THE CONTROL OF MONOPOLIES AND RESTRICTIVE BUSINESS PRACTICES IN AUSTRALIA

By J. A. Richardson*

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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Australian Legislation

For many years the only domestic enactment was the Commonwealth's Australian Industries Preservation Act 1906. Later I will mention the fate of this legislation in *Moorehead's case*[1] and the *Adelaide Steamship Company case*,[2] decided before the First World War. It was not until after the *Adelaide case* that the States moved in at all to regulate restrictive practices, notwithstanding an early judicial indicator in *Barger's case*[3] that productive industry and intrastate trade and commerce were very much State affairs. Even now, only three States—New South Wales, Queensland and Western Australia —have any valid claims to being at all active in this field.

In *New South Wales* the Monopolies Act, 1923, as amended, creates statutory offences of monopolisation and combination in restraint of trade. The Act also provides for investigations to be conducted by the Industrial Commission of that State. The Act gained a brief prominence not long ago when Mr. Justice Cook investigated the operation of wool pies in Goulburn.

In *Queensland* the Profiteering Prevention Acts, 1948 to 1957, prescribe offences such as exclusive dealing contrary to the public interest, undertaking to act in conformity with the directions of a commercial trust, and monopolising or combining to control the supply of, or demand for, goods in Queensland.

In *Western Australia* the current legislation is the Trade Associations Registration Act, 1959, which provides for the registration of trade associations and various types of agreements in restraint of trade. The Act is, at best, luke-warm, and contains no real provisions for any follow-up action on those restraints which might be regarded as offensive. It replaced a much more courageous effort by the previous administration, the Monopolies and Restrictive Trade Practices Control Act, 1956.

It is fair to state that no State Act has been so administered as to have any far-reaching effects on restrictive business practices. The same comment applies to the Australian Industries Preservation Act.

Monopoly, Merger and Restrictive Business Activity in Australia

Monopolies: A monopoly, in the popular sense, according to the Privy Council in the *Adelaide Steamship Company case*,[4] involves the existence of a state of circumstances in which some trade or industry has passed or is likely to pass into the hands or under the control of a single individual or group of individuals.

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1. (1908) 8 C.L.R. 330.
2. (1913) 18 C.L.R. 30.
3. (1908) 6 C.L.R. 41.
4. (1913) 18 C.L.R. 30, 34.

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 article[6] 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.

electrical goods; cycles; furniture and furnishings; insurance; fibrous plaster; real estate; flour; fruit and produce; tractors and other machinery; paper bags and writing paper; stationery; catering; optometrical equipment; soft goods; groceries; clothing; dry cleaning; metal industries; glass; paint; plumbing; aerated waters; cotton textiles; canvas goods; bricks; radio; wool; cement; superphosphate; porcelain ware; linseed oil; household equipment; jewellery; photography; motion pictures; and footwear. The Commission also reported on the prevalence of restrictive practices carried on by associations, including the channelling of distribution, price fixation and control, and level or collusive tendering.[7]

Collective arrangements: The collective trade restraint most frequently encountered is the price fixing agreement. In its simplest form the parties agree to fix wholesale or retail prices or both. There are many variants; for example, some trade associations adopt a system of variable discounts for different classes of reseller or user. Well-known cases of collective price fixing involve paint; motor tyres and tubes; automotive spare parts; builders' hardware; and books. Price fixing arrangements are frequently backed by other measures, such as requiring a distributor to submit returns. Sometimes other restraints are imposed at the same time, e.g. a retailer may be advised not to stock the products of rival manufacturers who do not belong to an association.

Other collective arrangements include the following:

(1) Uniform terms of dealing, e.g. discounts for cash.
(2) Restriction of quantity, quality or variety of output, e.g. standardisation of electric light bulbs.
(3) Allocation of markets, e.g. agreements not to trade interstate.
(4) Restriction of distributor outlets, e.g. to wholesalers approved by a manufacturers' association.
(5) Boycotts and refusals to deal, e.g. withholding of supplies of automotive parts and electrical goods to resellers who do not observe fixed prices.
(6) Exclusive dealing, e.g. single brand petrol stations.
(7) Discriminatory trading, e.g. classification of retailers into groups and giving one group more favourable discounts than the others.
(8) Predatory pricing, e.g. a conscious campaign to undersell a manufacturer not a member of an association.
(9) Collusive tendering, e.g. supply of electrical cables to municipal authorities.
(10) Limitations on admission to trade associations, e.g. potential newsagents.

