TIME, URANIUM AND THE LEGISLATIVE PROCESS

BY LAURENCE W. MAHER*

On the evening of 18 November 1976 the Foreign Proceedings (Prohibition of Certain Evidence) Act 1976 passed through both Houses of Federal Parliament in less than three hours. The Federal Government claimed that the Act was urgently needed to protect the Australian national interest, which was said generally to be threatened by attempts being made to gather evidence in Australia for use in large-scale litigation in the United States of America arising out of an international uranium cartel. The Parliamentary debate did little credit either to the Government or the Opposition. It is necessary to go beyond the Parliamentary Debates to make an informed assessment of the Act. When the facts are examined it becomes clear that the Government's claim that the situation was urgent was unfounded, that the appeal to the national interest was at best highly questionable and that, because of the availability of appropriate judicial process, legislative action was unnecessary. The Act is alarmingly vague and reposes wide discretionary powers in the Attorney-General. Its passage and operation have quite disturbing implications for parliamentary democracy and the principle of open government. Where uranium is concerned the Federal Government is showing an increasing tendency to use the Parliament as a cipher.

> Earlier the Attorney-General (Mr Ellicott) said that this legislation was in the national interest and that he was surprised that I was not supporting it. I want to say quite clearly now that I consider the processes of this Parliament, its right to the proper scrutiny of legislation and the duty of its membership to examine every piece of legislation which affects the rights and freedoms of citizens as much more important than defeating Westinghouse.
>
> Mr G. M. Bryant, M.P.[1]

> I want to know what I am helping to pass.
>
> Senator R. Steele Hall.[2]

> There is nothing sinister or suspicious in the Bill. It is designed to meet a sudden emergency.
>
> Senator James McClelland.[3]

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[1] H.R. Deb. 1976, Vol. 102, 2917.

[2] S. Deb. 1976, Vol. 70, 2197.

[3] *Ibid.*

This article examines aspects of the enactment and operation of the Foreign Proceedings (Prohibition of Certain Evidence) Act 1976 as amended (Cth) ("the Act"), so aptly described by a commentator in the Australian Law Journal as "one of the most extraordinary pieces of legislation ever passed by the Commonwealth Parliament".[4] In particular, it focuses on:

1. the *haste* with which the Act was introduced and passed;
2. the *national interest* in relation to the Act's policy of denying evidence to foreign tribunals;
3. the extra-territorial *jurisdiction* of the anti-trust laws of the United States;
4. the vesting in the Attorney-General of *wide discretionary powers* for giving effect to the Act;
5. the *constitutional* basis of the Act; and
6. the *interpretation* of the Act.

The principal conclusions are that the Act was passed more as a panic measure than an urgent measure, that its enactment was based on an erroneous factual premise, and that the Act was (and is) unnecessary.

1. BACKGROUND

During the late 1960s the Westinghouse Electric Corporation ("Westinghouse"), which is a major manufacturer of nuclear power reactors, entered into long-term contracts with various electric power utilities in the United States of America, for the supply of approximately 80 million pounds of uranium at very competitive fixed prices averaging less than U.S.$10 per pound. Westinghouse employed the competitive nuclear fuel supply contracts as a means of selling nuclear reactors to the same utilities. It appears, however, that Westinghouse then had no more than 15 million pounds of uranium at its disposal.[5] Within a relatively short time the world uranium market changed dramatically. In its First Report, the Ranger Uranium Environmental Inquiry described the changes in the following terms:

> Large variations have occurred in uranium prices in the last two decades. During the 1950s, when many uranium mines were being developed in the U.S.A. and other countries, the average price was approximately US$11 per pound of U_3O_8 in yellowcake. With the slow increases in demand recorded in the 1960s, prices fell to much lower levels. In this period, the principal buyer was the U.S. Atomic Energy Commission, which purchased uranium for its stockpile.

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[4] Note, (1976) 50 A.L.J. 607.

[5] Joskow, "Commercial Impossibility, the Uranium Market and the Westinghouse Case" (1977) 6 Journal of Legal Studies 119.

> Production of uranium generally exceeded demand, putting downward pressure on prices and resulting in large build-ups in stocks. The price fell to below US$5 per pound of U_3O_8 in 1972.
>
> Demand for uranium did not increase significantly until the advent of substantially higher oil prices late in 1973. As surplus inventories were disposed of and existing production capacities more fully utilised, prices began to increase sharply. The average price of U_3O_8 in yellowcake for early delivery increased to about US$15 per pound in new contracts made at the end of 1974, to about US$35 per pound in new contracts made at the end of 1975, and to US$40 per pound in new contracts made in the first half of 1976. Prices paid under previously existing contracts for deliveries in these periods were, however, much lower, averaging less than US$11 per pound of U_3O_8 in yellowcake. Recent price increases partly reflected general inflationary conditions, but stemmed mainly from the desire of utilities to cover their more immediate requirements at a time when the rate of uranium production could not be quickly increased.[6]

Controversy surrounds the cause or causes of those price increases. There is a large body of evidence that an international cartel existed. The role of the cartel in the upward price movements is hotly contested. Those whom Westinghouse was later to accuse of conspiring to increase the price blamed the 1973 Arab oil embargo and even Westinghouse's own heavy short selling for the ten-fold price rise.[7]

In any event, matters came to a head for Westinghouse in 1975. To deliver the promised quantities of uranium at average prices of less than U.S.$10 per pound, when the world market price was four times higher than that, would have required purchases of uranium by it, which probably would have wiped out Westinghouse. Attempts by Westinghouse to re-negotiate the nuclear fuel supply contracts failed.

