily resident. This interpretation would give the Act a very far-reaching extraterritorial effect in these areas.

Some of the definitions given in section 4 display a clear parliamentary intention that the Act is to have an extraterritorial effect. These definitions give further support to the express provision for extraterritoriality in section 5:

> 4. (1) "competition" includes competition from imported goods or from services rendered by persons not resident or not carrying on business in Australia;
>
> "corporation" [includes] a foreign corporation;
> "trade or commerce" means trade or commerce . . . between Australia and places outside Australia;
>
> 4. E. "market" means a market in Australia.

The definition for competition is particularly interesting as it seems to discount section 5(1) which makes Australian residency or carrying on business in Australia a prerequisite. If this definition is to be taken prima facie, it would give the Act a very wide extraterritorial interpretation. An example could be: a product, X is only available to Australia from five overseas corporations. They form a group which fixes the price of X. The Australians buy X, but all the negotiations, the signing of the contract and the payment occur overseas. The Australian buyers ship it to Australia and sell it themselves. Thus the overseas corporations forming the cartel have absolutely no connection with Australia—no incorporation, no carrying on business etc. However, this definition would seem to indicate that an action could still be taken against the cartel. The Court would use section 5A(1) which prohibits price-fixing. It would

be extremely unlikely, given the reticence of the Court in *A.M.H.* to apply the law extraterritorially where there was at least some connection with Australia to use this provision in such a way. However, the provision does exist.

Although the contravention of the Act must have an effect upon the Australian market, the definition and the Act do not preclude the conduct which contravenes the Act from occurring overseas.

It is unclear what a court would do if the section 4 definitions contradicted section 5. As yet there is no judicial decision upon this point. However, it is possible to speculate that there might exist situations where the court would consider it had to exercise its prescriptive jurisdiction and apply to a foreign court to exercise the enforcement part of it. For example, if a major Australian industry, or a large number of consumers were threatened, and the contravention could only be rectified by an attempt to enforce the Act extraterritorially, a court might be flexible in its application of these sections. For example a court might hold that section 5 does not apply but section 4 does and not allow the inapplicability of section 5 to deter it from using section 4, or vice-versa.

It is possible to construct innumerable hypotheticals where Parts IV and V are contravened and an extraterritorial element is involved. However, the problem highlighted by *A.M.H.* concerning the dichotomy between prescriptive and enforcement jurisdiction could occur in an equal number of hypotheticals. If Parts IV or V are contravened, a remedy can be sought under Part VI. For example, section 76 provides for a pecuniary penalty, but if the overseas corporation has no assets in Australia, it would be very hard to get the penalty enforced. As already indicated, it was recognized in *A.M.H.* that the pecuniary penalty of one state will not be enforced by another state. Section 80 provides for an injunction, but the foreign corporation might be involved in the contravention in such a way that an injunction would be ineffective. *A.M.H.* demonstrates the possibility of section 81(1A) not working in relation to a foreign company.

It is suggested that there must be some situations where the court will have to try and enforce its jurisdiction extraterritorially. Consider the example of product X given above. Let us suppose that product was indispensable to the Australian community. Surely that would be an example of a court having to enforce its jurisdiction overseas by asking the assistance of the relevant overseas courts. Another example could be where State A is the only consumer of this product. Four of these corporations are non-Australian and one is Australian. Product Y is Australia's major export. The four non-Australian corporations form a cartel and fix a maximum price. State A only buys from the four corporations as a direct result of the price-fixing which has made the product cheaper than the Australian equivalent. Surely in this example too, a court would have to try and do something about this problem.

D. SOLUTIONS

The situations before the courts will not always have practical alternatives to extraterritorial enforcement, as in *A.M.H.* As yet there are no guidelines in the cases as to when a court will try to enforce the antitrust law extraterritorially, nor what process it will use to make the decision. Some guidelines which have already been used in the cases include:— comity, nationality, balancing of interests and the effects test.