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7. Report of Honorary Royal Commission on Restrictive Trade Practices and Legislation (W.A.), at pp. 8-9 and 12-15.

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".

U.S.A.

Sherman Act: The sheet anchor of United States antitrust law is the Sherman Act passed in 1890, that is, during a period of intensive economic development and growth in population. By 1890 there was already much public outcry, led by farmer and labour organisations, against the predatory activities of large-scale business. For example, the formation of the Standard Oil Trust in 1879 led to unified control of 90 per cent. of United States oil refining capacity and the Trust sought preferential treatment for its business activities across the continent, e.g. secret railway freight rebates.

The Sherman Act is a double-pronged weapon directed against business misbehaviour. First, section 1 declares to be illegal "Every *contract, combination* in the form of trust or otherwise, or *conspiracy, in restraint of trade or commerce* among the several States, or with foreign nations. . . . " (Itals. added.)

Second, section 2 declares to be guilty of a misdemeanour "every person who shall *monopolise*, or attempt to monopolise, or combine or conspire with any other person or persons, to monopolise any part of the trade or commerce among the several States, or with foreign nations, . . . " (Itals. added.)

Clayton Act: In 1914 the United States government decided that more specific restraints should be imposed on American business in order to maintain as many undertakings as possible in competition with each other. In that year Congress passed the Clayton Act to supplement the Sherman Act by making certain specific business practices unlawful. Amendments in 1936 and 1950 further strengthened the Clayton Act.

For present purposes, the main provisions of the Clayton Act are three:

(1) Section 2 strikes at price discrimination where the effect of the discrimination "may be substantially to lessen competition or tend to create a monopoly in any line of commerce. . . . " This section was made effective by the 1936 amendment known as the Robinson-Patman Amendment. It is energetically policed by the Federal Trade Commission.

(2) Section 3 prohibits the supply of goods on the condition or understanding that the person being supplied shall not use or deal in the goods of competitors of the supplier where the effect may be to substantially lessen competition or tend to create a monopoly in any line of commerce (as defined). In other words, the section is aimed at tying contracts and exclusive dealing.

(3) Section 7 deals with mergers. It prohibits mergers through the acquisition of stock or assets if they tend "in any line of com-

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.

rangements of this nature are established on the facts there is no room for the application of the "rule of reason".

The scope accorded the United States commerce power is the envy of the Australian public lawyer, who, though having at his disposal a power which reads no less substantially than its American counterpart, knows that the High Court will draw a distinction between interstate trade and intrastate trade no matter how artificial the result may be.[11] An observer of United States antitrust enforcement can hardly fail to be impressed with the comparative inattention to constitutional issues. The apparent unconcern is partly explained by the fact that in a mainland area the size of Australia there are 48 States, which, in a country with an established economy, makes for a tremendous volume of interstate commerce. But another reason is the liberal judicial treatment accorded the federal commerce power vested in Congress under Article 1, section 8 of the United States Constitution.

Cases have arisen under the antitrust laws which show how comfortably the commerce clause embraces intrastate transactions and activities bearing some relationship to interstate commerce. Some cases also show the readiness of the courts to hold that a transaction forms part of interstate commerce itself when in Australia a similar transaction would not be so held.

