COMMENT

THE AUSTRALIAN INDUSTRIES PRESERVATION ACT 1906-1950 IN A STATE SUPREME COURT

The judgment by Smith J. in the Supreme Court of Victoria in *Bourke Appliances Pty Ltd v. Wonder*[1] was given on 10 November, 1961, but was not reported until it was included in the Victorian Reports for 1965, no doubt because of the interest that had been generated in the *Australian Industries Preservation Act* 1906-1950 by the proceedings in the High Court in *Redfern v. Dunlop Rubber Australia Ltd*[2]. Although its importance has been reduced by that High Court decision and by the enactment of the *Trade Practices Act* 1965[3], it still merits consideration on several points.

Bourke Appliances Pty Ltd v. Wonder was an action in the Supreme Court of Victoria for damages for an alleged conspiracy by the defendants.[4] The plaintiff carried on business as a discount house, selling electrical appliances through social clubs and similar organisations. The defendants were other retailers of electrical appliances and were members of a trade association (the Radio Electrical and Television Retailers' Association of Victoria) which resolved in August, 1960, not to buy any goods produced by two large interstate manufacturers who had supplied the plaintiff and other discount houses. The plaintiff alleged that, as a result of the defendant's activities, it was unable to obtain supplies.

Smith J. first considered the claim that, quite apart from the *Australian Industries Preservation Act* 1906-1950, the defendants' combination was an actionable conspiracy on the common law ground that the concerted threats which they made to the plaintiff's suppliers with the object of stopping its supplies were without lawful justification. Smith J. held that the action failed on this basis since the ' predominant purpose' [5] of the defendants was to protect their own legitimate trade interests against harm arising from social club trading and its consequences which (he found) included the overthrowing of the price structure in the retail trade and the splitting of the trade association.[6]

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[1] [1965] V.R. 511.

[2] (1964) 110 C.L.R. 194.

[3] At the date of writing this comment, the former Act is still in force, but when section 4 (1.) of the *Trade Practices Act* 1965 comes into operation (on a day to be fixed by Proclamation) it will restrict the former Act to overseas trade and commerce by way of the carriage of goods by sea. Clause 5 of the *Trade Practices Bill* 1966 to amend the *Trade Practices Act* 1965 seeks to repeal the *Australian Industries Preservation Act* entirely but with no retrospective effect.

[4] If it had been an action for treble damages under section 11 (1.) of the *Australian Industries Preservation Act* 1906-1950, proceedings would have been in the High Court.

[5] He referred (inter alia) to *Ware and de Freville Ltd v. Motor Trade Association* [1921] 3 K.B. 40, and *Crofter Hand Woven Harris Tweed Co. Ltd v. Veitch* [1942] A.C. 435.

[6] [1965] V.R. 511, 516.

The second basis on which the plaintiff alleged an actionable conspiracy was that the defendants had conspired to commit breaches of section 4 of the *Australian Industries Preservation Act.* Section 4, so far as was relevant, provides:—

> '4.—(1.) 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—
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> (a) in restraint of or with intent to restrain trade or commerce ;
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> ...
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> is guilty of an offence.
> Penalty : Five hundred pounds, or, in the case of a continuing offence, Five hundred pounds for each day during which the offence continues.
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> (2.) Every contract made or entered into in contravention of this section shall be absolutely illegal and void.
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> (3.) It shall be a defence to a proceeding for an offence under paragraph (a) of sub-section (1.) of this section, and an answer to an allegation that a contract was made or entered into in restraint of, or with intent to restrain, trade or commerce, if the party alleged to have contravened this section proves—
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> (a) that the matter or thing alleged to have been done in restraint of, or with intent to restrain, trade or commerce, was not to the detriment of the public, and
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> (b) that the restraint of trade or commerce effected or intended was not unreasonable.'

Smith J. held

(a) that the defendants were not parties to any contract or combination 'in relation to trade or commerce with other countries or among the States' and that section 4 (1.) therefore did not apply;

(b) even if section 4 (1.) did apply, the defence provided by section 4 (3.) was established.

