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THE AUSTRALIAN PLAINTIFF AND THE SHERMAN ACT

Can Australian businessmen who are being injured by restrictive practices invoke the United States Sherman Act to reinforce or substitute for the Australian law? If so, when?

This is the most interesting question raised by an action currently pending in the United States District Court for the District of Hawaii, which has been brought by a Sydney truck distributor, L. C. O'Neil Trucks Pty. Limited, against Pacific Car and Foundry Company, of Renton, Washington, for treble damages for breach of the Sherman Anti-Trust Act¹.

The defendant is a manufacturing company which has two unincorporated divisions making Kenworth and Peterbilt trucks respectively. These two heavy vehicles, chiefly used for long-distance semi-trailer work, are almost identical in all respects, but they are manufactured separately and sold through different channels of distribution. Despite their high price (in the region of \$25,000), official registration figures and casual observation on our highways show that there is in this country a sizeable and growing demand for them.

The plaintiff O'Neil distributed Peterbilt trucks in Australia until 1966, while a Victorian company, Cameron Kenworth Importers Pty. Limited, marketed the Kenworth line. The complaint alleges that in 1966 the Peterbilt and Kenworth divisions conspired with Pacific Car and Foundry Co. and Cameron Kenworth to suppress the export of Peterbilt products to Australia and concentrate exclusively on Kenworth, with Cameron Kenworth as importer-distributor. As a result of this alleged conspiracy in restraint of trade, the plaintiff claims to have lost the future profits of its distributorship and of a proposed Peterbilt manufacturing plant to be operated by the plaintiff as a partner in a joint venture. The damages claimed total \$U.S.8 million.

To date only questions of venue and discovery have been dealt with, and it is far from certain that the case will come to a hearing on the merits at all. Antitrust actions hold such risks and uncertainties for both sides that there is strong pressure on both parties to negotiate a settlement. But even if the case is settled, it will have served to highlight one important legal implication of the growth of international trade and commerce: that where American trade grows, antitrust grows with it. What this means for Australians this article will attempt to explore.

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1. *L. C. O'Neil Trucks Pty Limited v. Pacific Car and Foundry Co.*, District of Hawaii, Civil 2724 (1967). Section 1 of the Sherman Act (15 U.S. Code § 1) provides in pertinent part '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, is declared to be illegal . . .'

Whether as a consequence or by coincidence, the worldwide expansion of business since 1945 has been accompanied by a rediscovery of the forgotten benefits of competition. Germany, once the home of the cartel, has set an example of economic growth under the author of a book fittingly called *Prosperity through Competition*², Dr. Ludwig Erhard. Even in Eastern Europe, economists such as Dr. Ota Sik are (or were, until 21st August, 1968) contending that some form of competitive market mechanism is the only system which can make communist economies approach the efficiency of the leaders in the West. Throughout the industrial world, old monopoly laws have been dusted off, new ones enacted, and today few developed countries are without some form of legislation designed to cure the distortions caused by restrictive practices and abuses of dominant economic power.

But while most legal systems authorize governments to act against anti-competitive restrictions in the market mechanism, not all give the individual trader any effective way of taking action on his own initiative. Australian law does provide remedies, but the protection they give to the individual is illusory. The common law remedy for conspiracy to injure is available only when the plaintiff can show that the defendant's coercive or monopolizing conduct is the result of an intent to injure, rather than of a desire to advance the defendant's business interests³. The common law rules on the legality of contracts in restraint of trade give scarcely even lip-service to the policy of maintaining competition as such⁴. While it is true that the House of Lords has recently struck down exclusive dealing contracts imposed by oil companies on their retailers on the ground that they were too onerous⁵, the tests which it has applied are the old tests of reasonableness between the parties, which turn upon whether or not the restriction is more severe than necessary for allowing the oil refiner to achieve his goal of a distribution system with long-run stability. Nothing in the judgments suggests any disposition to examine the problem of restrictive practices in its economic setting—the indications are rather to the contrary⁶. The service-station cases may therefore remain an anomaly for some time.

It has been cogently argued that the tort of intimidation, as expanded by *Rookes v. Barnard*⁷, could be applied and developed to provide remedies against

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2. Translation published in London, 1958. In a chapter titled 'Cartels—Enemies of the Consumer', Dr. Erhard says at 123: 'I must state why I am such a definite opponent of cartels . . . I start with the sound economic findings made by scientific research, that a competitive economy is at one and the same time the most economical and the most democratic form of any [sic] economic order. The State must only take a hand in the running of the market insofar as it is needed to uphold the mechanism of competition, or to supervise those markets where competition is impossible'.
 3. *Crofter Hand Woven Harris Tweed Co. v. Veitch* [1942] A.C. 435; *A.-G. (Cth) v. Adelaide Steamship Co. Ltd.*, (1913) 18 C.L.R. 30 (P.C.).
 4. *Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Co.*, [1894] A.C. 535.
 5. *Esso Petroleum Co. Ltd. v. Harper's Garage (Stourport) Ltd.*, [1967] 2 W.L.R. 871; see also *Petrofina (Gt. Britain) Ltd. v. Martin* [1966] 2 W.L.R. 318.
 6. See, e.g., [1967] 2 W.L.R. 871 at 898, 910-12, where the court declared that some forms of restraint of trade such as brewers' exclusive dealing arrangements could be "readily justifiable on the basis of long established practice".
 7. [1964] A.C. 1129.

traders who seek to deny others access to the market⁸. So it could—but to date it has not been so applied or developed, and the history of the common law since the early 1800s suggests to this writer that it will not. Reflecting the views of their class and time, the English judiciary of the 19th century felt little enthusiasm for competition or equality of economic opportunity as such. It saw no reason to attack restrictive or coercive behaviour which did not stem from malice or entail any act which was otherwise unlawful. The resulting permissiveness towards purely restrictive conduct became part of the common law by the time of the *Mogul* case⁹ and has remained so ever since. Changing times have brought little change in the law on conspiracy to injure and restraint of trade in this respect. One may therefore be entitled to doubt whether in applying the tort of intimidation the courts will shift their focus from the unlawfulness or maliciousness of the act to the restrictiveness of the end.

The Trade Practices Act 1965-1967 (Cth) grants the individual a civil remedy in section 88 to replace the treble damages action given by the 1906 Australian Industries Preservation Act. A person who suffers loss or damage by an act of another person done in contravention of an order of the Trade Practices Tribunal in examination proceedings or in contravention of the collusive tendering and bidding sections may recover the amount of his damage by action in the Industrial Court. There is no cause of action unless such an order was in force at the time the damage was done; an interim restraining order can be obtained only after examination proceedings have begun, and may be sought only by the Commissioner of Trade Practices¹⁰. The wrongdoer can never be made to compensate the person injured for any damage caused before the restraining order took effect.