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[6] *Ranger Uranium Environmental Inquiry: First Report* (1976) 57.

[7] The most convincing repositories of evidence establishing the existence of a cartel are *International Uranium Supply and Demand*, Hearings Before the Subcommittee on Oversight and Investigations of the U.S. House of Representatives Committee on Interstate and Foreign Commerce, Serial No. 94-150 (Washington, 1977) (hereinafter "*Uranium Supply and Demand*") and *International Uranium Cartel*, Hearings Before the Subcommittee on Oversight and Investigations of the U.S. House of Representatives Committee on Interstate and Foreign Commerce, Serial No. 95-39 (Washington, 1977) (hereinafter "*Uranium Cartel Hearings*"). In contrast to the almost coy attitude of the Australian Government concerning the existence of the cartel and the Government's involvement (if any) in it, the Canadian Government has been very candid about its promotion of and participation in the cartel. See *Statement By Hon. Alastair Gillespie, Minister of Energy, Mines and Resources*, 22 September 1976 and accompanying Background Paper on the Canadian Uranium Industry's Activities in International Uranium Mining, 22 September 1976 (hereinafter "First Canadian Statement") and *Press Release by the Hon. Alastair Gillespie*, 14 October 1977 (hereinafter "Second Canadian Statement"). See also Goralksi "The Uranium Pricing Puzzle" (1977) 23 The Orange Disc (published by Gulf Oil Corporation) 28, for an assessment of the uranium price rise which discounts the role of the cartel.

On 8 September 1975, Westinghouse announced that it would not honour the supply contracts.[8] That decision has resulted in what one commentator has described as "a series of international disputes and what may be the highest-priced package of private lawsuits in U.S. history".[9] In particular several utilities sued Westinghouse for damages for breach of contract in a State court in Pennsylvania ("the Pittsburgh suit").[10] As a result of further similar suits brought against it by other utilities in federal courts, Westinghouse initiated proceedings in the United States District Court in Richmond, Virginia for relief from the consequences of compliance with its uranium contract commitments pursuant to certain provisions of the Uniform Commercial Code ("the Richmond suit").[11] In an anti-trust suit in the United States District Court in Chicago, Illinois, Westinghouse sued 29 domestic and foreign uranium producers for treble damages ("the Chicago suit").[12] Common to each suit was an allegation by Westinghouse that the 29 uranium producers had illegally conspired to fix the prices of uranium. This allegation, and evidence of the alleged cartel which had emerged elsewhere, excited the interest of the United States Government and resulted in a Federal Grand Jury being empanelled to inquire into various aspects of United States domestic and foreign commerce in uranium.[13] The activities of the cartel have also given rise to other litigation in the United States involving uranium producers and utilities.[14]

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[8] New York Times, 9 September 1975, 53.

[9] Business Week, 26 September 1977, 125.

[10] *Duquesne Light Company* v. *Westinghouse Electric Corporation*, Court of Common Pleas of Allegheny County, Pennsylvania—Civil Division, No. GD 75—23978 in Equity. This action has since been settled.

[11] *In re Westinghouse Electric Corporation Uranium Contracts Litigation*, United States District Court for the Eastern District of Virginia, M.D.L. No. 235. This is multidistrict litigation resulting from the consolidation of 13 separate suits brought against Westinghouse in various U.S. District Courts. See (1975) 405 F. Supp. 316 and *Tennessee Valley Authority* v. *Westinghouse Electric Corporation* (1977) 429 F. Supp. 940. On 29 October 1978, a short time prior to publication of this issue of the Review, the District Court in the Richmond suit rejected Westinghouse's defence (see n. 28 *infra*) and upheld the electric utilities' claims. New York Times, 30 October 1978.

[12] *Westinghouse Electric Corporation* v. *Rio Algom Ltd*, United States District Court for the Northern District of Illinois, Eastern Division, No. 76 C38330. Westinghouse apparently chose to bring its suit in Illinois in part because, in the terms of its Complaint, Count One, para. A.2(b) (copy in author's possession) "the largest uranium conversion facility in the world is located in Metropolis, Illinois; the conversion of uranium concentrate (U_3O_8) to uranium hexafloride (UF_6) is an essential step in the processing of uranium for fabricated fuel assemblies to be used in nuclear reactors; and a large majority of all uranium sold by defendants in furtherance of the combinations and conspiracies alleged herein has come to rest and been processed in Illinois". This action has not yet come to trial.

[13] At the time of writing the United States Department of Justice was still conducting a Grand Jury investigation but no indictments had been returned. Under Rule 6(e) of the *Federal Rules of Criminal Procedure* (18 U.S.C.A.), that investigation is conducted in secret.