Thus in *Swift & Co.* v. *United States*,[12] sales of cattle in the stockyards in Chicago after shipment from other States were held to be in interstate commerce just as were sales of prepared meats by agents of the packers after shipment to their local stores in different States. The mere decision itself is, perhaps, not very important, but this was the case in which Holmes J. enunciated the so-called "current of commerce" doctrine, so laying a pattern of interpretation for many subsequent decisions. The learned Judge said:

> . . . Commerce among the States is not a technical legal conception, but a practical one, drawn from the course of business. When cattle are sent for sale from a place in one State, with the expectation that they will end their transit, after purchase, in another, and when in effect they do so, with only the interruption necessary to find a purchaser at the stockyards, and when this is a typical, constantly recurring course, the current thus existing is a current of commerce among the States, and the purchase of the cattle is a part and incident of such commerce. What we say is true at least of such a purchase by residents in another State from that of the seller and of the cattle.

In *United States* v. *Yellow Cab Co.*,[13] the Supreme Court held that the transportation of passengers and their luggage between railway stations in Chicago, when the passengers or goods were moving from

11. *The King* v. *Burgess; ex parte Henry* (1936) 55 C.L.R. per Dixon J. at p. 672.
12. (1905) 196 U.S. 375.
13. (1947) 332 U.S. 218.

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.

commerce. Needless to say they failed, but the decision of the Supreme Court, delivered by Frankfurter J., leaves no doubt that the practice was one which affected interstate commerce and was capable of being dealt with by federal antitrust law.

In *United States* v. *Women's Sportswear Association*,[18] a purely local association of stitching contractors, which handled at least one-half of the sportswear produced in Boston, had induced jobbers engaged in interstate trade to enter into restrictive agreements giving all their work to available association members who were in good standing with the International Ladies' Garment Workers' Union. In order to induce jobbers to sign the agreement the association had threatened work stoppages. The Supreme Court held that the agreement affected interstate commerce to the extent of violating the Sherman Act.

The last case which need be mentioned in this context is *Moore* v. *Mead's Fine Bread Co.*[19] Mead conducted a local bakery business in Santa Rosa, New Mexico. The defendant, a company engaged in bakery business interstate, cut the wholesale price of its bread in Santa Rosa but did not cut the price in any other town or State. The result was to force the local baker out of business. The Supreme Court held that the price cut, even though made in intrastate commerce against a purely local competitor, was subject to the Clayton Act because the beneficiary of the practice was an interstate business and if approval were given to the method of competition the pattern for growth of monopoly would be simple.

In a few words, the cases show "If it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze".[20]

Canada

Combines Investigation Act: Canada has also had antitrust laws for many years. In fact, the first federal action was taken in 1889, a year before the passing of the Sherman Act. The key Canadian provision has always been the statutory offence of conspiring or combining with others in restraint of trade. In other words, the starting point of the Canadian law is a provision roughly equivalent to section 1 of the Sherman Act. As in the United States, subsequent amending legislation has been directed against the more specific trade practices, e.g. resale price maintenance. In Canada antitrust offences are criminal.

The Canadians have employed various kinds of administrative machinery for the purpose of investigating restraints of trade. However, enforcement of the law is, naturally enough, in the hands of the

18. (1949) 336 U.S. 460.
19. (1954) 348 U.S. 115.
20. *United States* v. *Women's Sportswear Association* (1949) 336 U.S. 460, 464.

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. Subsection (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.

Kellock J. said in *Howard Smith Paper Mills Ltd.* v. *The Queen*:[21] "The statute proceeds upon the footing that the preventing or lessening of competition is in itself an injury to the public. It is not concerned with public injury or public benefit from any other standpoint." From a legislator's point of view, this is a very sensible judicial approach.

United Kingdom Legislation

Restrictive Trade Practices Act, 1956: This comparatively recent Act should be mentioned because it is the most novel experiment so far conducted in dealing with restraints of trade.

The key to the English legislation is the requirement that agreements in restraint of trade are to be registered. The word "agreement" is defined to include any agreement or registration in which restrictions are accepted by two or more persons. Section 6, which provides for registration of the agreements there specified, covers gentlemen's agreements as well as enforceable contracts. The Act also establishes a Restrictive Practices Court which consists of judges from the superior courts and lay members who are supposed to be knowledgeable in industry, commerce or public affairs. The Court is a superior court of record and its decisions on questions of fact are final. An appeal lies to the High Court on any questions of law.

The Act provides for a Registrar of Trade Practices to maintain the register and bring restrictive agreements, of his choosing, before the Restrictive Practices Court.