With a choice between common law doctrines encrusted with the petrified prejudices of nineteenth-century England's ruling class and a statutory remedy which denies him relief when he most needs it, the individual Australian businessman is virtually without defence against the restrictive or coercive activities of cartels and monopolies. Moreover, since the Act has extraterritorial operation¹¹ and provides the same remedies for activities which have an extraterritorial element as for those which do not, he is as vulnerable to overseas traders and international cartels as to Australian ones.

In the face of international cartels, the individual's weakness becomes the nation's weakness. Few countries depend on foreign trade more than Australia does. International agreements which distort world trade can injure the nation in innumerable ways. There is currently no effective inter-governmental action against world cartels¹², and a relatively small power such as Australia can do

8. J. Little, "Monopoly in Trade—a Kind of Intimidation" (1968) 6 Melbourne University Law Review 265.

9. *Mogul Steamship Co. v. McGregor, Gow & Co.*, [1892] A.C. 25.

10. s.54.

11. ss.7(1) and 91(3).

12. This is partly because secrecy provisions such as those in s.34 of the Trade Practices Act make it difficult for responsible officials in different countries to communicate with each other.

little against them on its own¹³. A vivid example of this is to be found in the activities of the Timken roller bearing cartel during World War II. Defence production had sparked an unprecedented need for bearings which existing sources were unable to meet. The Australian Government approached the American Timken company with an offer of tariff protection if it would build a bearing plant in Australia. Timken refused on the ground that Australia was in the "territory" of British Timken, a separate company licensed to use the product name and patents. The two companies, together with French Timken, had agreed to divide the world into territories in which each of them would have a monopoly, and to assist each other to eliminate competition from outsiders. At this time the British company had no intention of supplying more bearings to or building plants in Australia. The agreement thus helped to keep the Australian armed forces short of desperately needed equipment at the time of the nation's greatest peril. The roller bearing cartel was dissolved by an Ohio Federal District Court in 1949¹⁴.

Some of the international market-sharing agreements, such as the duPont-ICI agreement¹⁵, are defunct, but many are not. One of the revelations of the Roberston-Philips affair in 1965 was that Matsushita Electric would not export certain electric light components to an Australian buyer (Robertson) because Matsushita had a market-sharing agreement with N.V. Philips of Holland. Ironically, it was said that Robertson wanted to import the components in the first place because it was the target of a domestic boycott organized by Philips already¹⁶.

Against alignments such as these, the Trade Practices Act seems a frail weapon: it can be invoked only by the Commissioner, not the individual; in most areas it can only enjoin repetition or continuance of conduct, and cannot be used to penalize or compel compensation for past conduct, however injurious; the public interest test which provides for "weighing" generalized detriments against concrete benefits inherently favours the respondent¹⁷; and where all the parties are foreign-based companies it may be difficult to subject them to Australian jurisdiction¹⁸.

In some cases a better weapon, if it were available, would be a civil action under the Sherman Act. Since many more large multi-national corporations

13. "Countries dislike to see the acts of their nationals in their own territory limited by acts of a foreign government. However, countries also dislike to see commerce within their territory limited by the acts of persons operating outside those territories. *Large countries may protect themselves by unilateral action under national law; small countries often cannot*" (my italics); *Proceedings, International Conference of Control of Restrictive Business Practices*, Chicago 1960, at 229.

14. *United States v. Timken Roller Bearing Co.*, 83 F. Supp. 284 (N.D. Ohio 1949); *modified and aff'd.*, 341 U.S. 593 (1951)

15. *United States v. Imperial Chemical Industries Ltd.*, 100 F.Supp. 504 (D.C.N.Y. 1951).

16. See speech of Mr. Kelly, M.H.R., in *House of Representatives Debates*, 30 November 1965, at 3347-48.

17. I have expanded this point in *Australian Monopoly Law: Issues of Law, Fact and Policy* (1967), at 67, 198-199 and in "Price Agreements, Rationalization and the *Distant Waters Case*" (1967) 41 *Australian Law Journal* 375; see also (1969) 13 *Antitrust Bulletin* 1491.

18. Masterman and Solomon, *Australian Trade Practices Law* (1967), at 344-347.

are resident in the United States than in Australia, jurisdiction may be easier to secure. Nor has it any of the other weaknesses of the Australian legislation set out above. Most important, the aggrieved person can take action, or effectively threaten action, without waiting for any moves by a government enforcement agency.

The application of American antitrust law to international trade has for several years given rise to the most troublesome polemic in the whole field of monopoly control. It is self-evident that when American courts purport to regulate American exports and imports, they must simultaneously be affecting some other country's imports and exports. This has often been viewed as an affront to the sovereignty of the other state, especially by governments which themselves have no strong antitrust policies¹⁹. But having turned on the emotional question of sovereignty, the debate has largely overlooked one important point of policy: that the restrictive activities of large corporations (whether American or not) may distort the trade relations of many countries; and if the United States courts remove those restrictions, other nations may benefit as much as the United States does, or more. The Timken case illustrates the point. If the Timken cartel had been struck down in 1939, who would have gained more, Australia or the United States? The answer is obvious. Again, it was found that British exports were stimulated rather than hindered by the removal of the long-standing market sharing agreement between duPont and Imperial Chemical Industries. ICI's sales in the United States rose from \$500,000 to \$5,000,000 within a couple of years after the District Court decision which broke up the cartel²⁰.

There are times, therefore, when it would be in the interests both of individual Australian traders and of the nation for a civil antitrust action to be commenced in a United States District Court by an Australian plaintiff²¹, whether or not the Australian courts were willing to enforce any orders which the plaintiff obtained²².

An Australian plaintiff considering such action, or a defendant of any nationality confronted with it, faces three sets of problems. First is the question of jurisdiction over the defendant under United States law. Secondly, it must be determined whether the transaction is one to which the antitrust laws apply. This may involve questions of international law. Thirdly, there are practical questions such as whether the U.S. Department of Justice is likely to take over the carriage of the matter, and if not, whether it is practicable for the plaintiff to take action by himself. We will consider each of these topics in turn.

19. Some of the arguments on this issue are outlined below.

20. Fugate, *Foreign Commerce and the Antitrust Laws* (1958) (hereinafter cited as 'Fugate') at 3-4.

21. Kingman Brewster, *Antitrust and American Business Abroad* (1958) (hereinafter cited as 'Brewster') at 227 cites three private suits attacking foreign commerce restraints and affirms that there is a right of action in such cases. See also *Carnation Co. v. Pacific Westbound Conference*, 383 U.S. 213 (1965).

