

THE CONTROL OF MONOPOLIES AND RESTRICTIVE BUSINESS PRACTICES IN AUSTRALIA

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In 1960 the Federal Government announced its intention to consider the introduction of legislation to protect and strengthen free enterprise against the development of injurious monopolies and restrictive practices in commerce and industry. It appears that the Government may introduce legislation this year, although at time of writing it is not clear whether the Commonwealth will do so even if it does not receive support from the States. Whatever the legislative approach, it is almost certain that the Act will be more concerned with restrictive business practices than with monopolies. As a matter of history, the common law countries first to pass antitrust laws were originally concerned mainly with those undertakings which, because of size and dominating industrial influence, were commonly known as monopolies or trusts. With the passing of years, the emphasis has shifted from the institutions themselves to the conduct of those engaged in business, whether monopolists or not. Restrictive business practices are themselves frequently stepping-stones to monopoly, but even where they are not they may place consumers in a less favourable position than they should be.

In the United States the first federal antitrust law, the Sherman Act of 1890, contains two basic prohibitions; the one on monopolies and monopolisation and the other on arrangements in restraint of trade. Little has since been done to enlarge the scope of the law against monopolies, but much has been added to the legislation which deals with restraints of trade. This observation also applies to the principal Canadian statute, the Combines Investigation Act. In England the Monopolies and Restrictive Practices (Enquiry and Control) Act passed in 1948 is quite overshadowed by the Restrictive Trade Practices Act, 1956, which provides for the registration of agreements in restraint of trade and their examination by a Restrictive Practices Court. The concept of a monopoly belongs more to the nineteenth century, whereas the focus on restraints of trade is mainly a development which has accompanied the growth and growing complexity of business in the present century.

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Monopolies provide a colourful subject for economic and social writings, but, for all that, the significance and extent of monopoly control in Australia are not yet fully determined.⁵ Suffice it to say that there are monopolies, in the popular sense, in important branches of Australian industry, e.g. iron and steel; glass; matches; paper; minerals and sugar.

Restrictive business practices: Agreements and arrangements in restraint of trade and commerce still await comprehensive study, but a picture is emerging of an Australia-wide pattern of collective restrictive practices implemented mainly through the mechanism of trade associations. A recent article⁶ mentions 119 trade associations known to exist in Victoria, and it is quite probable that this is no more than half the total figure. Associations cover a wide range of business activity, including ice manufacture; quarrying; building; footwear manufacture and distribution; bread-making; catering; film exhibition; timber; fibrous plaster; electrical goods manufacture, distribution and installation; furs; wool-broking; hardware manufacture and distribution; lifts; carriers; dry cleaning; groceries; hairdressing; masonry; painting; decorating and signwriting; plumbing; pastry-making; tanning; concrete; milk production and distribution; fruit-growing; nurseries; insurance; printing; roofing tiles; automotive parts; confectionery; rope and cordage; pharmaceutical goods; petroleum; and sporting goods. Not all associations practise restraints of trade, but available information suggests that as many as one-half of them do, and that many of these exercise various kinds of restraint.

Although Western Australia is not a highly industrialised State, a report of a Royal Commission on Restrictive Trade Practices, and Legislation, presented to the Western Australian State Parliament in 1958, lists 111 trade associations connected with trade and commerce in that State. The Commission said that there were others of which it was not aware. It also observed that some associations had written rules but that others had not; and that some were affiliated with similar bodies in other States, while a few were federal bodies operating in Western Australia. The extent to which Western Australian commerce is covered by associations is quite surprising. The Commission referred to trade associations concerned with, for example, timber; liquor; pharmaceutical supplies; galvanised iron; wine and spirits; hardware; printing; automotive spare parts; meat; bread; steel; rope; building;

5. One of the few notable publications is E. L. Wheelwright's "Ownership and Control of Australian Companies". Wheelwright tells an interesting story of Australian company shareholdings and interlocking directorates but the book falls short of an assessment of where monopoly control lies. See also "The Structure of the Australian Economy" (1962) by Prof. P. H. Karmel and Miss M. Brunt for a useful description of the scale of activities of some of the largest companies in Australia.
6. Alex. Hunter, "Restrictive Practices and Monopolies in Australia", *The Economic Record*, March, 1961, at p. 32.