Under Section 21, a restriction under an agreement is deemed to be contrary to the public interest unless the Court is satisfied as to the existence of any one or more of seven specified circumstances (known as "gateways") *and* is further satisfied that the restriction "is not unreasonable having regard to the balance between those circumstances and any detriment to the public or to persons not parties to the agreement (being purchasers, consumers or users of goods produced or sold by such parties, or persons engaged or seeking to become engaged in the trade or business of selling such goods or of producing or selling similar goods) resulting or likely to result from the operation of the restriction". The second qualification is colloquially known as the "tailpiece".

Where, following judicial investigation of a registered agreement, the court finds a restriction to be contrary to the public interest, the agreement is void in respect to those restrictions and the court may, by order, restrain the parties from giving effect to them. In similar vein, the court may restrain a trade association from making recommendations which it has found to be contrary to the public interest. The

21. (1957) S.C.R. 403, 411.

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.

industry which was advantageous to the Commonwealth, having due regard to the interests of producers, workers and consumers. Section 5 imposed a similar prohibition upon "any foreign corporation, or trading or financial corporation formed within the Commonwealth", that is to say, extended the operation of the Act to the corporations specified in section 51(xx) of the Constitution. The assumption was that the corporations power allowed the regulation of the business activities of the corporations described in the grant of power.

Sections 7 and 8 of the Act dealt with the monopolisation of interstate or external trade by persons and the monopolisation of trade in general by foreign corporations or trading or financial corporations formed within the Commonwealth. Section 7 made it an offence for any person to monopolise or attempt to monopolise, or to combine with any other person to monopolise, any part of the trade or commerce with other countries or among the States with the intention of controlling, to the public detriment, the supply or price of any service, merchandise or commodity. Similar action by foreign corporations or trading or financial corporations formed within the Commonwealth was prohibited under section 8.

Subsequently, additional sections were included in the Act to deal with specific subjects such as unfair trading concessions (section 7A),[24] improper refusals to sell (section 7B),[25] and exempting from the operation of the Act certain shipping agreements (section 7C).[26]

Moorehead's case: In 1909 the High Court struck a heavy blow at the parliamentary conception of the corporations power, by holding in *Huddart Parker & Co. Pty. Ltd.* v. *Moorehead*[27] that the attempt to extend the operation of the Preservation Act to all trading activities of the corporations described in paragraph (xx) was beyond that power. Sections 5 and 8 were declared to be *ultra vires.* Thus, from a Commonwealth standpoint, monopolisation and restraints of trade carried on in intrastate trade and commerce and in the bulk of productive industry were inviolate.

Referenda on monopolies: Rebuffed legally, successive federal governments turned to constitutional amendment. In 1911, 1913 and 1919, there were three separate but unsuccessful attempts to acquire federal power over combinations and monopolies, including a power to nationalise monopolies. The proposed law submitted in 1913 gained separate majorities in three States and came within 25,000 votes of an absolute majority of voting electors. On the same three occasions the Federal Parliament, either separately or in conjunction with the mono-

24. Act No. 26, 1909.
25. Ibid.
26. Act No. 7, 1930.
27. (1909) 8 C.L.R. 330.

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.

the shipping companies undertook to buy coal from no one else and to sell the coal at not more than agreed maximum prices.[30]

The shipping agreement was impeached in the proceedings before the Privy Council. In modern parlance, the agreement was a collective one which provided for exclusive dealing and price maintenance and the parties to it together were undoubtedly predominant in their own fields of business. The Privy Council held that the shipping agreement did not contravene either section 4 or section 7.

To the detriment of the public: The current significance of the *Adelaide Steamship case* lies in their Lordships' treatment of the expression "to the detriment of the public".[31] In delivering the Privy Council's judgment, Lord Parker referred to the attitude of the common law courts in dealing with restraints of trade. His Lordship said:[32]

> The existing law on the point is laid down in the case of *Nordenfelt* v. *Maxim Nordenfelt Co.*[33] For a contract in restraint of trade to be enforceable in a Court of law or equity, the restraint, whether it be partial or general restraint, must (to use the language of Lord Macnaghten, evidently adapted from that of Tindal C.J. in *Horner* v. *Graves*[34]), be reasonable both in reference to the interest of the contracting parties and in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public. Their Lordships are not aware of any case in which a restraint though reasonable in the interests of the parties has been held unenforceable because it involved some injury to the public. . . .