22. Accordingly we need not consider questions such as those raised by *British Nylon Spinners Ltd. v. Imperial Chemical Industries Ltd.*, [1953] 1 Ch. 19, [1954] 3 All E.R. 88.

A. *Jurisdiction over the Defendants*

As will be seen from the examples already given, the parties to the restrictive agreement could include American companies (such as U.S. Timken) or other foreign companies, such as British Timken or Philips. There could also be the Australian subsidiaries of American concerns or wholly Australian enterprises such as AWA²³.

Jurisdiction over United States corporations and residents is automatic and the only real question is the selection of a proper judicial district. In civil antitrust actions, a corporation may be sued in any district in which it does business, subject to its right to apply for a change of venue²⁴. Australians have an obvious interest in using the District of Hawaii if possible, in order to reduce the expense of flying witnesses and legal advisers to court²⁵.

Non-American corporations may be parties to Sherman Act suits by virtue of section 8 of that Act, which states that the word "person" "shall be deemed to include corporations or associations existing under or authorized by . . . the laws of any foreign country". Whether they may properly be served and made defendants depends upon whether they have such contacts within the territory of the forum that maintenance of the suit does not offend traditional conceptions of fair play and substantial justice²⁶.

A non-American company will have sufficient contacts for this purpose if it "transacts business" of a "substantial character" within the jurisdiction, whether by buying or selling goods or services of the kind in which it normally deals, or by other means such as licensing others to exploit its patents and know-how or taking part in joint ventures with local concerns²⁷. It is not enough that the company employs an American sales agent²⁸, nor that it has a wholly-owned subsidiary in the jurisdiction²⁹ unless, for example, the subsidiary's function is to carry on the business of the foreign parent³⁰. On the other hand, once it is shown that the local subsidiary is an "alter ego" or agent directed by the absent parent, the separate incorporation of the subsidiary will not insulate the parent and service on the subsidiary will be taken to be valid service on the parent³¹.

Few Australian companies need fear anything on this account, for only a few (Qantas, for instance) would have the degree of business presence required to subject them to antitrust jurisdiction. However there would

23. Amalgamated Wireless (Australasia) Ltd. was named as a co-conspirator in the *Zenith* case, which is discussed below.

24. See s.12 of the Clayton Act (15 U.S. Code § 22). In *Pacific Car*, the defendant moved that the venue be changed, pursuant to 28 U.S. Code § 1404(a), from Honolulu to Seattle.

25. See below under "*C. Practical Problems*".

26. *International Shoe Co v. Washington*, 326 U.S. 310, 316 (1945).

27. *United States v. Scophony Corp. of America*, 333 U.S. 795 (1948).

28. *United States v. Asbestos Co. Ltd.*, 34 F.2d 182 (1929).

29. *Coclin Tobacco Co. v. British-American Tobacco Co.*, 210 F.Supp. 779 (S.D.N.Y. 1962).

30. *United States v. Imperial Chemical Industries Ltd.*, supra n. 15 at 511.

31. *Ibid.*

clearly be scope for joining other non-American parties. The *Imperial Chemical Industries* case³² provides an illustration.

By a series of agreements signed between 1897 and 1939, duPont and ICI divided up between themselves the world's markets for explosives, sporting arms and ammunition and other products. Australia, being part of the then British Empire, was allotted to ICI. DuPont had to withdraw from the Australian market and transfer its local enterprises, such as the Australian Ammonia Company, to the British company. An Australian whose business had suffered by the suppression of duPont's substantial business activity in Australia would of course have been able to sue duPont in the United States for a section 1 Sherman violation. But in addition, since ICI was transacting business in the United States through its New York subsidiary, he could have joined ICI as a co-defendant. This would have enabled the court to make a more effective final order than if duPont alone had been sued.

An Australian subsidiary of an American parent company can be made a defendant through service on the parent if there is "substantial business identity" between the two. In such a case the court may feel free of "the danger that a corporation may be drawn into litigation in a strange forum by the acts of someone relatively unfamiliar with its major policies and unimportant in its corporate hierarchy. Here, the court already has jurisdiction over the parental policy making body . . ." ³³. Once it is established that the activities of the subsidiary are directed by the parent, the court will not hesitate to pierce the corporate veil. "Where two corporations under common ownership are used as interlocking facilities to execute a common design, the self-serving niceties of inter-corporate housekeeping are of minor significance" ³⁴. An American company related in this way to its Australian subsidiary may therefore find that the subsidiary's participation in an Australian cartel affecting American trade can be reached in a Sherman Act suit.

If the non-American company is neither the *alter ego* subsidiary of an American parent, nor has enough business contacts of its own to make it present within the jurisdiction in its own right, it cannot be made a defendant. It may, however, be named as co-conspirator, as Cameron Kenworth has been in the *Pacific Car* case. Judge Rifkind in *National Lead* declared that the absence of the defendants' foreign co-conspirators would place a practical limitation on the court's decree, but it would not "prevent the court from finding a violation as the facts warrant, and from restraining those within the reach of its mandate from continuing a conspiracy in defiance of the Sherman Act" ³⁵. A person so named is therefore not amenable to the court's order, but his conduct may be examined by the court and his contractual arrange-

32. *Supra*, n. 15.

33. *United States v. Watchmakers of Switzerland Information Centre*, 133 F.Supp. 40, 134, 48 (S.D.N.Y. 1955).

34. *United States v. Watchmakers of Switzerland Information Centre*, 134 F.Supp. 710, 712 (S.D.N.Y. 1955).

35. *United States v. National Lead Co.*, 63 F.Supp 513, 525 (S.D.N.Y. 1945). Brewster at 62-63 criticizes the practice of naming absent foreign firms as co-conspirators

ments with trading partners who are defendants may be upset if the court orders the defendants to put an end to agreements which it finds unlawful. In *Hazeltine Research Co. v. Zenith Radio Corporation*³⁶, the Australian companies AWA, Philips, STC, EMI and Pye which participated with Hazeltine in a patent pool designed to monopolize certain Australian electronics markets, were named as co-conspirators. The pool, which dealt entirely with Hazeltine patents, was profoundly affected by the court's order, even though the injunction bound Hazeltine alone.