Bi-lateral restraints: Many bi-lateral transactions in restraint of trade may have no marked effects on competition. However, in Australia, by reason of the comparatively small overall market, the number of suppliers of a given product or service is sometimes quite small and a number of predominant supplier situations have emerged. In some instances, predominant firms consciously adopt parallel action as to prices, without entering into arrangements with each other. Individually, firms, whether predominant or not, are frequently parties to vertical-type restrictive arrangements. A common bi-lateral transaction is a vertical resale price maintenance arrangement as occurs, for example, when a manufacturer agrees with a distributor as to the price at which his products shall be sold. Exclusive dealing, discriminatory trading and predatory pricing are also carried on individually as well as collectively. There are many forms of these types of restrictive devices; for example, the supplier of a product may insist that his customer also take goods of a different description which the supplier is in a position to supply. Another case is where the supplier of, say, petrol, requires the reseller not only to deal only in that brand of petrol, but also to deal only in associated brands of tyres, batteries and accessories.⁸

Mergers: One other distinctive type of business activity should be mentioned—the merger. Most Australian mergers are so-called take-overs in which one company acquires the shares of another. Another type of merger sometimes encountered is the amalgamation of companies. In all cases the central concept is the vesting of the right to control and determine policy in the hands of one directorate.

Mergers occur for various reasons, including the following:

- (1) Taxation advantages.
 - (2) Development of new markets.
 - (3) Economies of large-scale business.
 - (4) In vertical mergers, economies of integrated processes.
 - (5) In horizontal mergers, diversification of assets.
 - (6) Aggrandisement.
 - (7) Reduction of competition.⁹
 - (8) False market values for the shares of some public companies.
- Mergers are not necessarily restrictive or monopolistic but they may be and they can do much to shape the ultimate competitive structure of a developing industry.

THE ANTITRUST LAWS OF U.S.A. AND CANADA

Some reference, at this early point, to the legislation of the two North American federations should assist further examination of our own antitrust problems.

8. For an interesting commentary see article by Alex. Hunter, *op. cit. supra* n. 6.
9. See J. A. Bushnell, "Australian Company Mergers, 1946-1959".

merce in any section of the country” to lessen competition substantially or to create a monopoly.

Commerce is defined in the Clayton Act to mean trade or commerce among the several States and with foreign nations and also territorial trade.

Federal Trade Commission Act: Another Act of importance is the Federal Trade Commission Act, also passed in 1914. The Act created the Federal Trade Commission. Section 5 empowers the Commission to prevent persons, partnerships and corporations from using “unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce”. Commerce is again defined as interstate, foreign and territorial commerce.

Enforcement of the antitrust Acts: Congress intended the Sherman Act to reach to the limits of federal constitutional power, and the Act extends to activities which merely *affect* interstate commerce, but the other two Acts are restricted to behaviour taking place *in the course of* interstate commerce. The Antitrust Division of the Department of Justice is alone responsible for the enforcement of the Sherman Act, but administration of the Clayton Act is divided between it and the Federal Trade Commission.

The Commission enforces its jurisdiction under the Clayton Act and the Federal Trade Commission Act through its own administrative machinery, e.g. the issue of cease and desist orders. The Antitrust Division of the Department of Justice, on the other hand, has to resort to the ordinary federal courts in enforcing its jurisdiction under both the Sherman and Clayton Acts. Thus business is exposed on two fronts, on one to the threat of administrative proceedings, and on the other to legal prosecution or suit.

Legal aspects of the United States antitrust laws: For an Australian lawyer, the American antitrust laws have two features of interest. One is the gloss which the courts have applied in interpreting the Sherman Act. The other is the scope of the federal commerce power.