The willingness of the common law courts to assume that an agreement reasonable in the interests of the parties is also reasonable in the interests of the public had, by 1913, virtually sanctified the right of every individual to trade by means of his own choice. The references in sections 4 and 7 "to the detriment of the public" could reasonably have been supposed to indicate a parliamentary intention that detriment was not to be assessed by taking reasonableness as between the parties as the starting point as the courts would do in considering the enforceability of a contract in restraint of trade at common law. So far from taking this view, their Lordships construed the words in question as adopting a position even narrower than the traditional common law attitude. Lord Parker said:[35]

30. Although the Privy Council suspected that the shipowners "had some arrangement between themselves" precluding them from underselling each other, there was no evidence before the Court of such an arrangement.
31. The expression remains in section 4 although sections 4 and 7 were redrafted in 1910 to provide for the creation of offences, in certain circumstances, without proof of an intention to act to the detriment of the public.
32. (1913) 18 C.L.R., at p. 33.
33. (1894) A.C. 535.
34. 7 Bing., 735.
35. (1913) 18 C.L.R., at p. 38.

> 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.

state trade in coal at their mercy and to concentrate on the price factor alone. In this connection, Lord Parker said:[37]

> It can never, in their Lordships' opinion, be of real benefit to the consumers of coal that colliery proprietors should carry on their business at a loss, or that any profit they make should depend on the miners' wages being reduced to a minimum. Where these conditions prevail, the less remunerative collieries will be closed down, there will be great loss of capital, miners will be thrown out of employment, less coal will be produced, and prices will consequently rise until it becomes possible to reopen the closed collieries or open other seams. The consumers of coal will lose in the long run if the colliery proprietors do not make fair profits or the miners do not receive fair wages. There is in this respect a solidarity of interest between all members of the public.

As to the link between the vend agreement and the shipping agreement, Lord Parker said:[38]

> If, as their Lordships think, there was justification for a combination of colliery proprietors to raise the price of coal, it was obviously reasonable on their part to take precautions to secure a market for their coal at the increased price. . . .

And so—

> Their Lordships conclude that neither the vend agreement nor the shipping agreement taken separately, nor both agreements taken together as parts of a single scheme, can raise any legitimate inference that any of the parties concerned, whether colliery proprietors or shipping companies, acted otherwise than with a single view to their own advantage, or had any intention of raising prices or annihilating competition to the detriment of the public.

Legislative and administrative eclipse: With the failure of the prosecution the Commonwealth's attempt to control monopolies and restrictive practices by court action ended and, ever since, the Act has rested silently in the Statute book. It could be said that administrative lethargy ever since amounts to a negative species of quasi-legislation. There are still one or two who remember that Attorney-General Hughes, if he had been so inclined, could have brought proceedings under sections 4 and 7, as amended in 1910 to provide for an offence to be proved without the specific ingredient of an intent, instead of continuing proceedings under the sections in their original form.

The lessons of the case for the legislator are:

(a) not to make it necessary to prove any specific intent where a restraint of trade is concerned but to obtain reliance on the proposition, pursued in Canada, that a person intends the natural consequences of his acts;

37. Ibid. at p. 48.
38. Ibid. at pp. 51-52.

(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) to 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.

slaughter of stock for export even though the activity of slaughtering is conducted entirely within State borders. However, the Court was careful to point out that "slaughter for export" constituted an objective standard well understood in the meat industry as having to be satisfied in conducting an export trade in meat.

