EXTRATERRITORIALITY - THE FOREIGN PROCEEDINGS (EXCESS OF JURISDICTION) BILL, 1983. STATEMENT BY THE ATTORNEY GENERAL *

7 December
180/83

LEGISLATION TO PROTECT AUSTRALIA'S NATIONAL INTERESTS AGAINST FOREIGN LAWS

I today introduced in the Senate a Bill to consolidate and expand Australian laws which protect Australian trading interests and policies against the extraterritorial enforcement of foreign laws.

The legislation, the Foreign Proceedings (Excess of Jurisdiction) Bill 1983, is intended to ensure that foreign laws do not interfere with Australia's sovereign interests and with the effective control by Australia of its export industries, particularly its commodity marketing measures and primary produce marketing boards.

The legislation incorporates and complements laws introduced by the previous Government in 1976 and 1981. Whereas the original measures were introduced against a backdrop of troubled relations between Australia and the United States in relation to the extraterritorial enforcement of U.S. antitrust laws, the new Bill is introduced at a time when the general climate between Australia and the United States in this regard is much improved.

The Labor Government's policy in this area, of which this legislation is part, has already been explained to the United Kingdom and United States Governments and is as follows:

. First, the Government reaffirms Australia's commitment to the consultative approach of the Antitrust Co-operation Agreement between Australia and the

United States. It is the Government's firm belief that jurisdictional conflicts between the laws and policies of sovereign governments should be resolved if at all possible by consultation and not by unilateral legal or executive action.

. Secondly, notwithstanding the protection afforded by the Antitrust Co-operation Agreement, the Government cannot ignore the fact that the underlying jurisdictional threat to Australian sovereignty and to our export and other trading policies still remains.

Third, since it has become apparent that the problem of extraterritoriality goes much wider than the antitrust field and is raised, for example, by the extraterritorial application of the U.S. Export Administration Act, the Government believes that Australia should have available to it a comprehensive arsenal of defences which it could use as a last resort, should the resolution of conflict through the consultative approach fail.

As I indicated to U.S. Government representatives during my visit in June, the Government believes it is better to introduce protective legislation during a period of improved relations than to leave it until some crisis arrives, and so heighten what would be at that time a public perception of conflict between our two countries.

This Bill accordingly gives protection to Australian businesses against crippling damages and costs awards made in foreign antitrust private treble damages suits. It also protects against the extraterritorial effect of judicial and executive orders made under other foreign laws which may be inimical to Australia's national interests.

The Parliamentary Labor Party when in Opposition gave broad bi-partisan support to the measures introduced by the Fraser Government. Work on the present legislation had been commenced by that Government and has been carried through to completion by the Labor Government. Its purpose is:

(a) to consolidate and refine existing provisions of the Foreign Proceedings (Prohibition of Certain Evidence) Act 1976 and the Foreign Antitrust Judgments (Restriction of Enforcement) Act 1979;

(b) to deal with the problem of private treble damages actions under foreign antitrust laws by enabling the Attorney-General to make orders in appropriate cases involving Australia's national interest for:

- the "recovery-back" by an Australian defendant of either a proportion or all of a money judgment awarded to a plaintiff in foreign antitrust proceedings;

- the recovery by an Australian defendant of the reasonable costs of an incidental to foreign antitrust proceedings;

- the reciprocal enforcement of "recovery-back" judgments by agreement with other countries;

(c) to deal with problems arising from the extraterritorial application of other foreign laws by enabling the Attorney-General to make orders in appropriate cases involving Australia's national interest for:

the blocking of actions or decisions of foreign governments under a law related to trade or

commerce where such action or decision would impose an obligation upon an Australian person or company that had to be performed in Australia; and

- the blocking of judgments of a foreign court which would require or prohibit an act being done in Australia, or would require a person to refrain from conduct in Australia.

In line with the emphasis on a consultative approach, the substantive provisions of the proposed legislation will only operate when activated by an Order made by the Attorney-General.