As to the gloss, section 1 of the Sherman Act in terms applies to *every* contract in restraint of trade, but in the *Standard Oil case*, in 1911,¹⁰ the Supreme Court held that the Act outlawed only undue limitations on competitive conditions. The Act had to be interpreted by a “rule of reason”. The application of the rule enables the court to exclude from the operation of the Act agreements which are themselves insignificant or else do not affect market conditions to any appreciable extent. Certain practices are, however, judicially regarded as being illegal *per se*. These include all collective price fixing agreements, collective market sharing and collective boycotts. Once ar-

10. (1911) 221 U.S. 1.

one State to destinations in other States which carried them through Chicago, was part of the stream of interstate commerce. The fact that a part of the journey consisted of transportation by an independent agency solely within the boundaries of one State did not make that portion of the trip any less interstate in character. Accordingly, an agreement to bring Chicago taxi cab companies under common control and eliminate competition among them relative to contracts for supplying transportation for the intra-Chicago journey could violate the Sherman Act. The decision calls to mind *Hughes v. State of Tasmania*,¹⁴ in which the High Court decided that a Tasmanian road carrier transporting goods purchased in other States from ship's side at Tasmanian ports to their ultimate destination, Hobart, was not engaged in interstate commerce so as to attract the protection accorded by section 92 of the Constitution.

In *Ford Motor Company v. Federal Trade Commission*,¹⁵ the Court of Appeals for the Sixth Circuit held that sales on credit by local Ford dealers, though intrastate in character, became part of interstate commerce because they were made pursuant to a unified plan of the Ford Company for selling and financing cars shipped into interstate commerce. Control of local sales was appropriate to the protection of interstate commerce.

The decision in *Federal Trade Commission v. Cement Institute*¹⁶ gave effect to an established principle of antitrust law, that if a conspiracy is carried on interstate the acts directed toward the conspiracy cast the entire matter into interstate commerce, even though a particular defendant may have transacted all his business intrastate. Thus, a company producing cement which combined with other cement producers in pricing goods on a multiple basing point system could offend against section 2 of the Clayton Act, even though all its production and sales were intrastate.

Another interesting case is *Federal Trade Commission v. Bunte Bros.*¹⁷ Bunte Bros. were candy manufacturers in Illinois. They sold packs of candy by methods involving the element of chance to customers within the State. The F.T.C. endeavoured to prohibit the use of this selling device on the ground that it enabled the company in the Illinois market to compete unfairly with manufacturers in other States who could not indulge in the device because the Commission had barred the so-called "break and take packages" as an unfair method of competition under the Federal Trade Commission Act. The interesting thing is that the Commission endeavoured to show that Bunte Bros.' selling methods within the State of Illinois were part of interstate

14. (1955) 93 C.L.R. 113.

15. (1941) 120 F. 2d 175.

16. (1948) 333 U.S. 683.

17. (1941) 312 U.S. 349.

ordinary courts and there is no equivalent to the Federal Trade Commission of the United States. The current principal Act is the Combines Investigation Act, 1952. Substantial amendments were made to that Act in 1960.

Section 32 forbids combinations or agreements that prevent or unduly lessen competition in the production, purchase, sale or transportation of an article. Other sections provide for control of monopolies and mergers. An unusual feature of the legislation is that it imposes a general prohibition on collective and individual resale price maintenance (section 34). Section 33A prohibits price discrimination and predatory price cutting.

Federal constitutional power: From a constitutional standpoint, Canadian experience is of little help to Australia. Section 91(2) of the British North America Act, 1867, vests in the Canadian Parliament a power to regulate trade and commerce. There is some support for the view that the power allows adequate federal coverage of monopolies and restraints of trade, but the Privy Council's early emphasis on the scope of the property and civil rights power of the provinces, under section 92(13), has given Canadians little confidence that they can deal with restraints under the federal trade and commerce power except so far as the restraints relate to international and inter-provincial trade. The central Parliament has, however, a power under section 91(27) to make laws on the subject of criminal law and procedure and this is the power on which the Combines Investigation Act rests. The constitutional position offers, therefore, at least a partial explanation of the criminal emphasis of the Canadian Act.

In the light of later indications of the attitude of the Privy Council in the *Adelaide Steamship Company case*,^{20a} the interpretation of section 32 of the Combines Investigation Act is of some interest. Sub-section (1) creates the offence of conspiring to restrain trade and on its face the wording suggests that the conspiracy must be with intent to do one of the things prohibited. Thus, sub-section (1)(d) reads:

"(1) Every person who conspires, combines, agrees or arranges with another person— . . .