There would be little to prevent a Commonwealth law on restraint of trade from operating at the point at which there is a meeting of manufacturers in one State for the purpose of making an agreement to restrain interstate trade, but the *Noarlunga case* does not really encourage a constitutional interpretation which allows intrastate trading to be regulated simply because of its effect on interstate trade. Victorian breweries, on some remote occasion, may sell beer in Victoria at prices which amount to predatory trading but the sales would not be within reach of Commonwealth power because they make it difficult for interstate breweries to compete on the Victorian market. The facts of the *Cement Institute* and *Bunte Bros.* cases, mentioned earlier in connection with United States law, could have no place in the pattern of federal commerce control in Australia. Similarly, the case against *Mead's Fine Bread Co.*, in which the beneficiary was interstate trade, would not be within Commonwealth power.

Upon a literal reading, sub-section (1) of the Preservation Act applies to contracts in relation to interstate trade which are "in restraint of . . . trade or commerce". So the provision would then apply where A. in New South Wales agrees to supply B. in Queensland with goods on condition that B. does not buy similar goods produced in Queensland by C. Could a Commonwealth law invalidate a restriction imposed in the course of an interstate transaction in the interests of protecting or promoting intrastate trade? If it could, then consider from a federal power viewpoint the corollary of the case just mentioned. X. in N.S.W. refuses to supply Y., also in N.S.W., with goods produced in N.S.W. if Y. should continue to obtain similar goods from Queensland. *Barger's case* seems to give the answer against the Commonwealth.

Extra-territorial restrictive practice laws: Power questions also occur in considering the extra-territorial operation of a Commonwealth restrictive practices law. Take the case of a company engaged in manufacture in Australia which agrees in London with an English company making similar goods that it will not export to certain foreign markets if the English company does not export to Australia. *R.* v. *Foster ex parte Eastern and Australian Steamship Co. Ltd.*[41] makes it perfectly plain that a Commonwealth law will not be invalid for extra-territoriality. The Australian company probably cannot be compelled to engage in foreign trade against its wishes but a law should not be

41. [1959] A.L.R. 485.

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.

so curtailing trade to and from U.S.A. The Court ordered I.C.I. to reassign to Dupont certain British nylon patents under which British Nylon Spinners Ltd. held an exclusive licence from I.C.I. British Nylon Spinners Ltd. then sought and obtained an interlocutory injunction in England restraining I.C.I. from complying with the American decree and ultimately obtained specific performance of the I.C.I. contract.[46]

The corporations power: Section 51(xx) empowers the Commonwealth Parliament to make laws with respect to "Foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth." The power has so far been a constitutional cinderella and its fragmentary judicial history since *Moorehead's case* in 1909 has not given any relief to the potential legislator. However, the possibility of some further thinking about the scope of the power is not out of the question. Even *Moorehead's case*, on close analysis of the judgments, does not seem to preclude the Commonwealth from taking any antitrust action under paragraph (xx).

Sir Robert Garran submitted to a conference of Commonwealth and State Ministers, held to discuss constitutional matters in 1934, a summary of relevant judicial opinion in *Moorehead's case* which is adequate for present purposes:[46a]

"The decision of the High Court in *Huddart Parker* v. *Moorehead*[47] has thrown great doubt on the meaning of the clause. This case arose under the *Australian Industries Preservation Act* 1906. The object of that Act was to prohibit combinations in restraint of trade or unfairly competitive; and by reason of the fact that the Federal power as to trade and commerce is limited to trade and commerce with other countries and among the States the main provisions of the Act are limited to matters in relation to external and interstate trade. An attempt was made, however, to extend its provisions so far as companies were concerned to all trade, including trade within a State. The idea was that this extension could be justified as a law relating to companies.

"The High Court, however (Isaacs J. dissenting), held that the Federal Parliament could not under the corporation power control the behaviour of companies. The real basis of the decision is that such a law is not really a law relating to companies but a law relating to the subject-matter under which the behaviour comes. That is to say in this particular instance, the law purported to control the behaviour of

46. *British Nylon Spinners Ltd.* v. *Imperial Chemical Industries Ltd.* [1954] 3 All E.R. 88.

46a. Conference of Commonwealth and State Ministers on Constitutional Matters, 1934. Proceedings and Decisions of Conference with Appendices, published by the Commonwealth Government Printer in 1935. No. 134—F 1671, at p. 73.