[14] For example, at the time of writing other suits were pending in State or Federal Courts in Santa Fe, Alberquerque and Knoxville. Parisi, "Critical Court

At the time of writing, related proceedings involving Westinghouse were pending in a court in Sweden, and an attempt by Westinghouse to obtain evidence in the United Kingdom had given rise to proceedings which were resolved against Westinghouse in the House of Lords.[15]

The Australian involvement in this extraordinary litigious saga can be traced in part to the presence of four Australian corporations among the 29 U.S. and foreign uranium producers whom Westinghouse alleged in the Chicago suit had, contrary to the Sherman Anti-trust Act and Wilson Tariff Act, conspired to effect the enormous price rise.[16] Those four Australian corporations rejected the jurisdiction asserted in the Chicago suit.[17] That did not deter Westinghouse from seeking from Australian sources evidence of the alleged conspiracy. On 21 October 1976, Letters Rogatory directed to the Supreme Court of New South Wales, were issued in the Richmond suit at the behest of Westinghouse, seeking the taking of evidence and the reception of documents from specified individuals and corporations in Australia including, but not limited to, officers of the four defendant corporations. On the same day a similar Letter of Request, also issued at the behest of Westinghouse, and addressed to the Supreme Court of New South Wales, was issued in the Pittsburgh suit.[18]

The issue of those requests attracted a measure of attention in Australia. A question was asked in the House of Representatives, but as late as the morning of 18 November 1976 the Government's public position was unclear and there had not been any informed public discussion on the subject.[19] However, before that day was over the Australian Parliament had acted decisively to put an end to the

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Ruling in U.S. Soon on Uranium", Australian Financial Review, 3 January 1978, 12. In some instances the proceedings have gone as far as the Supreme Court of the United States. See *General Atomic Co.* v. *Felter* 54 L. Ed. 2d 199 and 56 L. Ed. 2d 480.

[15] *Rio Tinto Zinc Corporation Ltd* v. *Westinghouse Electric Corporation* [1978] 2 W.L.R. 81. Westinghouse also failed to have Letters Rogatory enforced in proceedings in the Ontario High Court of Justice: *Re Westinghouse Electric Corporation and Duquesne Light Co.* (1977) 78 D.L.R. (3d) 3.

[16] Conzinc Riotinto of Australia Ltd, Mary Kathleen Uranium Ltd, Pancontinental Mining Ltd, Queensland Mines Ltd.

[17] *E.g.* Conzinc Riotinto of Australia Ltd, *Annual Report* (1977) 8, 27.

[18] Recitals in Orders promulgated pursuant to the Act on 29 November 1976, 23 and 24 December 1976 and copy of Pittsburgh suit Letters Rogatory in possession of author.

[19] Questions Nos. 1051 and 1507 had been placed on the House of Representatives Notice Paper on 8 September 1976 but were not answered until 9 December 1976. See also Nation Review, 17 September 1976, 1185, 1187. On the morning of 18 November 1976 the Attorney-General, in answer to a question without notice, said that he understood a letter of request had been filed in the Supreme Court of New South Wales (as to which see text at nn. 35 and 36 *infra*) seeking documents of oral evidence, and went on to inform the House that "the matter of whether such evidence should be produced is under consideration at the moment". H. R. Deb. 1976, Vol. 102, 2841-2842.

processes which the issue of those requests had been intended to initiate.

2. THE ACT

On 18 November 1976 the Foreign Proceedings (Prohibition of Certain Evidence) Act 1976 was passed by the Commonwealth Parliament as an urgent measure. It came into operation the following day. On 29 November 1976 an order, made by the Attorney-General pursuant to section 5 of the Act, was gazetted.[20] The order prohibited the giving of evidence, or the production of documents, for the purposes of the Richmond and Chicago suits and the Grand Jury investigation. On 10 December 1976 the Foreign Proceedings (Prohibition of Certain Evidence) Amendment Act 1976 was passed by the Parliament. That Act came into operation on 20 December 1976. On 23 December 1976 the original order was revoked and the following day it was replaced by an order which added the Pittsburgh suit to the proceedings affected by the superseded order.[21]

A measure of doubt surrounds the immediate cause of the decision to legislate to obstruct the attempts by Westinghouse to obtain evidence. The Attorney-General's second reading speech on the Bill for the principal Act suggests that the Government was unilaterally responding to a serious threat to Australian sovereignty. However, on the day following that on which the amending Bill was passed by the House of Representatives, the Minister for National Resources informed the Parliament that the Bill for the principal Act was introduced in the light of representations received from the Australian Uranium Producers' Forum and from one of the defendants in the Chicago suit, Mary Kathleen Uranium Limited.[22]

The scheme of control embodied in the Act as amended is as follows. First, section 4(1) *requires* the Attorney-General to impose restrictions pursuant to the Act only where he is satisfied that:

> (a) a foreign tribunal is exercising or proposing or likely to exercise jurisdiction or powers of a kind or in a manner not consistent with international law or comity in proceedings having a relevance to matters to which the laws or executive powers of the Commonwealth relate being the only proceedings of a foreign tribunal in relation to which the restrictions are to have effect; or

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[20] *Australian Government Gazette*, No. S214, 29 November 1976.

[21] *Australian Government Gazette*, Nos. S237, 23 December 1976 and S239, 24 December 1976.

[22] H.R. Deb. 1976, Vol. 102, 3704. Answer to Question on Notice No. 1507. However, in a letter dated 8 July 1977, the Chairman of the Australian Uranium Producers' Forum informed the author that he did not "know what motivated the Federal Government to introduce this legislation into Parliament".

(b) the imposition of the restrictions is desirable for the purpose of protecting the national interest in relation to matters to which the laws or executive powers of the Commonwealth relate.