(d) to restrain or injure trade or commerce in relation to any article,

is guilty of an indictable offence. . . ."

However, the courts have proceeded on the basis that persons intend the natural consequences of their acts, and it has not been necessary to establish a specific intent to injure trade. Moreover, the courts have also taken the view that once a substantial interference with competition is established it is not a defence that the powers assumed by the parties have been exercised reasonably or with restraint. As

20a. *Supra* n. 2.

Act purposely avoids the imposition of criminal sanctions except in relation to registration and failure to obey an order of the court.

Traditional freedom of English trade and industry: In comparing the English approach with the blunt onslaught on business which the United States antitrust laws permit, it must be remembered that American businessmen have grown up with the Sherman and Clayton Acts in the background. It follows that the trade restraints so commonly found in Australia, notably collective price maintenance, limitation of distributorships and collective boycotts, are not openly practised in the United States. They have been driven well underground and have to be practised furtively and in fear of penalty if they are to be practised at all. English commerce and industry, on the other hand, have traditionally been free from controlling legislation, and restrictive agreements and arrangements have been carried out, right up until after World War II, quite openly and without fear of legal sanction. Accordingly, the 1956 Act deals with a problem markedly different from that encountered in the United States.

JUDICIAL HISTORY OF THE AUSTRALIAN INDUSTRIES PRESERVATION ACT

In the early years of Federation, a common complaint in and out of Parliament was that the infant Australian industries were in danger of falling into the hands of foreign corporations, particularly those of United States origin, as indeed had happened in petroleum, tobacco and beef. H. L. Wilkinson, in a study entitled "The Trust Movement in Australia", written in 1914, described trusts and combinations of his time in sugar, tobacco, shipping, coal, flour and bread, timber, brick supplies and painting, and beef. He said that the general effect of trusts and monopolies in Australia was to curb enterprise, enhance the profits of a few and increase prices for many.

In 1906, five years after Federation, the second federal Parliament passed the Australian Industries Preservation Act, using the Sherman Act as its model. This was about two years before the High Court decided, in *Barger's case*²² and the *Union Label case*,²³ that trade and commerce which began and ended entirely within the confines of any one State was excluded from the federal trade and commerce power expressed in section 51(i) of the Constitution.

Principal sections of the Act: Sections 4 and 5 of the new Act dealt with restraints of trade and the destruction of industries. Section 4 made it an offence for a person to enter into a contract or combine in relation to trade or commerce with other countries or among the States "with intent to restrain trade or commerce to the detriment of the public", or to injure or destroy by unfair competition an Australian

22. (1908) 6 C.L.R. 41.

23. (1908) 6 C.L.R. 469.

poly proposal, also sought to enlarge the scope of the trade and commerce and corporations powers.

In 1926 the Bruce-Page Government made a further effort to extend the corporations power and to convince the federal electors that the Commonwealth should have a power over combinations, trusts and monopolies in restraint of trade. The electors decisively repudiated these proposals. The remaining reform effort was in 1944 when fourteen subjects, submitted together to the electors as part of a programme of post-war reconstruction, included one described in the time-honoured trilogy "trusts, combines and monopolies".

The Adelaide Steamship Company case: The second episode in the legal history of the Preservation Act was *Attorney-General of the Commonwealth v. The Adelaide Steamship Co. Ltd.*²⁸ This case originated before Isaacs J. who, in 1911, found for the Commonwealth. It proceeded to the Privy Council by way of an appeal from a judgment of the full High Court reversing Isaacs J.²⁹ The principal issue before the Privy Council was whether an agreement between colliery proprietors and shipowners contravened either section 4 or section 7 of the Act. These sections did not, as the Sherman Act did, declare all restraints of trade and all monopolisation and attempts to monopolise to be illegal. They incorporated the notions of the intent to restrain trade and intent to monopolise respectively. Moreover, in each case the prosecution had to show that the disputed activity was "to the detriment of the public".

According to the facts before the Privy Council, colliery proprietors in New South Wales had entered into a vend agreement which provided for an association of colliery proprietors, the allocation of total trade among members of the association, and the fixing of common prices for the sale of various grades of coal produced. All members of the association were free to dispose of their produce without restriction but, in order to induce members not to increase their share by under-selling, any member whose trade exceeded his determined proportion had to contribute to a fund for compensating those members whose trade was less than their estimated proportions.