* [Text of Press Release by the Attorney General, Senator Gareth Evans of 7 December 1983, No. 180/83. See the text of the second reading speech by the Minister for Trade and Deputy Prime Minister, the Hon. Lionel Bowen. Reference may also be made to our comment in this issue on unilateral declarations. As regards the parliamentary report on extraterritoriality see [1984] Australian I L. News 87.]

EXTRATERRITORIALITY - THE FOREIGN PROCEEDINGS (EXCESS OF JURISDICTION) BILL, 1983. SECOND READING SPEECH BY THE DEPUTY PRIME MINISTER *

FOREIGN PROCEEDINGS (EXCESS OF JURISDICTION) BILL 1984

Bill received from the Senate, and read a first time.

Second Reading

Mr Lionel Bowen (Kingsford-Smith—Minister for Trade) (10.16)—I move:

That the Bill be now read a second time.

The purpose of the Bill I am introducing today is to consolidate and expand Australian laws which protect Australian trading interests and policies against the extra-territorial enforcement of foreign laws. I would like to outline, for the benefit of honourable members, the historical and policy context in which the Bill has been prepared and the principal provisions proposed. A detailed description of the provisions of the Bill is contained in the explanatory memorandum which has been circulated to honourable members for information.

Existing Commonwealth Legislation

In November 1976 the Parliament enacted the Foreign Proceedings (Prohibition of Certain Evidence) Act. The purpose of that Act was, briefly stated, to enable the Attorney-General to make orders, subject to parliamentary disallowance, to prohibit the production of documents located in Australia and, in certain circumstances, the giving of evidence in foreign proceedings. The Attorney-General could make orders where he was satisfied that the foreign court was exercising jurisdiction contrary to international law or comity or that the imposition of the restrictions specified in the order was desirable for protecting the national interest. In March 1979 the Parliament enacted the Foreign Antitrust Judgments (Restriction of Enforcement) Act. That Act, which was confined to foreign anti-trust judgments, enabled the Attorney-General to prohibit the enforcement of such judgments on grounds which, whilst not identical, were broadly similar to those enabling the Attorney-General to prohibit the production of evidence under the Foreign Proceedings (Prohibition of Certain Evidence) Act. As in the case of that Act orders of the Attorney-General were subject to parliamentary disallowance. The Attorney-General could also permit the partial enforcement of foreign judgments for a reduced amount specified in the order.

The 1981 'Recovery Back' Bill

In June 1981 the former Government introduced the Foreign Antitrust Judgments (Restriction of Enforcement) Amendment Bill 1981, which I shall hereafter refer to as the 'Recovery Back Bill'. The Recovery Back Bill would have enabled an Australian defendant to a foreign anti-trust judgment, where an order had been made under the Foreign Antitrust Judgments (Restriction of Enforcement) Act, to recover back from the foreign plaintiff any amount which had been recovered under the prohibited judgment in an overseas country in excess of the amount specified. The former Government did not seek passage of the Recovery Back Bill following the signing of the Antitrust Co-operation Agreement between Australia and the United States on 29 June 1982.

* [Second Reading Speech by the Minister for Trade and Deputy Prime Minister, the Hon. Lionel Bowen to the House of Representatives 1 March 1984. Hansard, House of Representatives Debates, 1 March 1984 at 253-257.]

The Antitrust Co-operation Agreement

The Commonwealth legislative measures that I have referred to were introduced against the backdrop of the troubled relations between Australia and the United States of America in relation to the extra-territorial enforcement of United States anti-trust laws. That legislation was directly occasioned by proceedings in the United States relating to trade in uranium and, more particularly, the Westinghouse suit for private treble damages. Without wishing to go over the entire Westinghouse saga, I would like to point out that the private suit by Westinghouse to recover treble damages from a number of Australian companies, which were among the list of defendants in the proceedings, related to conduct that, although in breach of United States anti-trust laws, took place outside the United States and in compliance with Australian Government policies for the marketing of uranium.