Secondly, section 5 identifies the kinds of restrictions which the Attorney-General *may* order. It provides as follows:

(1) The Attorney-General may, by order in writing, prohibit, except with his consent in writing or as otherwise permitted by the order—

(a) the production in, or for the purposes of, a foreign tribunal of documents that, at the time of the making of the order or at any time while the order remains in force, are in Australia;

(b) the doing of any act in Australia, in relation to documents that, at the time of the making of the order or at any time while the order remains in force, are in Australia, with the intention that the act will result, or where there is reason to believe that the act will, or is likely to, result, in the documents, or evidence of the contents of the documents, being produced or given in, or for the purposes of, a foreign tribunal;

(c) the giving by a person, at a time when he is an Australian citizen or is a resident of Australia, of evidence before a foreign tribunal in relation to, or to the contents of, documents that, at the time of the making of the order or at any time while the order is in force, are in Australia; or

(d) the production of documents before a tribunal in Australia or the giving of evidence, whether in relation to the contents of documents or otherwise, before a tribunal in Australia, for the purposes of proceedings in a foreign tribunal.

(2) An order under this section may—

(a) be directed to a particular person, to persons included in a class of persons or to persons generally;

(b) relate to a particular foreign tribunal, to a class of foreign tribunals or to foreign tribunals generally; and

(c) relate to particular documents or to documents included in a class of documents.

The remainder of the Act provides for the method of service of orders (section 6), creates an offence of contravention of an order punishable, in the case of an individual, by a fine of $5,000 or imprisonment for 6 months, and in the case of a company, by a fine of $10,000 (section 7), and in part applies section 48 of the Acts Interpretation Act 1901, dealing with the tabling and parliamentary

disallowance of subordinate legislation, to an order made under the Act (section 6A).[23]

3. THE PARLIAMENTARY DEBATE

(a) *Original Bill*

It is necessary to describe the course which the debate took, and in particular to identify the matters which were emphasised by Government and Opposition participants, and the matters which, in the author's view, were overlooked.[24] In his second reading speech the then Attorney-General stressed the following matters:

1. The immediate need for the Bill arose out of the Richmond and Chicago suits and the Federal Grand Jury investigation.

2. Claims were being made in the civil proceedings that the anti-trust laws of the United States have an operation outside the United States which is beyond what is generally conceded in international law, and beyond what other countries were then prepared to concede in relation to the proceedings. Those jurisdictional claims were inimical to Australian sovereignty because their extra-territoriality was based merely on the conduct of persons or corporations having some economic effect in the United States.

3. The need for action in Australia was urgent because four Australian companies were among those being sued by Westinghouse, and in particular because Letters of Request had been issued to the Supreme Court of New South Wales seeking the taking of evidence and the production of documents for the Richmond suit.

4. There was nothing novel about the Bill since similar action had been taken in the United Kingdom in 1964 in connection with attempted extra-territorial application of maritime laws of the United States,[25] and more importantly the Canadian Government had acted in connection with the Westinghouse litigation to deny access to evidence in Canada.[26]

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[23] S. 48 of the Acts Interpretation Act 1901 provides that regulations must be laid on the table of each House of the Commonwealth Parliament within fifteen sittings days of their making, and enables the disallowance of regulations in defined situations. See generally, Pearce, *Delegated Legislation in Australia and New Zealand* (1977).

[24] For the debates see H.R. Deb. 1976, Vol. 102, 2909-2917, 3384, 3486-3497. S. Deb. 1976, Vol. 70, 2186-2198, 2934-2935, 3070-3071.

[25] Shipping Contracts and Commercial Documents Act 1964. Mann, "Anglo-American Conflict of International Jurisdiction" (1964) 13 International and Comparative Law Quarterly 1460. For a general statement on the official United Kingdom position see "Aide-Memoire" re-produced in full in Brownlie, *Principles of Public International Law* (2nd ed. 1973) 303-306.

[26] This was meant to refer to the *Uranium Information Security Regulations* made on 22 September 1976 pursuant to the Canadian Atomic Energy Control Act, R.S.C. 1970, Ch. A-19. See text at n. 59.

5. In conclusion the Attorney-General, having referred to the scheme of the Bill and its provisions for prohibiting orders to be made by him, announced in the following terms that such orders would be made:

> As I have already indicated, this legislation has particular relevance to *certain letters of request which may already have been made to the Supreme Court of New South Wales and there is, accordingly, a need for this legislation to be passed as a matter of urgency so that the necessary orders prohibiting the production of evidence to that court can be made and applied in those proceedings.*[27]

Introduction of the Bill took the House of Representatives by surprise. The Opposition did not oppose it but some of its members, and at least one Government backbencher, questioned the method of its introduction and its substantive provisions. The shadow Attorney-General justified the "immediate need" for the Bill on the entirely different ground that "[i]t appears that an American company is trying to use American laws to break contracts entered into outside America and this is not what we would favour".[28] The same speaker, however, was the first to touch, albeit indirectly, on the *issues* in the Westinghouse litigation, when he referred, *inter alia*, to a statement of the Canadian Minister of Energy, Mines and Resources made on 22 September 1976.[29] It was, the shadow Attorney-General said, important to recognise the need for orderly and reasonable marketing of uranium.

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[27] H.R. Deb. 1976, Vol. 102, 2910 (italics added).

[28] *Ibid.* (Mr L. Bowen, M.P.). The shadow Attorney-General's description is a considerable over-simplification. In making its announcement on 8 September 1975, and in the Pittsburgh and Richmond suits, Westinghouse relied on s. 2-615 of the Uniform Commercial Code which provides as follows: "Except so far as a seller may have assumed a greater obligation and subject to the preceding section on substituted performance:

(a) Delay in delivery or non-delivery in whole or in part by a seller who complies with paragraphs (b) and (c) is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid.