For the purpose of interstate trade, the colliery proprietors sold their coal to shipping companies who carried it to other States where they sold it wholesale or retail in the course of their businesses as coal merchants. The colliery proprietors entered into an agreement with the shipping companies under which they undertook to supply the shipping companies with all the supplies of coal they required for interstate trade at agreed prices and to supply no one else. In return,

28. (1913) 18 C.L.R. 30.

29. (1912) 15 C.L.R. 65.

It was strongly urged by counsel for the Crown that all contracts in restraint of trade or commerce, which are unenforceable at common law, and all combinations in restraint of trade or commerce which if embodied in a contract would be unenforceable at common law, must be detrimental to the public within the meaning of the Act, and that those concerned in such contracts or combinations must be taken to have intended this detriment. Their Lordships cannot accept this proposition. It is one thing to hold that a particular contract cannot be enforced because it belongs to a class of contracts the enforcement of which is not considered to be in accordance with public policy, and quite a different thing to infer as a fact that the parties to such contract had an intention to injure the public. . . .

Moreover, the Privy Council regarded the words "detriment to the public" as including the interests of those engaged in production and distribution of coal as well as of the consuming public. Lord Parker said:³⁶

It was also strongly urged that in the term "detriment to the public" the public means the consuming public, and that the legislature was not contemplating the interest of any persons engaged in the production or distribution of articles of consumption. Their Lordships do not take this view, but the matter is really of little importance, for in considering the interests of consumers it is impossible to disregard the interests of those who are engaged in such production and distribution. It can never be in the interests of the consumers that any article of consumption should cease to be produced and distributed, as it certainly would be unless those engaged in its production or distribution obtained a fair remuneration for the capital employed and the labour expended.

Privy Council economics: Perhaps the most offensive part of the Privy Council decision from an economist's point of view was their Lordships' assessment of the economic effects of the shipping agreement. Dealing with section 7, their Lordships said that the Act of 1906, in using the word "monopolise", was referring to a monopoly not in the strict legal sense, but in the more popular sense in which, by a contract or combination in restraint of trade, some trade or industry had passed or was likely to pass into the hands or under the control of a single individual, or group of individuals, to the public detriment. A restraint of trade would be detrimental if it created a monopoly in the sense of bringing about an "undue enhancement of prices". Looking back to the vend agreement, of course, there was not only an intention to increase the price of coal but also to annihilate competition in the New South Wales coal trade and the shipping agreement was an integral part of this arrangement. However, their Lordships chose to ignore the combined attempt to bring about exclusive dealing as between the colliery proprietors and the shipowners which put inter-

36. *Ibid.* at p. 39.

- (b) to spell out the type of considerations which a court should take into account in determining whether an act is to the detriment of the public or offensive to the public interest. In the United Kingdom the Restrictive Trade Practices Act, 1956, section 21, probably with the *Adelaide Steamship case* in mind, specifically excludes from "detriment to the public" the interests of the parties to a restrictive agreement; and
- (c) not to expect the ordinary courts to adopt other than a strict construction of any Act which attaches criminal liability to the business actions which it treats as legal misbehaviour.

THE LEGISLATIVE POWER OF THE COMMONWEALTH PARLIAMENT

A convenient starting point for an analysis of constitutional power is the present section 4(1) of the Australian Industries Preservation Act, which reads:

Any person who, either as principal or as agent, makes or enters into any contract, or is or continues to be a member of or engages in any combination, in relation to trade or commerce with other countries or among the States—

- (a) in restraint of or with intent to restrain trade or commerce; or
 - (b) the destruction or injury of or with the intent to destroy or injure by means of unfair competition any Australian industry the preservation of which is advantageous to the Commonwealth, having due regard to the interests of producers, workers and consumers,
- is guilty of an offence.