B. *International Transactions to which the Antitrust laws apply.*

The first substantive requirement is market conduct which, if it held no extraterritorial problems, would constitute a violation of the Sherman Act³⁷. Applying the normal section 1 principles on agreement and conspiracy³⁸ to international dealings presents no special problems, but the operation of the monopolization provisions in section 2 holds unanswered questions because of the need to define monopolization by reference to the geographical market which has allegedly been monopolized. What is the relevant market in international trade? If a market for these purposes means the same as in domestic cases, that is, an area of effective competition, then dominance in any isolated world market (such as Fiji) could make a trader liable, unless the monopoly were shown to have been "thrust upon" him in some way. On the other hand, if it means the entire United States export or import trade in a given product, monopolizing one market would seldom be sufficient to give rise to section 2 liability unless the market were an overwhelmingly important one, such as Europe. Attempt to monopolize may be somewhat easier to prove³⁹, but the application to international trade of section 2 as a whole is still so speculative that it is more rewarding at present to concentrate on section 1.

The crux of all "foreign commerce antitrust" actions is the question whether the conduct is sufficiently connected with the United States to warrant the application of American regulatory law. The early view taken by the Supreme Court was that the antitrust legality of an act was to be determined wholly by the law of the country where the act was done. In *American Banana Co. v. United Fruit Company*⁴⁰ both plaintiff and defendant were American corporations but the acts complained of took place chiefly in Panama and Costa Rica. Relying on the principle that all legislation is prima facie territorial, the Court held that the defendant's extraterritorial conduct was outside the scope of the statute.

The *Banana* decision turned partly on the fact that the direct cause of the plaintiff's loss, seizure of its property by a detachment of Costa Rican militia,

36. 239 F.Supp. 51 (N.D. Ill., 1965), modified 288 F.2d 39 (7 Cir. 1967), certiorari granted 391 U.S. 933 (1968).

37. The Clayton Act, which contains express territorial limitations, would seldom if ever apply to external trade.

38. For an outline of these principles, see, e.g., *Report of the Attorney-General's National Committee to Study the Antitrust Laws* (Washington, D.C. 1955) at 12-42.

39. See Brewster at 189

40. 213 U.S. 347 (1909).

was the act of a sovereign state⁴¹. It was not long before the courts began to distinguish the case on this and other grounds in order to avoid the legal vacuum in foreign trade to which it seemed to point. *United States v. American Tobacco Company*⁴², which dealt with a world market-sharing agreement between the leading British and American tobacco companies, and *United States v. Pacific and Arctic Railway and Navigation Company*⁴³, involving a transport monopoly between American and Alaskan ports, showed that a new protective principle was developing which would prevent the creation of any such vacuum. Parallel to the strict territorial view taken in the *Banana* case, an effort to protect competition and freedom of economic opportunity in the nation's external trade was gathering strength. A proven adverse effect upon United States commerce became the factor which helped the courts to apply the Sherman Act to contracts or combinations containing a foreign element. In *United States v. Sisal Sales Corporation*⁴⁴, a plan to monopolize the purchase, importation and sale of sisal had partly been carried out by approaching the governments of Mexico and Yucatan State to induce them to pass legislation which discriminated in favour of the defendants' purchasing agency and ultimately gave it an effective monopoly in acquiring sisal from the producers. However, both the agreement and some of the acts to make it effective took place in the United States, and they brought about within the jurisdiction the forbidden result of restraining trade in sisal and increasing its domestic price. The Court had no difficulty in finding the defendants liable.

The protective principle can be seen working in several cases between 1911 and 1945, but in all cases some act of the parties within the United States was still insisted upon—whether the agreement and partial performance as in the *Sisal* case, or the performance alone, as in the shipping conference case of *Thomsen v. Cayser*⁴⁵. It was not until the *National Lead* and *Alcoa* cases that the protection of American trade emerged as the dominant principle. *United States v. National Lead Company*⁴⁶ was a suit by the Government for an injunction against National Lead and duPont, which had joined with producers in other countries in a system of patent exchange agreements for dividing among themselves world markets in titanium pigments. Some of the agreements which led to the final division of markets were made abroad, between non-American companies, and the defendants (duPont and National Lead) contended that the court for this reason had no jurisdiction to consider the overall plan. To this argument the court replied:

“The several agreements relating to manufacture and trade within Europe are but some of the links in the chain which was designed to enthrall the entire commerce in titanium. The object of the govern-

41. Compare *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962) where the opposite conclusion was reached.

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

43. 228 U.S. 87 (1913).

44. 274 U.S. 268 (1927).

45. 243 U.S. 66 (1917).

46. 63 F.Supp. 513 (S.D.N.Y. 1945).

ment's attack is a conspiracy in the United States affecting American commerce, by acts done in the United States as well as abroad"⁴⁷.

Despite this reassuring language, the fact remained that agreements dealing with commerce among foreign countries only were invalidated by the court because they were intended to complement restrictions on American overseas trade. "This case, perhaps more than any other, became the anvil of precedent upon which other opinions and decrees were hammered out. It became clear that cartel participation which explicitly governed imports or exports was thereafter vulnerable even if imports or domestic production were not proved to be seriously curbed or extortionately priced"⁴⁸.

The *National Lead* judgment is notable also for its treatment of the "When in Rome" argument. The defendants had argued that "American producers cannot do business successfully in a cartelized world except on cartel terms; . . . to abstain from such business would amount to a greater restraint on trade than is involved in joining the cartel"⁴⁹. The court rejected this proposition, which it thought should more properly be addressed to the legislature than the judiciary. At all events, experience seems to have shown that business opportunities are greater for those who manage to avoid joining an international ring than for those who take part in organized restriction⁵⁰.

The broadest and most unequivocal reading of the effects test is to be found in the *Alcoa* judgment⁵¹. One of the issues in this case was the legality of an agreement concluded outside the United States among certain French, German, Swiss and British companies and the Canadian subsidiary of Alcoa, Aluminium Ltd. There was evidence that the agreement was intended to affect American imports of aluminium, but it was not clear whether that trade had in fact been affected. The court held that both intention and effects had to be proved, but once the intent had been shown, the burden of proof of the second element shifted to the defendant; that burden not having been discharged, the offence was proved. Aluminium Ltd. did transact business in New York, so that in holding it liable the court was not strictly attacking the conduct of aliens abroad. But the court's dictum that "any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders which has consequences within its borders which the state reprehends"⁵² has been taken by many to mean that aliens who do abroad acts authorized by the *lex loci* which affect American trade are thenceforth liable to antitrust action.

The requirement of *intention* to affect United States trade was an essential check on the potential scope of the effects test. The interdependence of

47. *Id.*, at 525.

48. Brewster at 28. Put another way, this means that the required effect on American trade constitutes not only the substantive violation but also supports the operation of United States laws on foreigners. See Note "Sherman Antitrust Law—Applicability to Foreign Commerce", (1952) 37 Cornell Law Quarterly 821.