He held, therefore, that the defendants' activities were not unlawful under the Act.

Section 4 (1.) : *Combinations 'in relation to' interstate trade.*

In *Bourke Appliances Pty Ltd v. Wonder*, the statement of claim as originally framed contained no allegation of any contract or combination in relation to interstate trade.[7] Some amendments were permitted at the hearing, but were of such limited scope that the only evidence before the Court concerning interstate trade was as follows:—

> '... the ordinary course of trading had been that the manufacturers all had branches in Melbourne and bulk stores here at which stocks of their products were maintained, and that the orders of Victorian

[7] Ibid. 517.

> retailers were given to these Melbourne branches and were supplied out of these Melbourne stocks either forthwith or as required. The goods, moreover, were invoiced out by the Victorian branches and payment was made to them in Victoria. There was no evidence that this normal method of trading had ever been departed from in any instance. The nearest approach is evidence of one large order having been accepted at a time when the Melbourne stock needed to be supplemented from another State in order to fulfil it. Moreover, there is no evidence as to whether reasons did or did not exist for the manufacturers or the retailers to insist upon a strict observance of the normal method . . .'[8]

There was, therefore, no evidence before Smith J. of any existing interstate trade between the manufacturers and Victorian retailers.[9]

The plaintiff contended, however, that a sufficient connexion could be found on the basis that there *would have been* interstate trade between the interstate manufacturers and the plaintiff, or between those manufacturers and the defendants, to which the defendants' restrictive arrangements would have applied. Smith J. declined to infer that such trade 'would have' taken place.[10]

The plaintiff further contended that the defendants had such trade 'in contemplation' at the time of combining and that this afforded a sufficient relationship with interest trade to make section 4 (1.) applicable. However, Smith J. held that it was 'as likely as not, upon the evidence, that an interstate transaction was so highly improbable that the possibility would not have occurred to the defendants.'[11]

Smith J. said that the only nexus between the defendants' combination and interstate trade was that 'the bulk stocks held by the manufacturers in Melbourne, from which they supplied the orders received in the course of intrastate trade, had been imported by them from other States and needed to be replenished or augmented from time to time by further importations from other States', and he recognised that 'the combination had the tendency, by reducing the demand in intrastate trade in Victoria for the products of a black-listed manufacturer, to reduce also the qualities of goods which he would find it worth his while to import into Victoria from other States and add to his stocks here.'[12] However, he thought this 'too remote' a connexion to make the combination by the defendants a combination 'in relation to' the interstate trade.

There remained, therefore, only 'the mere possibility of future interstate trade which would fall within the general language used by those combining' and in the view of Smith J. this 'mere possibility' was inadequate to bring the combination within section 4 (1.): 'The "relation" which the section requires between the combination and interstate trade must, in my opinion be a real, substantial and proximate relation'.[13]

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[8] Ibid. 519.
[9] Ibid. 518.
[10] Ibid. 519, lines 15-37.
[11] Ibid. 519, lines 37-58.
[12] Ibid. 520.
[13] Ibid. 518.

According to *Bourke Appliances Pty Ltd v. Wonder*, therefore, although an arrangement is expressed in terms wide enough to apply (inter alia) to a person's interstate trade, it is not within section 4 (1.) of the Act if that person

(a) is not actually engaged in, or

(b) is not likely to engage in,

any interstate trade to which the arrangement will apply. The ' mere possibility ' that the person may engage in such trade does not attract section 4 (1.). Thus Melbourne retailers who, as in *Bourke Appliances*, agree amongst themselves not to buy the products of an Adelaide manufacturer are not within section 4 (1.) if all their past purchasers have been made from the manufacturer's Melbourne branch and there is no likelihood of purchases direct from the interstate manufacturer. This seems a strange result since the retailers, who clearly agree not to buy from the Victorian agent or sales branch, surely agree *a fortiori* not to buy direct from the interstate manufacturer himself.