Scope of the trade and commerce power: Section 4 deals with behaviour "in relation to trade or commerce with other countries or among the States". The words "in relation to" bring in activities which are not necessarily "in the course of" interstate trade. On the other hand, "in relation to" may not cover a collective agreement by manufacturers in one State to sell only through distributors in that State, even though the manufacturers know that the distributors in their turn enter into interstate dealings. General phrases in statutes, such as "in relation to", seldom succeed in defining either the scope or constitutional limits of an Act.³⁹

*O'Sullivan v. Noarlunga Meat Limited*⁴⁰ makes it clear enough that the trade and commerce power can reach out to enable the Commonwealth to prescribe requirements for premises to be used for the

39. In *Huddart Parker Ltd. v. The Commonwealth* (1931) 44 C.L.R. 492, Dixon J. observed at p. 512:

"It may be that the verbiage 'in or in connection with the provision of services in the transport of persons or goods in relation to trade or commerce' has such a vague and general meaning that persons are included who are not concerned in oversea or inter-State commerce or its incidents, and further that the subject of 'employment' extends beyond the limits of the power given by sec. 51 (i) over inter-State and external trade. . . ."

40. (1954) 92 C.L.R. 565.

objectionable which prevented the company from entering into an agreement not to export even though the agreement is signed abroad.

Supposing the agreement was concerned entirely with foreign markets and the English company agreed not to trade in Africa and the Australian company agreed not to trade in Europe. Again it is probable that the Australian company could contravene a federal antitrust law. But the activities of the English company seem too remotely connected with the trade and commerce power to bring the company itself within the operation of the federal law. What, however, is the position of the English company under the firstmentioned set of facts?

The Australian problem should be compared with the situation in United States law. In *United States v. American Tobacco Co.*⁴² an agreement executed in England between an American combination and its British competitor provided that the English company was to limit its business to the United Kingdom and the American companies to U.S.A. and Cuba. The agreement was held to violate the Sherman Act.⁴³

The Sherman Act may cover activities by foreign combinations alone. In *United States v. Aluminium Co. of America*⁴⁴ (the *Alcoa case*), the Court was concerned with a cartel agreement between French, Swiss and British ingot producers and a Canadian subsidiary of Alcoa. (The Court held that Alcoa was not a party to the alliance.) In 1931 these firms formed a Swiss company and subscribed to its stock in proportion to their ingot capacities. They also agreed to allocate production on a quota basis and to set a price at which the Swiss company would purchase the unsold quota of any shareholder. At first, imports into the United States were not included in the quotas, but in 1936 they were. The Court held that the agreements violated section 1 of the Sherman Act. It considered the question whether liability was attached to conduct outside the United States of persons not in allegiance to the United States. Judge Learned Hand observed that: "It is 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 recognise."

Though the American courts are not constrained from making decrees that operate upon foreign corporations in respect of their activities abroad, serious jurisdictional problems have arisen. In *United States v. Imperial Chemical Industries*⁴⁵ the Court held that Dupont and other American concerns and British I.C.I. had conspired to restrain trade in chemical products by dividing world markets and

42. (1911) 221 U.S. 106.

43. A case in similar vein is *Timken Roller Bearing Co. v. United States* (1951) 341 U.S. 593.

44. (1945) 148 F. 2d 416.

45. (1951) 100 F. Supp. 504; decree (1952) 105 F. Supp. 215.

the company in respect of trade. The law was, therefore, not a law in respect of companies, but a law in respect of trade, and, not being limited to external and interstate trade, it was held to be beyond the power of the Federal Parliament.

"In the course of their judgments, the several judges expressed views which make the real meaning of the company power a matter of great uncertainty.

"In the first place the whole Court agreed that the clause did not confer power to create corporations. Foreign corporations it obviously could not create, and the words 'trading or financial corporations formed within the limits of the Commonwealth' implied that the corporations must be formed, or created, before the Federal power attaches. As regards this last point there is, of course, a possible alternative interpretation that the words 'formed within', etc., are only intended to describe home corporations as contrasted with foreign corporations; that the phrase is adjectival and not participial in meaning, and that it contains no implication that the corporation must have been formed prior to the Federal power attaching to it. This view, however, did not find favour with the Court.