49. 63 F.Supp. at 526.

50. Brewster 260-261.

51. *United States v. Aluminium Company of America*, 148 F.2d 416 (2nd Cir. 1945).

52. *Id.*, at 443.

markets in the contemporary world is such that an agreement between traders may have repercussions in another part of the world which the parties did not foresee. As Judge Hand put it, "Almost any limitation on the supply of goods in Europe, for example, or in South America may have repercussions in the United States if there is trade between the two"⁵³; or, one could add, even if there is no trade between the two. To seek to impose liability in respect of any transaction, wherever concluded, which raised any echo in the United States, and upon parties who contemplated no such consequences would be futile and unjust. Intent is therefore vital—but whether the intent required is a general intent to restrain international trade or a specific intent to restrain United States trade is the subject of some apparently inconsistent statements⁵⁴. There seems to be little real doubt, however, that although the parties need not have been totally certain that their conduct would infringe the Sherman Act, they will not be liable if they intended merely to restrain trade between countries of which the United States was not one.

In cases dealing with restraints of domestic trade, any effect upon interstate commerce is enough to make the violation complete. Where international trade and extraterritorial activities are involved, however, a heavier proof burden must be discharged. Subject to a possible shift of the burden once intent to restrict American trade is established, the effect on imports or exports must be shown to be substantial⁵⁵.

Perhaps the best way to show how these principles operate is to analyse a few of the fact situations in the decided cases. Surprisingly enough, every one of these deals with restrictions on trade with Australia. In terms of the kind of connexion they have with the United States (and Australian) foreign commerce, the examples will be divided into three categories: international cartels, Australian-American cartels and American participation in local cartels.

1. *International Cartels*

An agreement between the producers to fix prices, allot quotas or divide markets in international trade clearly has the elements of a Sherman Act violation if, expressly or by implication, it is designed to include American trade and has a substantial effect upon it.

Consequently, the liability of classic international cartels presents few legal difficulties. The *Imperial Chemical Industries* case⁵⁶ will serve not only to

53. *Ibid.*

54. Compare *Fugate* at 46 and *Brewster* at 84; *United States v. General Electric Co.*, 82 F.Supp. 753, 891 (D.N.J. 1949) and *National Lead*, *supra* n. 35 at 524.

55. *General Electric*, *supra* n. 54; *Aluminium Co. of America*, *supra* n. 51; Cooper, "Antitrust Aspects of Foreign Trade", (1967) 35 *University of Missouri at Kansas City Law Review* 16, 17; *Alfred Bell & Co. Ltd. v. Catalda Fine Arts, Inc.* 74 F.Supp. 973, 86 F.Supp 399 (S.D.N.Y. 1947, 1949), *aff'd* 191 F.2d 99 (2nd Cir. 1951); *Report of the Attorney-General's National Committee*, *op. cit. supra* n. 38 at 76.

56. *United States v. Imperial Chemical Industries Ltd.*, 100 F.Supp. 504 (D.C.N.Y. 1951).

illustrate the concepts involved and highlight the points at which such combinations are vulnerable, but also to show how early action by an Australian plaintiff might have saved Australia from several decades of virtual monopoly.

There were nine defendants in this case, including the British company Imperial Chemical Industries, its New York subsidiary (ICI[NY]), E. I. duPont de Nemours & Co. Inc. (duPont) and Remington Arms Co. Inc. These companies, it was alleged, had conspired to divide world markets and eliminate competition in chemicals, sporting arms and ammunition by methods which included reciprocal patent licensing and the establishment of jointly-owned foreign companies. DuPont and ICI (and ICI's predecessor, Nobel Industries Ltd.) had had market-sharing agreements as far back as 1897, some of which had been struck down in earlier proceedings⁵⁷. Of the arrangements challenged in this case, one group consisted of a series of agreements for the exchange of licenses over patents and secret processes which were coupled with a restriction preventing the licensee from using the invention to compete with the licensor in his "own" territory. A provision for sharing the profits realized by the licensing further reduced the incentive to compete. This series of agreements began in 1907 and culminated in a pact signed in 1929, expressed to be for ten years, which was renewed in 1939. This covered a wide range of chemical products and provided that patent licenses would be exchanged on the condition that duPont would receive exclusive licenses for North and Central America (except British countries) while ICI was to have exclusive rights in the "British Empire" (except Canada). The rest of the world was to be common territory. Existing establishments inconsistent with the agreement were to be withdrawn; accordingly, duPont transferred to ICI, among other things, the Australian Ammonia Company.

Side by side with the licensing agreements were the jointly owned companies. One of these was Nobel Chemical Finishes Ltd. (NCF), formed by Nobel (later ICI) to exploit the British Empire market for the automobile finish known as "Duco". DuPont was a minority shareholder in this venture, and in accordance with the market sharing policy the British company was given control of it. DuPont then gave NCF an exclusive license to make and sell Duco in the British Empire. If NCF were unable to meet the demand, duPont was to be permitted to enter the Empire market, provided that it shared its profits with NCF. "The clear purpose and effect of these arrangements was to eliminate competition between NCF and duPont and with other manufacturers of paints and varnishes"⁵⁸. One measure of their success in this country might be the fact that Australians still generally refer to the finish on their cars not as "paint" but as "duco".

In Australia, a special joint enterprise was formed to manufacture and sell rubber cloths and artificial leathers. By 1926, duPont had a substantial Australian business in leathercloth and similar fabrics but became aware that the Australian Government was considering erecting a high tariff against them. DuPont decided therefore to build a plant in Australia, but Nobel

57. *United States v. E. I. du Pont de Nemours & Co.* 188 F. 127 (1907).

58. 100 F.Supp. at 577.

promptly made it clear that the control of any such enterprise should be in the hands of Nobel. At first duPont was reluctant to accede to this. Mr. Lammot duPont wrote to Sir Harry McGowan of Nobel (later chairman of ICI) who was at that time busy forming ICI, "the new chemical trust" designed to monopolize the British chemical industry⁵⁹. Lammot duPont's letter pointed out that Nobel did no rubber-cloth business in Australia at all and their leather-cloth sales were well below duPont's⁶⁰. Ultimately, however, duPont agreed to surrender its strong position and take a minority interest in a jointly-owned company for the sake of preserving its "varied and pleasant relations" with Sir Harry McGowan's "new chemical trust". Nobel Chemical Finishes Ltd. (Australasia)⁶¹ was accordingly formed in 1927. Two years later the name was changed to Leathercloth Pty. Ltd. and the company was made a proprietary company in order to facilitate restricting the transfer of shares. One duPont executive wrote a memorandum expressing his view of the arrangement in these words:

"In other words, we are, by joining with ICI in this enterprise, foregoing the Australian market forever. Assuming that the general principle of British Empire for ICI, North America for duPont and the rest of the world open is believed to be a good thing . . . , then I feel that this is all right as Australia is of course one of the most important parts of the British Empire for the future and presumably the English should be in the best position to develop it for the long pull"⁶². There is wry amusement to be found in the law reports.