(b) Where the causes mentioned in paragraph (a) affect only a part of the seller's capacity to perform, he must allocate production and deliveries among his customers but may at his option include regular customers not then under contract as well as his own requirements for further manufacture. He may so allocate in any manner which is fair and reasonable.

(c) The seller must notify the buyer seasonably that there will be delay or non-delivery and, when allocation is required under paragraph (b), of the estimated quota thus made available to the buyer."

In its announcement Westinghouse stated that pursuant to s. 2-615 it had established a programme to allocate uranium in its inventory, or on order, fairly and equitably among its customers. Under the allocation plan each customer would have received slightly less than 19% of its anticipated uranium needs as those needs were described in the allocation plan. See *In re Westinghouse Electric Corporation Uranium Contracts Litigation* (1975) 405 F. Supp. 316.

[29] First Canadian Statement.

Other speakers referred to the background to the Bill, but for the most part attention was concentrated on the substantive provisions of the Bill, and in particular its mechanism for the making of orders by the Attorney-General to give effect to the policy of preventing evidence being given and documents being produced, for the purposes of foreign proceedings. Several members, in an unusual but thoroughly commendable bi-partisan display of concern for the proper functioning of Parliament, seriously questioned the Bill's alleged urgency.

Having passed through the House in less than one hour after its introduction, the Bill was introduced in the Senate. There the debate followed much the same course. The Leader of the Opposition in the Senate put the Australian Labor Party's attitude in the following terms:

> We do not oppose the Bill because we realise the need, in the circumstances, for some provision which would enable Australian citizens and Australian companies to be protected from laws, decisions or inquiries in other countries.[30]

Senate debate was principally concerned with the haste surrounding the Bill's introduction, and the scope of clause 4(2).[31] The Opposition suggested that the Bill be amended to limit its period of operation to six months. Of all the contributions to the debate only that of Senator James McClelland touches, albeit obliquely, on the issue of whether the Bill was necessary, a matter to which further attention is directed later in this article.[32]

(b) *The Amending Bill*

Less than three weeks following the enactment of the principal Act the Attorney-General introduced an amending Bill. It provided, first, for the deletion of section 4(2); secondly, for parliamentary disallowance of an order made by the Attorney-General; thirdly, for some clarification of the scope of an order made by the Attorney-General to uphold international law and comity; and finally, for certain other clarifying amendments. Among this last category of amendments was one expressly excluding the Judicial Committee of the Privy Council from the definition of "foreign tribunal".[33]

On this occasion the debate on the Bill was adjourned to the next day of sitting. The Bill passed through all remaining stages of the House of Representatives on the following day, 8 December 1976 and passed all stages of the Senate two days later. The principal features of

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[30] S. Deb. 1976, Vol. 70, 2187.

[31] "The validity of any exercise, or refusal of the exercise, of any power of the Attorney-General under this Act is not affected by, and shall not be subject to challenge in any court by reason of, any failure to comply with the provisions of this section."

[32] S. Deb. 1976, Vol. 70, 2193.

[33] This particular amendment can be traced to Senator Steele Hall's contribution to the debate on the original Bill. S. Deb. 1976, Vol. 70, 2192.

debate on the amending Bill were first, further affirmation of the urgency of the situation, secondly, an unsuccessful Opposition amendment in the committee stage to limit the principal Act's operation until 30 June 1977; and finally, greater attention than in the debate on the original Bill, to the background of international commerce in uranium.

In the author's view, the main deficiencies of the debates on both Bills included the following:

1. an examination of *Hansard* reveals nothing about the *issues* in the Westinghouse litigation;
2. it is not possible to form any view about the *precise purpose or extent* of the Letters of Request or Letters Rogatory;
3. the debates do not deal in any way with the disputed question of extra-territorial operation of the United States anti-trust laws;
4. participants in the debate appear to have been significantly influenced by their understanding that "Australian companies" and their officials were the targets of the Letters of Request; and
5. no consideration was given to the availability of alternative procedures to counter the apparent threat to the Australian national interest said to be involved in the jurisdiction being asserted by Westinghouse in the Richmond and Chicago suits.

4. CRITIQUE

(a) *Urgency*

Throughout the debates on both Bills the Government claimed that *parliamentary* and *executive* action was called for to deal with a situation involving a sudden urgency, namely the issue of Letters of Request to the Supreme Court of New South Wales. That claim calls for careful examination, since the urgent enactment of legislation is a relatively rare occurrence.[34] The available evidence does not justify the claim that a state of urgency had arisen. In the first place no Letters of Request arising out of the Westinghouse litigation were received by the Supreme Court of New South Wales.[35] Secondly, although Letters of Request were issued in the Pittsburgh and Chicago suits, they were not despatched to the Supreme Court of New South Wales.[36] The extent of the Government's lack of awareness about what had happened to the Letters of Request is apparent in an answer, given by the Attorney-General as late as 24 February 1977, to a question which had been placed on the House of Representatives Notice Paper on 23 November

[34] See generally Odgers, *Australian Senate Practice* (5th ed. 1976) 352-358.

[35] Letter dated 10 March 1977 and subsequent undated letter to author from Prothonotary of the Supreme Court of New South Wales.

[36] Letter dated 11 August 1977 to author from James A. Goold, Esq. of Kirkland & Ellis, Attorneys of Chicago, Illinois who act on behalf of the Westinghouse Electric Corporation.