47. (1909) 8 C.L.R. 330.

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 participal 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

in *Moorehead's case* were concerned with the conduct of the specified corporations. This suggests the possibility of bringing foreign corporations and trading or financial corporations formed within the limits of the Commonwealth within the ambit of a Commonwealth restrictive practices law by drafting a law so as to restrict the capacity of corporations to enter into certain types of restrictive arrangements.

Take the case of mergers. In the United States, in recent years, mergers have attracted much attention. Section 7 of the Clayton Act has been vigorously enforced in an endeavour to prevent mergers taking place which could have the effect of substantially lessening competition. The object of the enforcement exercise is to prevent the growth of monopoly power at an incipient stage.

Suppose an Australian law were drafted which provided, for example, that a foreign corporation or a trading or financial corporation formed within the limits of the Commonwealth should not acquire the whole or any part of the stock or other share capital of a trading or financial corporation formed within the limits of the Commonwealth without the approval of the Treasurer. Such a provision would be directed to preserving the continued existence of a specified corporation even against its corporate will. It could also be argued to deal with the structure or capacity of the corporation seeking the takeover.

One other thing remains to be said. In *Moorehead's case*, Isaacs J. said[48] that a purely manufacturing company was not a trading corporation. Most manufacturing companies must also trade in the sense of having to sell their products. It is submitted that to confine trading to buying and selling is too narrow.

Section 92: It is also necessary to examine the application of section 92 of the Constitution to embargoes on restraints of trade. For what it is worth, individual members of the High Court observed in *James* v. *The Commonwealth*[49] that the Australian Industries Preservation Act would not have offended section 92. The Privy Council also regarded the Act as inoffensive.[50] Since then there has been the *Banking case*[51] in which the Privy Council prescribed a new test for determining when section 92 is infringed.

If the effect of a law on interstate trade, commerce or intercourse is remote, section 92 is not infringed, but if the law has a direct operation and operates so as to impose a restriction as well, then the section is contravened. The thrust of the test is completely individualistic.

Legislation on restrictive practices entering the area of section 92 can be framed to avoid collision in most cases, but there may be some instances where the section becomes a problem. Turning again to

48. Supra n. 47 at p. 393.
49. (1935) 52 C.L.R. 570, e.g. per Evatt & McTiernan JJ. at p. 599.
50. *James* v. *The Commonwealth* (1936) 55 C.L.R. 1, 54-55.
51. (1949) 79 C.L.R. 497.

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 probihit 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.

question arises whether a federal court can or can be authorised to exercise jurisdiction conferred upon it by State Acts.

The sharing of legislative power: But before this stage is reached there is another problem which perhaps seems to indicate that the combined legislative powers of the Commonwealth and the States in some cases may not always amount to a complete legislative power.

An effective restrictive practices law must take account of the growing integration of Australian commerce and the inter-dependence between the many and various activities which make up the economy and between these activities and the competitive structure of the economy as a whole. And so the assessment by authority, whether it be a court or an administrative body, of a restraint of trade under the law of one State may involve having regard to economic factors outside the State. The New South Wales Constitution Act, 1902, confers power on the legislature "to make laws for the peace, order and good government of New South Wales in all cases whatsoever" but *Johnson* v. *Commissioner of Stamp Duties*[53] restrains the broad language of the Act by holding that extra-territorial elements of a State law must be connected with the State. Suppose the States agree to pass an anti-merger law which restrains one company from acquiring the shares of another company if the effect is to lessen competition in any line of commerce in any market. Now take a hypothetical case of a predominant retail departmental store (a company) carrying on business in Victoria but not in New South Wales which decides to acquire a company carrying on a similar and substantial business in Sydney. There would be no lessening of competition in New South Wales but the effect of such a merger on an Australia-wide market area is to lessen competition because one large independent retailer has disappeared.