The deterioration in relations in this area between Australia and the United States had become so serious that the matter was raised in discussions between the President of the United States and the then Australian Prime Minister in June 1981. The outcome of these discussions was a renewed negotiating effort to reach agreement. These efforts were ultimately successful and on 29 June 1982 the Antitrust Co-operation Agreement was signed. The Agreement provides a framework for notification and consultation designed to resolve conflicts which might arise between Australian national interests and policies and the implementation of United States anti-trust laws.

The Present Position

When the Labor Government came into office in March last year, the general climate between Australia and the United States in relation to the extra-territorial enforcement of US anti-trust laws had improved significantly.

The Labor Government has thus been able to formulate its policy on the protection of Australian trading interests and policies against the extra-territorial enforcement of foreign laws in the light of this much improved relationship between the two countries. In reaching its decision to introduce the Bill, the Government also had regard to the Attorney-General's discussions with Government representatives during his visit in June last year to the United Kingdom and the United States. As the Attorney-General then indicated to US officials, it is better to introduce protective legislation now, during a period of improved relations, than to leave it until some crisis arrives, and so heighten what would be at that time a public perception of conflict between our two countries. The Attorney-General has indicated that, on the basis of the responses he received in Washington, the United States Government would understand the need expressed by Australia to have protective legislation.

The Government is pleased to note the report by the Parliamentary Joint Committee on Foreign Affairs and Defence on 'Australian-United States' Relations: The Extraterritorial Application of United States' Laws', tabled on 1 December last year. The majority recommended the introduction of legislation to deal with problems arising from the extra-territorial application of foreign laws. The present Bill is consistent with that recommendation.

The essence of the Labor Government's policy in this area, which has been explained to the United Kingdom and United States governments, is as follows. First, in line with the conclusion of the Parliamentary Joint Committee that both countries should seek to implement both the letter and the spirit of the Agreement, the Government reaffirms Australia's commitment to the consultative approach of the Agreement. It is the Government's firm belief that jurisdictional conflicts between the laws and policies of sovereign governments should be resolved if at all possible by consultations and not by unilateral legal or executive action. The Government will advocate this approach vigorously in its dealings with individual foreign countries and in relevant international fora. I note that the Parliamentary Joint Committee recommended that Australia participate actively in international attempts, such as those within the Organisation for Economic Co-operation and Development and the United Nations Conference on Trade and Development, to reach broadly acceptable arrangements to avoid or resolve conflicts in the application of national trading laws.

Secondly, notwithstanding the protection afforded by the Antitrust Co-operation Agreement, the Government cannot ignore the fact that the underlying jurisdictional threat to Australian sovereignty and to our export and other trading policies still remains. There has been no significant change in US domestic anti-trust laws to take account of foreign government interests and no modification their wide jurisdictional claims. Article 4.2 of the Agreement recognises that if, after consultation, no means of avoiding conflict has been found, each party 'shall be free to protect its interests as it deems necessary'. While articles 4 and 6 of the Agreement also make some progressive steps forward in providing protection against private anti-trust proceedings, our central

concern remains. That is, private plaintiffs, who account for about 95 per cent of US anti-trust actions, are under no obligation to consider the national interests of other countries when they initiate their actions or in the conduct of the case. The US Deputy Secretary of State, Mr Kenneth Dam, in a speech last year acknowledged that private treble damages actions are not within government control and as result are often referred to in this context as 'rogue elephants'. I note that the obligation in the Agreement on the US authorities to intervene in private proceedings is at best a limited and indirect restraint on private plaintiffs and in any event the weight to be given to the US Government's intervention is left to the court to decide.

Thirdly, since Australia first came up against the vexed issue of the extra-territorial enforcement of foreign laws, it has become apparent that the problem goes very much wider than the anti-trust field. The serious conflict between the United States and European countries within the Atlantic Alliance over the measures taken by the United States under the US Export Administration Act with regard to the construction of the Soviet gas pipeline has focused attention on the wider implications of the problems of extra-territoriality. The problem can extend into many areas such as companies and securities regulation, banking, commodity futures market regulation, taxation, and laws related to enforcing national security or foreign policy controls over trade.