1976, in part of which the first Law Officer stated: "I understand that proceedings on the Letter of Request addressed to the Supreme Court of New South Wales have been adjourned. As far as I am aware the Supreme Court has not made any order following upon a consideration of the Letter of Request."[37]

The foregoing remarks are sufficient to dispose of the urgency claim. However, for the sake of completeness it is necessary to refer to several other matters which buttress this aspect of the critique.

First, even had Letters of Request been received by the Supreme Court of New South Wales (or indeed the Supreme Court of any of the States), and assuming that the looming situation was every bit as urgent as the Government claimed it was, it would not have followed that *urgent legislative or executive* action was thereby necessary. The reason militating against an urgent legislative response was (and is) that appropriate *judicial* procedures exist which would have enabled the affected companies and individuals *and the Australian Government* to resist the requests for testimony and documents.

The mere fact that Letters of Request are received from a foreign court does not compel the recipient judicial authority to accede unquestioningly to such a request. In New South Wales the Rules of the Supreme Court enable the taking of evidence in accordance with the Foreign Tribunals Evidence Act 1856 (Imp.). Section 1 of that Act provided as follows:

> Where, upon an application for this purpose, it is made to appear to any court or judge having authority under this Act *that any court or tribunal of competent jurisdiction in a foreign country*, before which any civil or commercial matter is pending, is desirous of obtaining the testimony in relation to such matter of any witness or witnesses within the jurisdiction of such first-mentioned court, or of the court to which such judge belongs, or of such judge, it shall be lawful for such court or judge to order the examination upon oath, upon interrogatories or otherwise, before any person or persons named in such order, of such witness or witnesses accordingly; and it shall be lawful for the said court or judge, by the same order, or for such court or judge, or any other judge having authority under this Act, by any subsequent order to command the attendance of any person to be named in such order, for the purpose of being examined, or the production of any writings or other documents to be mentioned in such order, and to give all such directions as to the time, place, and manner of such examination, and all other matters connected therewith, as may appear reasonable and just; and any such order may be enforced

[37] H.R. Deb. 1977, Vol. 103, 503.

> in like manner as an order made by such court or judge in a cause depending in such court or before such judge.[38]

From a plain reading of the Act and the Rules, and a consideration of the leading authorities, it is clear that there is a discretionary *power* reposed in the Supreme Court to satisfy itself that the foreign tribunal is a *court of competent jurisdiction.* The Letters Rogatory in the Pittsburgh suit invite such an inquiry by claiming as follows: "Whereas [this] . . . action is a commercial matter which is now pending before this Court *which is a court of competent jurisdiction in relation to that matter*".[39] Yet a reading of the debates on the Act suggests strongly that the Government's view was that the *mere issue* of Letters of Request committed the Supreme Court of New South Wales to assent to such request. As appears later in this article, the Government was very dogmatic and perfunctory in its assertion that the courts in the United States were asserting a jurisdiction which went beyond accepted limits of international law. A Government so convinced of the soundness of its position would have nothing to fear in arguing its case in court. Yet far from explaining why judicial processes should be shut off to all affected parties, the Government rushed the Bills through the Parliament without any reference to the salient features of the procedure referred to above.

It is important to contrast the response of the United Kingdom Government to the attempts made by Westinghouse to gather evidence in the United Kingdom to support its allegation of an illegal cartel, particularly since the Australian Government relied in part on action taken in 1964 by the then United Kingdom Government in a similar situation. Australia was not the only intended destination of Letters of Request in the Richmond suit. An attempt was mounted by Westinghouse to have evidence taken in London from executives of Rio Tinto Zinc Corporation Ltd and an associated company which were among the 29 defendants in the Chicago suit, and which incidentally controlled two of the Australian defendants in that suit. The extra-territorial operation of the anti-trust laws of the United States had engaged the attention of British courts and the United Kingdom Parliament on several occasions in the last two decades.[40] However, on this occasion the United Kingdom did not, as it had done in a somewhat analogous

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[38] (Italics added). Supreme Court Rules 1970 Part 58. For the largely uniform provisions in the other States; Qld: The Rules of the Supreme Court, 0.40, r. 43; S.A.: Supreme Court Rules, 0.37, r. 39; Tas.: Rules of Court, 0.49, Div. VII; Vic.: Rules of the Supreme Court, 0.37, r. 54; see *Ukley* v. *Ukley* [1977] V.R. 121; W.A.: Rules of Supreme Court, 0.39. For a comprehensive Canadian view see *Re Westinghouse Electric Corporation and Duquesne Light Co.* (1977) 78 D.L.R. (3d) 3.

[39] Letters Rogatory issued by Judge Wekselman on 21 October 1976 (italics added). Copy in author's possession.

[40] See *British Nylon Spinners Ltd* v. *Imperial Chemical Industries Ltd* [1953] 1 Ch. 19: Shipping Contracts and Commercial Documents Act 1964. See n. 25 *supra.*

situation in 1964, enact legislation to obstruct those attempts. Instead, on this occasion the United Kingdom Government successfully intervened in the judicial process to support the companies and the executives in resisting the Letters of Request. In *Rio Tinto Zinc Corporation* v. *Westinghouse Electric Corporation*[41] the House of Lords reversed a decision of the Court of Appeal which had given partial effect to the Letters of Request,[42] and the executives were thus able to avoid having to attend to give evidence and produce documents. For the purposes of this part of the critique it is necessary only to draw attention to the availability of judicial procedures. The delicate questions of jurisdiction which arise for determination in those proceedings is the subject of the third section of the critique.