"As to the power which the clause did confer, the members of the Court differed widely. Griffith C.J. and Barton J. thought that it applied to the capacity of companies but not to their behaviour; that is to say, that it enabled the Federal Parliament to forbid corporations formed under State laws from engaging in any particular branch of trade within the State, but did not enable the Federal Parliament to control the conduct of such corporations which lawfully engaged in such trade. O'Connor J. thought that the power was limited to the recognition of the status of corporations as legal entities within the Commonwealth, but did not include power to control their business when they had been so recognised. Isaacs J. thought that the clause did not give the Federal Parliament power to deal with the powers and capacities of corporations, or their internal regulation (matters that properly belonged to the States that created the corporations), but did give the Federal Parliament power to regulate the conduct of corporations in their transactions with or affecting the public. Higgins J. thought that the clause gave the Federal Parliament power to regulate the status and capacity of corporations and the conditions on which they would be permitted to carry on business, but not to regulate the contracts into which they might enter within the scope of their permitted powers."

Isaacs J. would have given a restrictive practices law a fairly easy path to success but the views expressed by O'Connor J. would present an impenetrable barrier. To accept the other judgments is to countenance a tenuous distinction between capacity and conduct. The sections of the Australian Industries Preservation Act under challenge

section 4 of the Preservation Act, the constitutional danger is that the court might regard the legislative attack on agreements entered into in the course of interstate trade as simply providing, in certain cases, a channel of protection for those aspects of trade, commerce or productive industry which are within the exclusive governmental control of the States. Hence to prohibit an agreement, made in the course of interstate trade, which only precludes a party from dealing with intrastate suppliers could, on this argument, be regarded as an infringement of the guaranteed freedom. The interstate supplier entering into the arrangement could well argue that by imposing the restraint he enhances both his own and the general level of interstate trade and without there being any adverse side effects on interstate trade to which legislation such as the Commerce (Trade Descriptions) Act is directed. Such an argument appears, however, to take the individualism beyond the border of the constitutional guarantee.

The imposition of legal restraints on mergers would also have to circumvent section 92. A law which prevented a trading corporation from acquiring the share capital of another trading corporation could be argued, by analogy with *Grannall v. Marrickville Margarine Pty. Ltd.*,⁵² not to infringe the section. Thus the argument would be that the acquisition does not itself form part of trade, commerce or intercourse or form an essential attribute of that conception.

COMPLEMENTARY COMMONWEALTH-STATE LEGISLATION

If Commonwealth power is insufficient to regulate restraints of trade, the States can be invited to participate in a joint legislative scheme. There are precedents for joint governmental arrangements in commercial affairs. For example, the Australian Wheat Board, a Commonwealth authority, accepts delivery of wheat from growers in the wheat-producing States, stores it and disposes of it under powers which State Acts confer. The Joint Coal Board, an authority set up under Acts passed by the New South Wales and Commonwealth Parliaments respectively, has most extensive powers relating to the working of New South Wales coalfields and the disposal of coal. It is doubtful whether all the legal problems in connection with arrangements of the type mentioned have been solved but the problems go beyond the scope of this article.

If the Commonwealth and the States should agree to pass complementary legislation to control restrictive business practices, there would be advantage in having a single authority to hear and determine cases. One approach, essentially judicial, would be for the Commonwealth to establish a Restrictive Practices Court to adjudicate in the manner of the Court of similar name in England. If it should, the

52. (1955) 93 C.L.R. 55.

purported grant of arbitral power under federal law⁵⁵ there is a question as to whether power lies to vest a federal court with State jurisdiction. No case holds that this cannot be done.

In *Lorenzo v. Carey*⁵⁶ the Court said:⁵⁷

It [the phrase "Federal jurisdiction"] does not denote a power to adjudicate in certain matters, though it may connote such a power; it denotes the power to act as the judicial agent of the Commonwealth, which must act through agents if it acts at all. An agent may have a valid authority from a number of independent principals to do the same act.

It is, however, quite another thing to suggest that a federal court can be an agent for a State. It is submitted that, as the authorities now stand, State jurisdiction cannot be conferred on a federal court.

In their joint judgment in the *Boilermakers' case*⁵⁸ Dixon C.J., McTiernan, Fullagar and Kitto JJ. observed⁵⁹ that "the autochthonous expedient of conferring federal jurisdiction on State courts required a specific legislative power and that is conferred by s. 77(iii)".