With respect to Smith J., his proposition that a combination is not one ' in relation to ' interstate trade unless there is something more than the mere possibility of future interstate trade which would fall within the general language used by those combining[14] is very much open to question. That proposition might be appropriate, for example, where the combination is a *price-fixing* agreement : if each of the parties is selling only within his own State and there is no real likelihood of any interstate sales to which the price-fixing agreement would be applied, it lacks a connexion with interstate trade sufficient to make it a combination ' in relation to ' that trade even though the agreement is expressed in terms wide enough to apply to it. But it is respectfully submitted that it is incorrect to apply that proposition to certain agreements to *refuse* to buy or sell. For example, the parties in one State to an agreement to boycott the goods of a manufacturer who produces them in another State do not agree simply to refuse to buy from his sales branch in their State ; they obviously agree as well not to buy direct from the manufacturer's factory wherever it is, and indeed not to buy from his sales branches in other States. Similarly, if suppliers with branches in several States agree not to sell to a certain person in one State, they surely agree (inter alia) to refuse any interstate orders that may be sent to them by that person. Even without any actual refusals of interstate orders, such boycott agreements should be held to be ' in relation to ' interstate trade. The position is even more plain where the agreements have actually been invoked in relation to interstate orders.

This view receives some support from *Redfern v. Dunlop Rubber Australia Ltd*[15]. In that case the plaintiffs specifically alleged in paragraph 16 of the statement of claim that the defendants had agreed not to sell to the plaintiffs ' at any place in Australia ' and ' in particular refused to sell . . . from their factories and/or warehouses situate in

[14] Ibid. 518.

[15] (1964) 110 C.L.R. 194.

States other than Victoria for delivery across State borders'. Three judges[16] in the High Court accepted this as sufficiently alleging a combination 'in relation to' interstate trade within the meaning of section 4 (1.) of the *Australian Industries Preservation Act* 1906-1950. A different view was taken by Taylor J. who said that 'all dealings between the plaintiff and the defendants had been in the course of intrastate trade and an agreement between the defendants to refuse to sell tyres to the plaintiffs cannot be converted into an agreement in relation to interstate trade by a refusal to accede to a request for supplies from another State'.[17] With respect, the view of paragraph 16 taken by Kitto, Menzies and Owen JJ. seems more realistic. Moreover, it is submitted that if suppliers agree to refuse interstate supplies to the plaintiff it is irrelevant (except as evidence of their agreement) that they have actually refused to fulfil interstate orders. In *Redfern* allegations of actual refusals pursuant to the defendants' alleged agreement were not regarded by Kitto and Menzies JJ. as essential.

There is therefore in *Redfern* some strong authority that casts doubt on the treatment by Smith J. of the boycott arrangements. In the light of that authority it is submitted that the better course now in a case in Victoria such as *Bourke Appliances Pty Ltd v. Wonder* is to hold that an agreement by retailers not to buy a manufacturer's goods made in another State includes an agreement not to buy the goods direct from that interstate source; on that basis the agreement should be treated as a combination in relation (inter alia) to interstate trade between the manufacturer and the combining retailers. Furthermore, since the purpose of the combining retailers is to induce the manufacturer (inter alia) to refuse interstate orders from the rival retailer, the combination should also be treated as a combination in relation (inter alia) to interstate trade between that retailer and the manufacturer's factory outside Victoria.

This could, of course, be an important matter for the interpretation of the *Trade Practices Act* 1965. For example, in cases in which there have not hitherto been any 'transactions, acts or operations' in the course of interstate trade or otherwise within paragraph (a) of section 7 (1.),[18] nor at the time any likelihood of such transactions between the persons involved, does that paragraph apply to an agreement expressly requiring the parties to refuse to enter into interstate transactions that would never have been sought but for an intrastate boycott of the person placing the interstate orders? Again, take the case of an agreement that is not expressly applicable to interstate orders but which is expressed in

[16] Kitto J., at pp. 210-211, Menzies J., at p. 222 and Owen J., at p. 233.