Secondly, it is necessary to contrast the scope of pre-trial discovery in civil proceedings in Australia (and in England for that matter) and the United States. The United States Federal Rules of Civil Procedure permit the taking of depositions and reception of documents from parties *and non-parties* in the interlocutory stages of a suit in a way that is not permitted in Australia or England.[43] In the case of the Westinghouse Letters of Request intended for Australia, the affected individuals and corporations could, for example, have objected to the requests on the basis that their issue was part of a "fishing expedition". This objection was successful in *Radio Corporation of America* v. *Rauland Corporation*.[44] Devlin J. pointed out the basis of such an objection in the following way:

> Recent cases in this country—for example, *Board* v. *Thomas Hedley & Co.* [1951] 2 All E.R. 431—have shown that discovery of documents may sometimes be obtained not only because they are relevant in the case itself but because they may fairly lead to a line of inquiry which would disclose relevant material, but it is plain that that principle has been carried very much further in the United States of America than it has been carried in this country. In the United States of America it is not restricted merely to obtaining a disclosure of documents from the other party to the suit, but there is a procedure, which might be called a pre-trial procedure, in the courts of the United States which allows interrogation not merely of the parties to the suit but also of persons who may be witnesses in the suit, or whom it may be thought may be witnesses in the suit, and which requires them to answer questions and produce documents. The questions would not necessarily be restricted to matters which were relevant in the suit,

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[41] [1978] 2 W.L.R. 81. See Isaacs, "The Westinghouse Case" (1978) 75 Law Society Gazette 101.

[42] *In re Westinghouse Electric Corporation Uranium Contract Litigation M.D.L. Docket No. 235* [1977] 3 W.L.R. 430; *In re Westinghouse Electric Corporation Uranium Contract Litigation M.D.L. Docket No. 235 (No. 2)* [1977] 3 W.L.R. 492.

[43] Federal Rules of Civil Procedure, 28 U.S.C.A. rules 26-37.

[44] [1956] 1 Q.B. 618.

> nor would the production be necessarily restricted to admissible evidence, but they might be such as would lead to a train of inquiry which might itself lead to relevant material.[45]

Thirdly, leaving aside for a moment the questions of national interest which prompted a decisive legislative resolution of the matter, it needs to be noted, if only in passing, that the Australian defendants in the Chicago suit were not entirely disabled from helping themselves. They could have appeared under protest to argue the jurisdictional issue as provided for in Rule 12(b) of the Federal Rules of Civil Procedure.[46]

Had such a course been unsuccessfully resorted to, it would still have been open to those defendants to have taken no further part in the suit and to have requested the Australian Government to intercede diplomatically or legislatively on their behalf. As it was, the companies simply ignored the proceedings.

Finally, the Australian Government could have sought a diplomatic solution to what it saw as a threat to international law and comity. In the debate on the original Bill emphasis was placed by the Government on the action of the Canadian Government in promulgating regulations to erect a barrier to the Westinghouse attempts at gathering evidence in Canada. More will be said about the Canadian responses below but for the time being it is sufficient to state that the Australian Government does not appear to have engaged in the intense diplomatic lobbying which the Canadian Government embraced.[47]

There is, however, an argument that the availability of a curial procedure is really only of academic interest, since if the Government is minded to resist the assumption of what it regards as a repugnant jurisdiction, it will be in a very strong position to persuade the domestic court that the courts and the executive should speak with one voice. This argument clearly impressed some members of the House of Lords in *Rio Tinto Zinc Corporation* v. *Westinghouse Electric Corporation*.[48]

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[45] *Id.* 643-644. See *Penn-Texas Corporation* v. *Murat Anstalt* [1964] 1 Q.B. 40; *Penn-Texas Corporation* v. *Murat Anstalt (No. 2)* [1964] 2 Q.B. 647; *Panthalu* v. *Ramnord Research Laboratories Ltd* [1966] 2 Q.B. 173; *American Express Warehousing Ltd* v. *Doe* [1967] 1 Lloyd's Rep. 222; *Lucas Industries Ltd* v. *Chloride Batteries Australia Ltd* (1978) 18 A.L.R. 579.

[46] Federal Rules of Civil Procedure, 28 U.S.C.A. rule 12(b).

[47] Second Canadian Statement, n. 7. Annexed to that Statement is a copy of a protest note which Canadian officials delivered to the United States authorities on 15 August 1977. On 9 December 1976 the Australian Minister for Business and Consumer Affairs, Mr Howard, in answer to a question on notice, stated that no note of protest in relation to the Act had been delivered by the United States Department of State. He also stated that the Australian Government had decided not to enter into negotiations with the United States Government with a view to effecting a treaty of mutual co-operation relating to trade practices and anti-trust activities. H.R. Deb. 1976, Vol. 102, 3708.

[48] [1978] 2 W.L.R. 81, 94 *per* Lord Wilberforce; 107 *per* Viscount Dilhorne (implicitly); 125 *per* Lord Fraser of Tullybelton, relying on *The Fagernes* [1927] P. 311.