In *A.M.H.* Justice Wilcox briefly mentioned international comity [at 118] when considering whether an Australian court should make a decision where:

> a vendor [referred to in section 81(1A)] who not only lacked a continuing association with Australia, such as residence, incorporation, or the carrying on of business in this country but who had not even the casual relationship of having engaged in Australia in conduct relating to the relevant transaction.

He concluded that such a decision would be a "disruption to international comity" [at 118]. Thus, Justice Wilcox considered that comity could be a prime factor when deciding an extraterritorial jurisdiction question. He did not mention any other guidelines. However, as the case did not call for a decision based on extraterritoriality principles, it is unclear whether in a case where this was the primary question, he might use other guidelines.

The result of Justice Wilcox's decision concerning the extraterritoriality issue: that the court had the prescriptive but not the enforcement jurisdiction seems to be an advocacy for a strict interpretation of the nationality principle of jurisdiction: that a court is only to make a decision concerning acts occurring within its own territory and over its nationals. Having regard to the discussion supra concerning section 4 and how it interrelates with section 5 and the rest of the Act, it is uncertain whether this is the legislator's intention. It is submitted that it is not, that the Act is intended to give the courts the opportunity to make decisions where an extraterritorial aspect is involved. However, as Justice Wilcox found an alternative to an extraterritorial application of the Act, it is unclear what he would have done if such an alternative was not available. Evidently he displayed extreme reluctance to give the Act such an interpretation. It is not known whether this reluctance would be shared by his brother judges.

Evidently making an extraterritorial decision on the basis of the nebulous concept of comity alone is insufficient. A clearer guideline is needed. The American decisions on antitrust have used the effects test, *Alcoa* and then developed it into a balancing of interests test, *Timberlane.* These tests have advantages and disadvantages, as shown supra. However, it is submitted that they do merit some consideration in Australia. One distinct problem with the tests is that it has taken the American courts 44 years to refine them, and the courts are still refining them. Rather than waiting for judicial creativity which the Australian courts are less

inclined to engage in than their American counterparts, perhaps the Australian legislator providing the parameters of a test, rather than the court taking decades to compose one, if at all. This would also have the advantage of the judiciary realizing that the legislator does want this problem to be dealt with, rather than giving the judiciary the opportunity to side-step the issue as Justice Wilcox seemed to indicate would happen. Another problem is that Australia seems to have condemned the tests. However, it is submitted that the tests could provide a good basis for guidelines upon how to apply an act extraterritorially, and the Australian legislator could create legislation on this point using the parts it considers worthwhile, and adding parts of its own to compensate for those it disagrees with.

The major problem highlighted in *A.M.H.* concerning the extra-territoriality issue was that the Court did not consider that its decision would be enforced as the cooperation of an overseas court was required to do so. This was despite the fact that it found an alternative remedy and indicated that extraterritoriality was only a subsidiary issue. A solution to this problem would be for the Australian government to draw up agreements with other countries for a program of reciprocal enforcement.

A possible starting point for such a course is the *Agreement on Antitrust Cooperation, United States-Australia.*[42] The Agreement was provoked by a recognition that tremendous conflict had arisen between the two governments in relation to the United States extraterritorial enforcement of antitrust law [at 154]. The governments determined that the conflict could best be resolved with "mutual respect for each other's sovereignty and with due regard for considerations of comity" [at 154].

In order to do this the Agreement provides a framework for inter-governmental consultation where an antitrust conflict between Australia and the United States arises (as long as a national interest is not involved). It does not provide a finite way of dealing with specific problems, but rather emphasizes a general policy of consultation and cooperation.

The agreement is not perfect, but, perhaps more importantly, it symbolizes recognition between the two countries that conflict does exist in these matters, and provides a possible framework by which to solve some of this conflict. Perhaps in a future antitrust case involving the United States, an Australian court in debating whether to make a decision which would require the cooperation of a court of the United States to enforce it, would take the Agreement into consideration. The court might conclude that it would receive cooperation and thus make such a decision.