The agreements allocating world markets for sporting arms and ammunition came in two stages. In the first, duPont and ICI brought "sporting powders" within their sphere of co-operation by exchanging patent rights. DuPont, which was a major producer of powder in the United States, also protected ICI from the competition of American cartridge manufacturers by withdrawing discounts and rebates on powder sold to them to produce cartridges for export. The second stage began in 1933 when duPont gained control of Remington Arms Company, a manufacturer of sporting arms and ammunition. Negotiations to bring Remington's exports within the duPont-ICI apportionment began at once, but met some resistance from Remington executives and minority shareholders, who resented being hindered in their export drive and being forced to give up to ICI markets in which Remington products had built up goodwill. Nevertheless, an agreement was drawn up in 1935 between ICI and Remington in the now familiar pattern: the British Empire, Canada excepted, to ICI; North and Central America, British countries excepted, to Remington⁶³.

59. *Id.*, at 528, 577.

60. *Id.*, at 577.

61. This is the way the company's name appears in the report, but presumably it should be Nobel Chemical Finishes (Australasia) Ltd.

62. 100 F.Supp. at 578.

63. This may help to explain why until recent years it was virtually impossible for the Australian shooter to obtain anything but ICI ammunition for his (non-Remington) .22 rifle. Executives of duPont and Remington must have been well aware that the humble rabbit alone could ensure a strong demand for sporting arms and ammunition in Australia almost indefinitely, yet for years they did nothing about it, either by direct export or by local manufacture. This is less likely to have

Each of these agreements—1929, 1935, 1939, the Australian leathercloth venture—affected and was intended to affect American trade by restricting the freedom of duPont, Remington and independent concerns to export and by protecting duPont and its affiliates from ICI imports. Each of them was therefore vulnerable to antitrust attack.

Although the U.S. Government proceeded against all of these interlocked agreements in one case, an Australian plaintiff would be unlikely to do so because, quite apart from the practical difficulties of such a task, its own damages would in all probability have been caused by one particular step in the grand design. For example, an importer or wholesaler could have been injured by the suppression of Remington exports; a supplier of raw materials to the Australian Ammonia Co. might have had his market cut off by the sale of that company to ICI; manufacturers who needed duPont commodities in their own production might have been unable to obtain goods of comparable price and similar quality from ICI, or might have been able to obtain them only at unsuitable times. *At every point where the suppression of freedom of choice could cause economic loss there would be potential plaintiffs.* Each one of them would need to prove only the particular part of the restrictive plan which brought about his own damage.

Similar remedies would have been available in the *Timken* case. The products of U.S. Timken, it will be remembered, were unavailable in Australia because U.S. Timken had agreed with British Timken to divide world markets, and Australia was in the British company's assigned area. The arrangement held good even at a time when bearings were desperately scarce in Australia and British Timken was not meeting the demand. If this situation were repeated today, an Australian manufacturer who needed roller bearings or who was dissatisfied with British Timken could commence a treble damages action against American Timken. The British concern could also be joined as a defendant if it engaged in sufficient business activity in the United States.

The same course would have been open if the electric light cartel of which at least Philips and Matsushita were apparently members in 1965 included any Americans—or, according to the *Alcoa* dictum, even if it did not but was intended to affect American commerce substantially and in fact did so.

Both *ICI* and *Timken* dealt with agreement which referred specifically to United States commerce. The *General Electric (Incandescent Lamp)* case demonstrates that absence of such obvious references is not conclusive. General Electric Company had helped to organize "Phoebus", the great international lamp cartel, in 1924. Yet neither General Electric nor its export sales company, International General Electric, signed this agreement, which allocated world markets other than the United States and Canada among a number of non-American companies by means of a patent licensing scheme. These markets were divided into "Home Countries", where only one local manufacturer could sell, and "Common Territory", where all parties were

been the result of inertia than of the market-sharing agreement, coupled with duPont's punitive action against independent cartridge companies which used duPont powder for their exports into ICI territory.

free to sell. Australia was the "Home Country" of Australian General Electric Co. Ltd., a wholly-owned subsidiary of the American company⁶⁴.

Because the agreements said nothing about American trade, General Electric argued that they were beyond the law's reach. But the evidence showed, in the court's view, that General Electric had been the architect and builder of Phoebus, which was designed to protect GE from the competition which threatened to follow the imminent expiry of its patents. The plan was to make home territories attractive to potential customers by giving each overseas manufacturer a monopoly on his home ground, and thereby deprive him of any incentive to go out and challenge General Electric's monopoly on its own territory. Though the agreements appeared to govern trade between other countries only, they were designed to buttress GE's monopoly in America by removing import competition. The court held that the defendant had infringed section 2 of the Sherman Act⁶⁵.

2. *Australian-American Cartels*

Some agreements which restrict Australian or American trade may be essentially bipartite arrangements between enterprises in the two countries rather than links in a world-wide scheme. An instance of this would be the *Pacific Car* case, if the facts are as the plaintiff alleges. A further example can be found in *Hazeltine Research Co. v. Zenith Radio Corporation*⁶⁶.

Zenith, the defendant in a patent suit, counterclaimed against Hazeltine for damages and an injunction for breach of the Sherman Act. Hazeltine was what was termed a patent holding and licensing company, and for the better exploitation of its patents it had set up patent pools in the United Kingdom, Canada and Australia. The Australian pool, which was similar to the other two, comprised Hazeltine on the one hand and the Australian companies AWA, Philips, STC, EMI and Pye on the other. Hazeltine licensed its patents to the pool, which could sublicense them only to persons who agreed not to sell, import or export in Australia any radio or television receiving apparatus not manufactured in Australia. The object and effect of this was to protect AWA, Philips, EMI, STC and Pye from competition from goods manufactured anywhere else in the world. It also gave Hazeltine a greater return on its patents by ensuring that the Australian manufacturers using them had a monopoly.

From the point of view of Zenith and all other overseas manufacturers, it meant that the Australian, British and Canadian markets were closed to trade in the range of products covered by the pool agreements. The trial court awarded Zenith damages assessed at \$16,238,872 and granted it an injunction.