Accordingly, the Government believes that Australia should have available to it a comprehensive arsenal of defences which it could use as a last resort, should the resolution of conflict through the consultative approach fail. It is unacceptable to the Government that at the present time Australian businesses, unlike their counterparts in countries like the United Kingdom, have inadequate protection against the crippling damages and costs awards that are usually made in foreign anti-trust private treble damages suits. Nor have they means of protection against the extra-territorial effect of judicial and executive orders made under other foreign laws which may be inimical to Australia's national interests. I wish to emphasise, however, that in line with the Government's firm belief in the consultative approach in this area, the substantive provisions of the proposed legislation will only operate when activated by an order made by the Attorney-General.

When in Opposition, the present Government gave broad bipartisan support to the legislative measures that were introduced by the Fraser Government. The Government in a real sense is completing the task that was begun by the former Government. Indeed, when the former Attorney-General, Senator Durack, introduced the recovery back Bill he said:

> It is also designed to underline the seriousness with which the Commonwealth Government and the Parliament continues to view this problem. For here, I believe that I express, in a complete sense, a national voice. The two previous Acts were enacted by the Parliament with bipartisan support and, whatever differences in nuance may emerge, the Opposition has been at one with the Government in its concern.

I would certainly hope for the reasons I have outlined, that the present Bill will receive the support of this House.

Content of Bill

I will briefly mention the major provisions contained in the Bill.

Prohibition of the Giving of Evidence

Division 2 of Part II of the Bill replaces the Foreign Proceedings (Prohibition of Certain Evidence) Act 1976. The purpose of the provisions, like the earlier Act, is to enable the Attorney-General to make orders to prohibit the production of documents located in Australia and, in certain circumstances, the giving of evidence in foreign proceedings. The Attorney-General may make orders where he is satisfied that the making of the order would be desirable for the protection of the national interest. The Attorney-General may also make orders where he is satisfied that the assumption of jurisdiction by the foreign court or the action taken by the foreign authority is contrary to international law or is inconsistent with international comity or international practice.

Enforceability of Judgments Given in Foreign Anti-Trust Proceedings

Clause 9 of the Bill replaces the Foreign Anti-trust Judgments (Restriction of Enforcement) Act 1979. These provisions, like the earlier Act, which are confined to foreign anti-trust judgments, will enable the Attorney-General to make an order prohibiting the enforcement of such judgments in whole or in part. This gives the Australian Government the flexibility to respond to the foreign judgment according to the circumstances. The grounds upon which an order may be made are broadly similar to those enabling the Attorney-General to prohibit the production of evidence under Division 2 of Part II of the Bill.

The recovery-back provisions are contained in clause 10 of the Bill. This right of action, given to an Australian defendant to recover back damages enforced against that defendant, is given only where the Attorney-General has made an order

that a foreign anti-trust judgment should not be enforceable in Australia in whole or in part. The right of recovery-back, which is given only to Australian defendants as set out in sub-clause 10 (4) of the Bill, is for any amount obtained by the foreign plaintiff from the Australian defendant in excess of the amount specified in the Attorney-General's order. The recovery-back provisions are based on the provisions contained in the 1981 recovery back Bill although they have been refined to avoid the complexity of the earlier Bill. A series of examples illustrating the operation of the recovery-back provisions is contained in the explanatory memorandum.

Clause 11 of the Bill gives a right to an Australian defendant, including an Australian statutory authority, to recover reasonable costs and expenses incurred by it in defending private anti-trust proceedings. This right of action is severely restricted:

(a) it is conditional upon an order being made by the Attorney-General either on national interest grounds or on the ground that the assumption of jurisdiction or the manner of exercise of jurisdiction by the foreign court or the exercise of power or the manner of exercise of power by the foreign court, was contrary to international law or inconsistent with international comity or international practice;

(b) it is confined to private proceedings for multiple damages where it is possible for the foreign court to assume jurisdiction simply upon there being an adverse effect on that country's trade or commerce; and

(c) it is further restricted to foreign proceedings where a successful defendant is not entitled to recover costs. This is peculiar to private anti-trust proceedings in the United States.