Can a federal court exercise State jurisdiction?[54] Conceding that judicial power, albeit of a State, is not as foreign to a federal court as a

53. [1956] A.C. 331.
54. Sections 75, 76 and 77 of the Constitution are material to this question. They read as follows:
"75. In all matters—
(i) Arising under any treaty:
(ii) Affecting consuls or other representatives of other countries:
(iii) In which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party:
(iv) Between States, or between residents of different States, or between a State and a resident of another State:
(v) In which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth:
the High Court shall have original jurisdiction.
76. The Parliament may make laws conferring original jurisdiction on the High Court in any matter—
(i) Arising under this Constitution, or involving its interpretation:
(ii) Arising under any laws made by the Parliament:
(iii) Of Admiralty and maritime jurisdiction:

purported grant of arbitral power under federal law[55] 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. observed[59] 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 said[61] that it was only by virtue of section 71[62] 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.

> courts established by or under Chap. III for the discharge of functions which are not in themselves part of the judicial power and are not auxiliary or incidental thereto. First among them stands the very text of the Constitution. If attention is confined to Chap. III it would be difficult to believe that the careful provisions for the creation of a federal judicature as the institution of government to exercise judicial power and the precise specification of the content or subject matter of that power were compatible with the exercise by that institution of other powers. The absurdity is manifest of supposing that the legislative powers conferred by s. 51 or elsewhere enabled the Parliament to confer original jurisdiction not covered by ss. 75 and 76. It is even less possible to believe that for the Federal Commonwealth of Australia an appellate power could be created or conferred that fell outside s. 73[64] aided possibly by s. 77(ii) and (iii). As to the appellate power over State courts it has recently been said in this Court: "On the face of the provisions they amount to an express statement of the Federal legislative and judicial powers affecting State courts which, with the addition of the ancillary power contained in s. 51(xxxix), one would take to be exhaustive": *Collins* v. *Charles Marshall Pty. Ltd.* . . . It would seem a matter of course to treat the affirmative provisions stating the character and judicial powers of the federal judicature as exhaustive.

This statement is quite positive in application to the Commonwealth Parliament—sections 75 and 76 of the Constitution do not embrace the grant to a federal court of jurisdiction under a State anti-monopoly law.[65]

The High Court was forced to make one concession in its view as to the federal courts, namely covering territorial appeals. Feeling some embarrassment by reason of the decision, in *Porter* v. *The King; ex parte Yee*,[66] that an appeal may be given to the High Court from a court of a territory by an exercise of legislative power under section

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64. Constitution, s. 73, reads:
"73. The High Court shall have jurisdiction, with such exceptions and subject to such regulations as the Parliament prescribes, to hear and determine appeals from all judgments, decrees, orders, and sentences—
(i) Of any Justice or Justices exercising the original jurisdiction of the High Court:
(ii) Of any other federal court, or court exercising federal jurisdiction; or of the Supreme Court of any State, or of any other court of any State from which at the establishment of the Commonwealth an appeal lies to the Queen in Council:
(iii) Of the Inter-State Commission, but as to questions of law only: and the judgment of the High Court in all such cases shall be final and conclusive."

65. See also *Collins* v. *Charles Marshall Pty. Ltd.* (1955) 92 C.L.R. 529 per Taylor J. at p. 562. This was, however, a case concerning an attempt by the Commonwealth Parliament to confer an appellate jurisdiction on the old Court of Conciliation and Arbitration from State courts exercising State jurisdiction.

66. (1926) 37 C.L.R. 432.

122[67] 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.

example, if it should be wished to follow the American example of a Federal Trade Commission to assess the effects of a given business practice, problems would arise as to how much of the American model can be incorporated in a Federal law without transgressing Chapter III of the Constitution.[71] Moreover, could an administrative order of a Commonwealth authority made under a complementary State law be enforced by a Federal Court consistently with Chapter III of the Constitution? Certainly, law-making is a much harder process than most people, and many lawyers, believe it is.

71. See *Rola Company (Australia) Pty. Ltd.* v. *The Commonwealth* (1944) 69 C.L.R. 185, in which the High Court was divided on the question whether the Women's Employment Regulations conferred judicial power upon committees of reference. The case shows how difficult it may be for a draftsman to act with confidence in matters concerning judicial power.