If this was to be the case, Australia would benefit from similar agreements with other countries. If Australia had such an agreement with

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[42] June 29 1982. Reprinted in Australian Attorney-General Department Press Releases, 1981-2, at 153.

the United Kingdom at the time *A.M.H.* was decided, perhaps Justice Wilcox would have found a different remedy ie. an extraterritorial one. The problem with the United States-Australia agreement is that it does not provide specifically for reciprocal enforcement. Perhaps that should be the next step. The agreements could embody similar principles as the *Foreign Judgements (Reciprocal Enforcement) Act.*[43] It would be difficult to compose an agreement on this point acceptable to both countries, for example in an agreement between the United States and Australia as the two have widely divergent views on the extraterritorial enforcement of antitrust legislation. For example, the American courts have been very willing to extend their antitrust law extraterritorially whereas the Australian courts have been largely reluctant to (although there is little Australian judicial guidance on this). Another example is the treble damages provided for in the American legislation, as opposed to the single damages in the Australian. Despite these problems, it is clear that further cooperation between the two countries is vital. Australia could only benefit by having similar such agreements with other countries. Justice Wilcox indicated in *A.M.H.* that he did not believe a United Kingdom court would enforce a section 81(1A) remedy. Thus Australia would benefit from bilateral cooperation with the United Kingdom too. Clearly it would also benefit from agreements with its other trading partners.

There have been a few multilateral and bilateral agreements on antitrust matters. However, none have been as specific as the Agreement, nor have had as much potential for success.[44] The agreements have rarely been used. Perhaps the advantage of the United States-Australia agreement is that it is bilateral and therefore tailored specifically to suit the individual needs of these two countries. This would lead to the conclusion that Australia might benefit more from similar bilateral agreements rather than trying to persuade many countries to enter a multilateral agreement. It is self-evident that the more countries involved, the more general an agreement must be in order to accommodate the differing antitrust policies. Perhaps a multilateral agreement in general terms could be worked out as a preliminary thus leading to greater international cooperation in antitrust matters. Then a series of bilateral agreements using the multilateral one for the outline but tailoring it to the specific needs of each pair of countries could be drawn up.

Considering the judicial reluctance in *A.M.H.* to apply the Australian antitrust law extraterritorially (although such a course was unnecessary on the facts), it may be that mere treaties between governments, such as the United States-Australia agreement would not be treated by the court as binding upon it. Thus Australia might have to resort to negotiations

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[43] 1973 (N.S.W.).

[44] These include the *General Agreement on Trade and Tariffs*, 30 Oct. 1947; the *Treaty of Rome*, 25 March 1957; and similar agreements flowed from suggestions by the Organization of Economic Cooperation and Development, the United Nations Conference on Restrictive Trade Practices.

with other states so as to prompt all parties to implement reciprocal enforcement legislation in order for the court to give effect to such cooperation.

V. CONCLUSIONS

Clearly Australia, like other countries, faces many problems in antitrust litigation when the cooperation of a foreign court is required for the enforcement of an Australian law extraterritorially. Today the extent of international cooperation in this area is similar to what it was up to World War Two and the introduction of the G.A.T.T.—sporadic and rarely international. However, the concept of a market has changed since these two events so that the domestic markets interact dependently with other domestic markets in the wider sphere of a world market. Today's combination of the reality, political views and the legislation concerning the market are not sufficiently cohesive for the domestic and world markets to cooperate as well as they could. *A.M.H.* all too clearly highlights these problems. A possible and promising solution would be for countries to cooperate and consider ways in which the market reality, political views of it and the legislation could be combined so as to ensure a smoother, more certain and less contentious market place especially in respect of antitrust jurisdiction. This could be done with multilateral and bilateral agreements drawn up in a spirit of good faith and comity.

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