The Hazeltine patent pool had a clear effect on United States export trade with Australia. There is no reason why an Australian who wanted to compete with AWA and its associates by selling radio or television products made by Zenith or any of the other excluded producers, or who needed these products

64. *United States v. General Electric Co.*, *supra* n. 54 at 837.

65. *Id.*, at 842-43.

66. *Supra* n. 36.

as components for his own manufactures could not himself have sued Hazeltine successfully. This would have given him a way of breaking the Australian monopoly without waiting for the rather feeble processes of the Trade Practices Act to take their course.

Many other two-sided arrangements between Australians and Americans are possible sources of antitrust liability. The "export franchises" commonly insisted upon by foreign companies to prevent their local subsidiaries or licensees from competing with them in export markets may be vulnerable if they amount to a market-sharing agreement with a competitor, especially if they prevent the local producer from exporting to the United States⁶⁷. This would not normally be the case, however, where the local concern is a wholly-owned subsidiary, since the parent company, being in complete control of the subsidiary, can direct its market policies as it sees fit⁶⁸. Exclusive dealing arrangements, though normally lawful, can also present problems. For example, an Australian distributor of agricultural machinery might bring pressure to bear on his supplier to induce him to cut off supplies to a neighbouring distributor who was cutting prices or poaching on his territory. If the supplier complies, he may be conspiring with the Australian to restrict American exports, much as Cameron Kenworth and Pacific Car and Foundry Company are alleged to have done.

3. *Participation by Americans in Purely Local Cartels*

If civil antitrust actions could be brought against American enterprises which take part in local Australian restrictive agreements, entire industries might indirectly be forced to accept competition. The American firms in any industry are likely to be among the stronger members. If they can be compelled by United States court decrees to abstain from collusion with other American companies in the same market, the whole cartel is liable to break apart under the pressure of their competition.

A number of important American concerns have apparently decided that local cartel participation presents no substantial anti-trust risks. Through their subsidiaries, several of them appear to enjoy the sports of price-fixing and boycotting (which at home they have had to eschew for decades past) in the oil and rubber tyre⁶⁹ industries at least. This view may well be justified, for

67. The *Timken* case belonged to this category. A study by Arndt and Sherk, "Export Franchises of Australian Companies with Overseas Affiliations", (1959) 35 *Economic Record* 239, found that of 650 Australian firms which were subsidiaries of or had manufacturing agreements with American companies, 275 said they were interested in exporting. Of these, about 40 per cent were restricted by their principals from exporting to certain areas, notably the United States. The analysis does not show how many of the 40 per cent were wholly-owned by an American parent, but it seems probable that some of these arrangements where there was less than total ownership must have carried some risks under the *Timken* doctrine.

68. Kronstein, Miller and Schwartz, *Modern American Antitrust Law* (1958) at 268-69; Brewster at 182-86; Hale, "Joint Ventures Collaborative Subsidiaries and the Antitrust Laws" (1956) 42 *Virginia Law Review* 927, *United States v. General Electric Co.*, 115 F.Supp. 835 (D.N.J. 1953).

69. *Report of the Royal Commissioner on Prices and Restrictive Trade Practices in Tasmania* (1965) at 19; *Redfern v. Dunlop Rubber Aust. Ltd.*, (1964) 110 C.L.R. 194.

unless the local cartel has a policy of distorting international trade by excluding imports (including American ones), as in the *Zenith* case, or reinforcing the domestic monopoly of a dominant American concern as in the *Incandescent Lamp* case, it is difficult to see how it could be calculated to affect the import or export trade of the United States.

However, there are dicta in *United States v. Minnesota Mining and Manufacturing Company*⁷⁰ which cast a shadow over such arrangements. The main significance of this case is that it sets some standards for American joint manufacturing ventures abroad and emphasises how narrow is the antitrust exemption given to export associations by the Webb-Pomerene Act⁷¹. The defendants, who accounted for four-fifths of the total exports of coated abrasives, agreed that they would no longer export to Australia, Britain, Germany, and certain other countries but would do their business there through jointly-owned foreign factories trading under the name "Durex". (The success of this enterprise may be gauged by the fact that in Australia a familiar cellulose product is still commonly referred to by the name which the consortium first gave it—"Durex tape"⁷².) This agreement was held an unlawful restriction on American exports which was neither exempted by the Webb-Pomerene Act nor excused by the fact that it replaced export of goods with export of capital. Speaking of co-operation by powerful American competitors abroad, Judge Wyzanski said: "The intimate association of the principal American producers in day-to-day manufacturing operations . . . and their common experience in marketing and fixing prices may inevitably reduce their zeal for competition *inter sese* in the American market"; he then went on to suggest that some forms of such co-operation might be unlawful: "Joint foreign factories would be invalid *per se* because they eliminate or restrain competition on the American domestic market"⁷³.

The possible implications of this dictum for American members of local cartels are wide. If participation in joint ventures abroad may lessen competitive zeal at home and so be unlawful, so might participation in tight Australian cartels. This dictum has never been tested in the courts, and some writers have criticized it for attempting to give the status of a *per se* prohibition to a hypothesis about a possible link between overseas and domestic competition which has never been adequately studied⁷⁴. But if in action against two or more American enterprises there were evidence, by itself inconclusive, of collusion on the American market, then evidence that the same concerns had taken part together in price-fixing or boycotting in the Australian market might help to tip the scales against them. While not a Sherman law violation by itself, local cartel participation may be circumstantial evidence that a violation has taken place elsewhere.

70. 92 F.Supp. 947 (D. Mass. 1950).

71. See also *United States v. United States Alkali Export Association*, 1946 Trade Cases 57481.

72. Perhaps before long someone will write a Master's thesis on the effect of restrictive practices on the Australian vocabulary.

73. 92 F.Supp. at 963.

