

1979

The Parliament of the
Commonwealth of Australia

The Senate

Foreign Antitrust Judgments (Restriction of
Enforcement) Bill 1979

Explanatory Memorandum

(Circulated by the Attorney-General,
Senator, The Honourable P. D. Durack, Q.C.)

FOREIGN ANTITRUST JUDGMENTS (RESTRICTION OF ENFORCEMENT)

BILL 1979

Existing Position

Apart from the Bill, possible means of enforcing judgments of foreign courts are :-

- . at common law, or
- . under State or Territory legislation.

2. For a discussion of the position at common law reference may be made to :-

- (a) Halsbury's Laws of England, Fourth Edn. Vol. 8, p.475 et. seq.; and
- (b) The Conflict of Laws by Dicey and Morris, Ninth Edn. p.985 et. seq.

In particular, it will be noted that :-

- (c) A foreign judgment cannot be so enforced by direct execution, but it may be recognised and regarded as creating a debt between the parties to it; on that basis an action may be brought on the judgment;
- (d) It is essential that the foreign court had jurisdiction according to the rules of the conflict of laws;
- (e) A foreign judgment will not be recognised or enforced if that would be contrary to public policy, or if the judgment is for a sum payable in respect of taxes or penalties.

3. Relevant State and Territory Acts and Ordinances are :-

- . Foreign Judgments (Reciprocal Enforcement)
Act 1973 (N.S.W.)
- . Foreign Judgments Act 1962 (Vic.)
- . Reciprocal Enforcement of Judgments Act
1959 (Qld.)
- . Foreign Judgments Act 1971 (S.A.)
- . Foreign Judgments (Reciprocal Enforcement)
Act 1963 (W.A.)
- . Foreign Judgments (Reciprocal Enforcement)
Act 1962 (Tas.)
- . Foreign Judgments (Reciprocal Enforcement)
Ordinance 1954 (A.C.T.)
- . Foreign Judgments (Reciprocal Enforcement)
Ordinance 1955 (N.T.).

4. In each of these Acts and Ordinances provision is made for a foreign judgment to be registered, whereupon it is able to be enforced as if it were a judgment of the local Supreme Court.

5. No Order in Council has been made applying any of these Acts or Ordinances to judgments of Courts in the United States of America. Under section 5 of the South Australian Act, however, such an Order in Council appears to be not essential.

6. The right to register a foreign judgment under the State or Territory legislation is dependent on the foreign court having had jurisdiction, and on the judgment not being for the enforcement of any penal or revenue law. In addition, a registered judgment may be set aside on a number of grounds, including the ground that enforcement of the judgment would be contrary to public policy in the relevant State or Territory.

7. There is no judicial authority directly in point on the question whether a judgment for treble damages

under antitrust legislation is wholly or partly penal for present purposes. In the United States there are some authorities which tend to support the view that in that country two-thirds of a treble damage award would be held to constitute a penalty - see Kline v. Caldwell, Banke & Co., 508 F.2d. 226 (9th Cir. 1974), Lyons v. Westinghouse Electric Corp., 222 F.2d. 184 (2d Cir. 1955) and Rogers v. Douglas Tobacco Board of Trade, Inc., 1957 Trade Cas. 68,706 (5th Cir. 1957) and Sun Theatre Corp. v. RKO Radio Pictures Inc., 1954 Trade Cas. 67,722 (7th Cir. 1954). The views of the United States courts would not, however, be necessarily followed by an Australian Court. Relevant principles were stated by the Privy Council in Huntington v. Attrill (1893) A.C. 150.

The Provisions in the Bill

Clause 1

Short title.

Clause 2

Commencement on Royal Assent.

Sub-Clause 3(1)

- . Defines "antitrust law" broadly and by reference to its purpose;
- . Defines "Australia" to include all Territories;
- . Defines "foreign court" broadly, but excludes the Privy Council (cf. Foreign Proceedings (Prohibition of Certain Evidence) Act 1976; and
- . Provides that a judgment includes any decree or order.

Sub-Clause 3(2)

- . Provides for the Attorney-General to make an order in respect of a particular foreign judgment;
- . Requires that the Attorney-General must be satisfied before doing so of inconsistency with international law or comity or that the order is desirable for protecting the national interest (cf. section 4 of the Foreign Proceedings (Prohibition of Certain Evidence) Act 1976);
- . Requires also that the Attorney-General be satisfied that the judgment would or might be detrimental to trade or commerce with other countries, the trading operations of a trading or financial corporation formed within the Commonwealth or matters within the legislative or executive powers of the Commonwealth;
- . Provides for an order to declare that a judgment be not recognised or enforceable in Australia; and
- . Enables such a declaration, if desired, to relate to a part only of a judgment, having regard, in particular, to the possibility of a judgment for treble damages being unobjectionable to the extent that it provides only compensation for loss suffered.

Sub-Clause 3(3)

- . Provides for orders to have legal effect according to their tenor.

Sub-Clause 3(4)

Requires an order to be published in the Gazette, and to have effect from the date of such publication.

Sub-Clauses 3(5) and (6)

Enable disallowance of orders by either House of Parliament.