In the *Pharmaceutical Benefits case*⁶⁰ Latham C.J. was a little more restrained on the question of investing State courts with federal jurisdiction. He said⁶¹ that it was only by virtue of section 71⁶² and section 77(iii) "that the Commonwealth Parliament can invest a State court with jurisdiction so that the court becomes bound to exercise it."

At least the foregoing observations make it fairly certain that a federal court could not be compelled to exercise State jurisdiction in the absence of an appropriate legislative power in the Constitution.

Later, the joint judgment in the *Boilermakers' case* continues:⁶³

A number of considerations exist which point very definitely to the conclusion that the Constitution does not allow the use of

(iv) Relating to the same subject-matter claimed under the laws of different States.

77. With respect to any of the matters mentioned in the last two sections the Parliament may make laws—

(i) Defining the jurisdiction of any federal court other than the High Court;

(ii) Defining the extent to which the jurisdiction of any federal court shall be exclusive of that which belongs to or is invested in the courts of the States;

(iii) Investing any court of a State with federal jurisdiction."

55. See *Attorney-General of the Commonwealth v. The Queen* (1957) 95 C.L.R. at p. 541.

56. (1921) 29 C.L.R. 243.

57. *Ibid.* at p. 252.

58. (1956) 94 C.L.R. 254.

59. *Ibid.* at p. 268.

60. (1949) 79 C.L.R. 201.

61. *Ibid.* at p. 236.

62. Constitution, s. 71, reads:

"71. The judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia, and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction. The High Court shall consist of a Chief Justice, and so many other Justices, not less than two, as the Parliament prescribes."

63. (1956) 94 C.L.R. at pp. 271-272.

122⁶⁷ of the Constitution, the joint judgment stated that there was at first sight an inconsistency with the decision that federal jurisdiction when created arose wholly under Chapter III. However, according to the judgment:⁶⁸

The reconciliation depends upon the view which the majority adopted that the exclusive or exhaustive character of the provisions of that chapter describing the judicature and its functions has reference only to the federal system of which the Territories do not form a part.

In a complaining mood their Honours added:

It would have been simple enough to follow the words of s. 122 and of ss. 71, 73 and 76(ii) and to hold that the courts and laws of a Territory were federal courts and laws made by the Parliament. As s. 80 has been interpreted there is no difficulty in avoiding trial by jury where it does apply and otherwise it would only be necessary to confer upon judges of courts of Territories the tenure required by s. 72. . . .

The vesting of (voluntary) jurisdiction in a federal court under a State Act could scarcely be regarded as a disparate or non-federal matter and if this view should fully flower Chapter III would govern the situation from the standpoint of Commonwealth and State Parliaments. If a State Parliament could do it a Commonwealth Parliament opposed to the action could doubtless displace the State law by a law passed pursuant to s. 51(xxxix)⁶⁹ of the Constitution. Again, apart from this, there would be a question whether a federal court could have, as a major part of its judicial functions, the exercise of State, as distinct from federal, jurisdiction. This possibility seems to be out of touch with "the reasons inspiring the careful limitations which exist upon the judicial authority exercisable in the Federal Commonwealth of Australia by the federal judicature brought into existence for the purpose".⁷⁰

OTHER QUESTIONS

This article leaves untouched several legal situations which could arise in constructing an Australian restrictive practices law. For

67. Constitution, s. 122, reads:

"122. The Parliament may make laws for the government of any territory surrendered by any State to and accepted by the Commonwealth, or of any territory placed by the Queen under the authority of and accepted by the Commonwealth, or otherwise acquired by the Commonwealth, and may allow the representation of such territory in either House of the Parliament to the extent and on the terms which it thinks fit."

68. (1956) 94 C.L.R. at p. 290.

69. Constitution, s. 51 (xxxix), confers power on the Federal Parliament to make laws with respect to "Matters incidental to the execution of any power vested by this Constitution in the Parliament or in either House thereof, or in the Government of the Commonwealth, or in the Federal Judicature, or in any department or officer of the Commonwealth."

70. *Boilermakers' case* (1956) 94 C.L.R. at p. 272.