[17] At 216. Windeyer J. at 229 was inclined to think that para. 16 was insufficient, but gave no reasons; his reasons might not have been the same as those given by Taylor J.. Dixon C.J., with whose judgment McTiernan J. agreed, did not deal with the particular combination alleged in para. 16.

[18] 7 (1.). The restrictions referred to in section 35 of this Act, and the practices referred to in section 36 and Part IX of this Act, include restrictions and practices that are (whether exclusively or not) applicable to, or engaged in in relation to, or that tend to prevent or hinder, transactions, acts or operations—

(a) in the course of trade or commerce with other countries or among the States.

general terms wide enough to apply to them and which is actually invoked in response to interstate orders. Does paragraph (a) of section 7 (1.) apply to this kind of agreement ? It is submitted that it does, for reasons similar to those given above concerning the *Australian Industries Preservation Act.*

A further noteworthy aspect of *Bourke Appliances Pty Ltd v. Wonder* is that the conspiracy alleged against the defendants was the *particular* agreement directed *specifically* against the plaintiff. Smith J. was not concerned with the question whether the restrictive agreements and practices of the defendants considered in their entirety constituted a combination ' in relation to ' interstate trade, and the decision provides no authority at all on that question. Since at least some of the defendants probably had some interstate business, their general combination was probably a combination partly ' in relation to ' such trade. In *Redfern* the plaintiffs did allege that their losses occurred by reason of restrictive arrangements between the defendants applicable generally to their business which included interstate trade. All the judges in the High Court held that the statement of claim sufficiently alleged here a combination ' in relation to ' interstate trade.[19]

Section 4 (3.) : *Detriment to the Public and Reasonableness of the Restraint.*

The narrow scope of the allegations in *Bourke* was important for another reason. In considering whether the defence under section 4 (3.) was made out, Smith J. was not concerned with the whole set of restrictive arrangements by the defendants for ' orthodox retailing ', but only with the effects of the *particular* combination directed *specifically* against the plaintiffs.

Smith J. came to the conclusion that the defendants had discharged the onus of showing that the particular combination which he was considering had caused ' no detriment to the public ' within the meaning of paragraph (a) of section 4 (3.)—a conclusion noteworthy in several respects.

He held that the defendant's actions had no great effect upon the course of events[20] for reasons including the defendants' reaction to the issue of the plaintiff's writ.[21]

More important, the learned judge accepted the argument that, in so far as it did have any effect, the defendants' conduct was ' not only no detriment to the public but was positively beneficial ' because it

[19] Although Taylor J. dissented from the order of the Court, he agreed (at p. 215) that the general combination was in relation to interstate trade, but held that the plaintiff's losses had not occurred ' by reason of ' that combination. His view was that the loss occurred by reason of the particular combination directed specifically against the plaintiffs and, as stated earlier in the text, he thought this combination was not one in relation to interstate trade (pp. 215-6).

[20] [1965] V.R. 511, 521 : ' . . . any effect of the restrictions upon the conduct of the business of the plaintiffs, the members of R.E.T.R.A. and the manufacturers was of a very minor and temporary kind.'

[21] Ibid. 515-6.

slowed down the rate of change from 'orthodox retailing' towards retailing with unrestricted price competition, and so prevented 'a serious dislocation to a section of the economy with loss and hardship to large numbers of retailers and employees'.[22]

Smith J. thought he was not required to consider whether 'orthodox retailing' in itself, as distinct from a sudden change away from it towards unrestricted price competition, was detrimental to the public. With respect, it is hard to agree that these broader considerations were irrelevant. Certainly the defendants' particular combination against the plaintiff may have had, as Smith J. found, certain beneficial effects on the people engaged in the trade, but these benefits may well have been outweighed by detriments to consumers from the prolonged maintenance of 'orthodox retailing'.[23] Why these detriments to consumers during the prolonged transition period should not be taken into account along with the benefits to the trade from retarding the transition is not at all clear. Furthermore, it is doubtful whether the defendants' activities should have been regarded as merely designed to slow down an inevitable transition to price competition. If the defendants' activities were successful against the plaintiff and repeated against other price-cutters, the transition away from 'orthodox retailing' would have come to an end, at least during any period of increased demand for electrical goods.