Clause 11 of the Bill can be justified on three grounds: An Australian defendant with no physical tie with the territorial jurisdiction of the United States can be put to considerable expense because section 12 of the United States Clayton Act – which provides for service on a corporation wherever found – enables a United States plaintiff to draw the Australian defendant into United States anti-trust litigation.

Again, United States anti-trust law does not allow a successful defendant his costs. This, when coupled with the widespread use of contingency fees, encourages United States plaintiffs to bring specious actions in the hope that the huge costs burden alone will compel the defendant to settle out of court.

Further, the costs burden in large United States anti-trust cases is of a magnitude unknown to our legal system and it is not uncommon for costs to amount to millions of dollars.

I should also mention that for both recovery-back and recovery of costs, orders would not in general be made where conduct, in respect of which a foreign judgment was given, took place entirely within a foreign country. We cannot discount, however, the possibility that situations may arise where it would be appropriate for an order to be made where conduct did take place entirely within a foreign country. An example would be where the costs or damages awarded in a private suit against an Australian defendant were considered to be so high as to be contrary to the national interest. For example, they might threaten the solvency of an Australian company, with consequences for the enterprise in which it was engaged and for the employment of Australian workers.

Clause 12 of the Bill provides for the enforcement of a 'recovery-back' judgment on a reciprocal basis after agreement with countries that have 'recovery-back' provisions that correspond with those in the Bill. The United Kingdom has shown considerable interest in developing the concept of reciprocal enforcement with Australia and has made provision for such a system in section 7 of its Protection of Trading Interests Act 1980. The Parliamentary Joint Committee recommended that consideration be given to reciprocal enforcement of recovery-back judgments only if Australian interests are further threatened or damaged by foreign laws. The Government considers it prudent, however, to deal comprehensively with the problem of extraterritoriality, rather than to introduce additional legislative proposals at a later stage if Australian interests should come under active threat from foreign laws. In this way, we avoid heightening what I said earlier would be a public perception of conflict between Australia and the foreign country.

Actions and Decisions of Foreign Governments Affecting Australia

The purpose of clause 13 of the Bill is to counteract the problem created by foreign laws relating to trade or commerce that would enable foreign governments or their agencies to impose obligations upon persons or corporations in Australia. Clause 13 of the Bill will enable the Attorney-General to make an order prohibiting the performance of the obligation where he is satisfied that the act or decision of the foreign government or agency would or might adversely affect the national interest. The topical example of such a foreign law is the United States Export Administration Act. A provision similar to this clause—s. 1 of the United Kingdom Protection of Trading Interests Act 1980 enabled the United Kingdom Government to counter United States executive orders which were directed at United Kingdom companies with the purpose of blocking the construction of the Siberian gas pipeline, contrary to the national interests of the United Kingdom and the other European States.

Prohibition on Giving Effect to Certain foreign Judgments

The purpose of clause 14 of the Bill is to enable the Attorney-General to block judgments or injunctions of a foreign court—but not money judgments – where the object of the judgment is to require the doing of an act or thing in Australia, or to prohibit the doing of such an act or thing, or to require a person to refrain from conduct in Australia. The Attorney-General may make an order based on national interest grounds similar to those in clause 13 of the Bill. Possible instances where this clause could be called into operation could include divestiture orders and 'cease and desist' orders made under United States anti-trust laws.

Miscellaneous

Part V of the Bill contains general provisions relating to parliamentary disallowance of orders and intruments made under the Act, jurisdiction of the Federal Court, service of notice of orders, offences and regulations.

Financial Impact Statement

The Bill will not necessitate any increase in the existing staff establishment of the Attorney-General's Department and will have no impact on Government revenues. The Government commends the Foreign Proceedings (Excess of Jurisdiction) Bill to the House.