74. Brewster at 210-14.

International Law Problems

The application of the Sherman Act to acts done outside the territory of the United States is an expression of the international law principle that even criminal law need not always be territorial in scope but may attach penalties to acts committed outside the state which adopts them. The foundation of this principle is the *Lotus case*⁷⁵, a decision of the Permanent Court of International Justice. Whether this principle justifies the holding in the *Swiss Watch* case, among others, and the dictum in *Alcoa*, is much disputed. At the 1964 conference of the International Law Association in Tokyo, a substantial body of opinion declared that if the courts were to apply the Sherman Act to the conduct of aliens abroad solely because of its effects on United States commerce, they would be violating international law⁷⁶. The reasoning, one must say, was not always as impressive as the names of the participants. The discussion rested on the assumption that the Sherman Act was a simple penal statute, in spite of the fact that all the antitrust cases under discussion were civil proceedings for equitable relief. There were purported distinctions based on the dichotomy between direct and indirect effects—a bullet fired across a border created a direct effect, but an agreement causing a steel shortage did not⁷⁷. Students of the Australian Constitution may raise their eyebrows at the blithe introduction of tests such as these. One may doubt whether international law doctrine is so primitive as to develop a principle which can comprehend nothing more subtle than the act of the malicious rifleman who points his Mannlicher across the Rhine. And even the last-ditch fallacy of the “thin end of the Orwellian wedge” was there:

“If the jurisdictional door is opened to the extraterritorial application of antitrust laws, it is also opened to the extraterritorial application of other penal laws, e.g., legislation aimed at the suppression of freedom of speech, or opinion or meeting”⁷⁸.

This does not mean that there is no substance in any of the international legal points raised against the workings of “foreign commerce antitrust”. It may mean, however, that much of the argument springs from an unspoken suspicion of strong monopoly law as such. If this is so, much of it must be growing obsolete as national governments and organizations such as the E.E.C. adopt stronger competition policies themselves⁷⁹. Such views have nevertheless made themselves heard in the United States and could influence a future court. Some American writers have urged the courts to consider the monopoly laws and policies of other affected states before applying the statute to foreign transactions⁸⁰. This could give the bizarre and rather heartless result that a plaintiff could be denied a remedy to which he was otherwise entitled unless

75. The S.S. *Lotus*, P.C.I.J. Series A, No. 10 (1927).

76. *Report*, at 15-55.

77. *Id.*, at 27-29.

78. *Id.*, at 37.

79. See *Report of the International Law Association, Helsinki Conference* (1966) at 7.

80. Note, “Extraterritorial Application of Federal Antitrust Laws”, (1967) 20 *Vanderbilt Law Review* 1030; Carlston, “Antitrust Policy Abroad”, (1954) 49 *North Western University Law Review* 569 at 713.

it could be shown that another legal system would have given him a similar right of action. It has also been suggested that this view would leave international trade in a state of unregulated anarchy⁸¹.

The international law questions are mentioned here for the sake of completeness, but in most of the examples given above they would not arise. Because few Australian enterprises have sufficient business presence in the United States to make them subject to antitrust jurisdiction, it would be improbable that an Australian concern would be made a defendant. Consequently, most of the defendants would normally either be American or would include Americans among their number, with the result that either the agreement or some of the conduct implementing it would have taken place in the United States. The international law controversy, it will be recalled, turns mainly on the application of the Sherman Act to the conduct of aliens abroad.

The Australian Government does not appear to have any policy against allowing Australians to invoke the Sherman Act—no objection seems to have been made to O'Neil's action. Indeed, it is difficult to see what it could do to prevent others from following O'Neil's example, apart from providing adequate private remedies at home.

C. *Practical Problems*

The chief impediment to antitrust litigation is cost. Sherman Act cases are so long and complex that the expense of conducting them may deter many potential plaintiffs. However, if the Department of Justice can be moved to act, it will largely lift the burden of litigation from the complainant since section 5 of the Clayton Act (15 U.S.C. § 16) makes a decision in the Government's favour prima facie evidence of the violation in private damages cases. When approaching the Department with this end in view, a complainant should present a well-documented and detailed case showing clearly the requisite effect on American imports or exports. Complaints by Australians, which are not unknown, have sometimes been defective on this point. Affidavits of witnesses together with copies of relevant correspondence and particulars of patents are highly desirable. If, on the basis of the material before it, the Antitrust Division decides to investigate the matter, it will normally spend some eighteen months on market studies, FBI investigations and the like before starting proceedings. This delay may be so long as to induce some beleaguered businessmen to take out their own originating process.

The *Pacific Car* case shows that the cost of private litigation need not be an insuperable problem. To help keep the plaintiff's costs manageable, O'Neil's Sydney solicitor has done much of the work himself and has even been admitted to the United States Federal Bar for the duration of the case. Much expense could be saved by suing in the Hawaii District Court; however the principles on which the court will act in deciding whether or not to change the venue to the mainland are not yet clear because in the *Pacific Car* case the parties have apparently changed the venue to San Francisco by

81. Fugate at 5.

consent rather than wait for the Circuit Court of Appeals to decide the venue question for them.

Conclusions

In terms of litigious tactics, a civil action under the United States anti-trust laws appears to offer an Australian plaintiff a means of reaching international cartels which are outside Australian jurisdiction, and of more effectively breaking up and obtaining compensation from those within it. It offers a more effective way of reaching agreements between local and American concerns which are designed to monopolize the Australian market, and perhaps (though this is arguable) of compelling American companies to withdraw from local cartels.

Because it gives a civil cause of action as soon as the unlawful act which causes the damage is done, and because that action can be brought at once by any person aggrieved, the Sherman Act also brings into play one factor which the Trade Practices Act in its present form never could: deterrence. Antitrust law is a complex and uncertain field. The paucity of cases on international trade makes this branch of it more difficult still, with the result that the law tends for practical purposes to be what the antitrust bar thinks it is. One commentator uses the term "counselors' law" to describe the state of the legal doctrine and tells of vast divergences which he found in the ideas held by different practitioners. Some believed that naked restraint of American commerce was the only proscribed conduct. "At the other extreme were those who felt that a know-how licensee could not be controlled at all and that short of total ownership of a foreign subsidiary, all investment was made suspect by *Timken*. By and large, counselors' opinions and client impressions of the law seemed to fall between these extremes. But even this middle ground is wide and leaves plenty of room for honest divergence between the optimistic and the gloomy"⁸².

One thing which would bring some of these divergent opinions into unanimity would be a victory or a satisfactory settlement for L. C. O'Neil Trucks Pty. Limited in its present action. But whatever the outcome of that case, O'Neil has already shown, by proceeding as far as it has, what a determined plaintiff is now able to do. It will already have come to the notice of the antitrust bar that there is a real (as opposed to the hereto somewhat theoretical) possibility that their clients' foreign trade, unless properly conducted, could draw them into potentially costly civil actions with traders based in Australia or their other overseas markets, quite apart from perhaps drawing a crossfire of prosecutions from Washington. The awareness of that possibility must act as a deterrent to restrictive or coercive conduct in international trade, just as a similar awareness in domestic trade has influenced American business decision-making over past decades. If by providing workable remedies for concrete problems the law can cause world trade to be run a little more fairly and a little more efficiently, every trading nation will benefit in the end.

82. Brewster at 257-58.