Smith J.'s judgment is also noteworthy for his conclusion concerning para. (b) of section 4 (3.). He had to decide whether the defendants had established that 'the restraint of trade or commerce effected or intended was not unreasonable'. He held :—(i) that the restraint effected and the restraint intended were not unreasonable as between the plaintiff and the members of the retailers' trade association 'regarded as competing retailers';[24] (ii) that the defendant had shown that the restraint *effected* was not unreasonable in the interests of the public, and (iii) that the restraint *intended* was not unreasonable either. He recognised that the last question was one of 'some difficulty' and continued :—[25]

> 'If what had been intended had in fact been to establish and maintain a system of trading in strict accord with the codes, it would have been difficult to say that the evidence warranted a positive finding that this was reasonable in the interests of the public. But it is clear, I consider, that notwithstanding the terms of the codes, and of the resolutions passed from time to time, this was not what was intended. What was in fact intended was to establish and maintain a system of trading under which social club trading was eliminated or greatly reduced ; and under which discounts were not advertised but trade, staff, and courtesy discounts continued to be allowed ; and under which the retailer,

[22] Ibid. 521 : Arguments of this kind have been decisively rejected by the United Kingdom Restrictive Practices Court after a full consideration of the economic and social factors invloved : *e.g. In re Yarn Spinners* (1959) L.R. 1 R.P. 118.

[23] Smith J. himself said at 521 that 'consumers would have the advantage of substantially lower prices'.

[24] This passage seems to imply that in trade competition no competitor can reasonably complain about the methods of his competitors : there are 'no holds barred'.

[25] Ibid. 522.

> though trying in cases outside those special classes to obtain the full list price, would allow some discount to any customer rather than lose a sale. And, in my view, the establishment and maintenance of such a system would not have been unreasonable in the interests of the public.'

The finding that the defendants did not intend to enforce the terms of the trading codes is surprising. While the restrictions actually effected by the combination under the current economic conditions fell short of completely eliminating price competition, it is, with respect, hard to believe that the defendants did not really intend to give as much effect as they could to the codes (a system which Smith J. himself said[26] he could not, upon the evidence before him, positively hold to be reasonable). Moreover, in the passage quoted above Smith J. expresses an opinion on the reasonableness of the system which he thought was intended, yet he does not there consider the merits of the alternative system of unrestricted price competition. With respect, it is arguable that the reasonableness of the system allegedly aimed at by the defendants cannot be assessed without fully considering the merits of the alternative system attempted by the plaintiff.

In a recent book on the United Kingdom Restrictive Practices Court,[27] the authors' comment on the English judicial tradition, upheld here by Smith J., of declining to hold that restraints that are reasonable in the interests of the particular people involved are unreasonable in the interests of the public. It is as well that special emphasis on the public interest in competition has been included in section 50 of the *Trade Practices Act* 1965 along with a requirement that the interests of consumers and other groups not involved in the trade in question must be considered.

Conclusion

The importance of *Bourke Appliances Pty Ltd v. Wonder* as a precedent for the interpretation of section 4 (1.) of the *Australian Industries Preservation Act* 1906-1950 and section 7 (1.) of the *Trade Practices Act* 1965 is very limited because of the narrow scope of the allegations in that case and because also of the subsequent majority judgments in *Redfern v. Dunlop Rubber Australia Ltd* in the High Court.

On the question of detriment to the public, its importance is again restricted by the narrow scope of the plaintiff's allegations and also by what is submitted is an unduly wide scope given in the judgment to the defence under section 4 (3.) of the *Australian Industries Preservation Act.* It cannot, of course, serve as a precedent for the Trade Practices Tribunal on the question of the 'public interest' under section 50 of the *Trade Practices Act.*

D. J. ROSE*

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[26] Ibid.

[27] Stevens and Yamey, *The Restrictive Practices Court* (Weidenfeld & Nicolson, 1965), ch. 3.

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