It is not clear to the author why the attitude of the executive should not be questioned by the courts. The underlying executive sensitivity resembles the attitude which, in the context of crown privilege, has been rejected decisively in decisions such as *Bruce* v. *Waldron*[49] and *Conway* v. *Rimmer*.[50] So far as the Act is concerned it would ill-behove the Australian Government to assert the "one voice" argument in view of its unwillingness to permit any judicial scrutiny of the foreign tribunal's requests for evidence. In the long run it is surely more healthy for the contesting views to be aired and dealt with publicly. Whether or not that view is tenable, the "one voice" argument can scarcely be relied on by a Government which is not prepared to subject its stance to judicial examination.[51]

(b) *The National Interest*

What was the national interest which led the Government to come to the aid of private litigants? Before considering the Government's answer to that question the following four considerations, none of which was mentioned in the second reading speeches, should be borne in mind. First, one of the defendants in the Chicago suit is Mary Kathleen Uranium Limited. Since 1974 the Australian Atomic Energy Commission has held 49 per cent of the issued capital of that company.[52] Secondly, in the Pittsburgh and Richmond suits one of the persons from whom evidence was sought was an officer of the Australian Atomic Energy Commission.[53] Thirdly, officials of Australian uranium producers and Australian Government officials had participated in meetings of the so-called uranium "club" whose activities were the

[49] [1963] V.R. 3.

[50] [1968] A.C. 910.

[51] The former Attorney-General and his successor have refused to be drawn on a request by the author for further information generally in relation to the circumstances prompting the Australian Government's policy. It is significant to note, however, that the Government made representations to the United Kingdom Government desiring to associate itself with the United Kingdom Attorney-General's intervention in the House of Lords argument in *Rio Tinto Zinc Corporation* v. *Westinghouse Electric Corporation* in opposition to the U.S. anti-trust inquiries. See Financial Times, 25 October 1977, 7. The author requested confirmation of this from the Australian Foreign Affairs Minister but, as in the case of his ministerial colleague, that request had, at the date of writing, been ignored. See also *Re Westinghouse Electric Corporation and Duquesne Light Co.* (1977) 78 D.L.R. (3d) 3 at 21.

[52] In *Kathleen Investments (Australia) Ltd* v. *Australian Atomic Energy Commission* (1977) 16 A.L.R. 535 the High Court of Australia, by a majority, rejected a challenge to the legality of that shareholding.

[53] S. 17(1)(d) of the Atomic Energy Act 1953 (Cth) provides that, subject to the Act, one of the functions of the Commission is "to negotiate on behalf of the Commonwealth, or enter into, agreements for the purchase and sale of uranium and minerals found in association with uranium". S. 17(2) provides that "The Commission may act as agent of the Commonwealth in relation to any matter within the functions of the Commission."

basis of the Westinghouse allegation of an illegal cartel.[54] Finally, there is the need to consider the transnational affiliations of several of the four defendants in the Chicago suit, and of the other Australian uranium producers specified in the relevant Letters of Request.[55]

The Government contributions to the debate on the original and amending Bills do not reveal much about the bases of the national interest which the Act was intended to protect. In his second reading speech on the original Bill the Attorney-General merely asserted that Australian sovereignty was threatened. Putting aside the significance, if any, of official Australian participation in the cartel, it is difficult to envisage what actual harm would have been done to the national interest if the Act had not been passed. So far as the Letters Rogatory sought the production of documents in Australia it appears that copies of documents with varying degrees of probative value had already been made public in the United States, although as copies they may not have been admissible as such in the pending proceedings.[56]

Although the Government sought to bolster its case by comparing its reaction to Westinghouse's jurisdictional claim to that of the Canadian Government, there are three significant areas where the Canadian reaction is in marked contrast. The first is that the Canadian action was taken by the Minister for Energy, Mines and Resources. Secondly, the Canadian Government had been (and continues to be) quite candid about its involvement in the cartel. Finally, the Canadian Government has since modified the rigidity of its Regulations.

On 22 September 1976 the Canadian Government promulgated the Uranium Information Security Regulations pursuant to the Atomic Energy Control Act.[57] Regulation 2 provided as follows:

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[54] It appears that there was *official* Australian representation. On 14 February 1972 the Canadian Embassy informed the United States Atomic Energy Commission that "Canada took the initiative in calling a meeting on February 2 [1972] in Paris of *government officials from Australia*, France, South Africa and Canada, to explore all facets of present uranium market problems. The prime motivation behind the meeting resulted from Canada's concern that the chaotic price situation could reduce exploration for uranium to a point endangering the adequacy of supplies in latter part of this decade. *The meeting was organised to complement one of major producers which had been called by Uranex of France for February* 3-4. *Representatives from Australia*, France and Canada attended Governmental Meeting, but there was no representation from South Africa." (italics added). A report of the Paris talks had appeared in Wall Street Journal, 8 February 1972. Those Paris talks mark the commencement of the cartel. Other meetings took place throughout 1972-1974 at various locations including Canberra, Sydney, Johannesburg, Toronto, London and Las Palmas: see *Uranium Cartel Hearings* 455-678.

[55] In the case of Conzinc Riotinto of Australia Ltd ("CRA") 72.6% of its share capital is owned by Rio Tinto-Zinc Corporation Limited. Mary Kathleen Uranium Limited is owned as to 51% by Conzinc Riotinto of Australia Ltd and as to 41.6% by the Australian Atomic Energy Commission. Conzinc Riotinto of Australia Ltd, *Facts About CRA* (1977) 2, 35.

[56] The documents were made public by Friends of the Earth and are assembled in *Uranium Supply and Demand* and *Uranium Cartel Hearings*.

[57] SOR/76-644; *Canada Gazette* Part II, Vol. 110, No. 19.

> No person who has in his possession or under his control any note, document or other written or printed material in any way related to conversations, discussions or meetings that took place between January 1, 1972 and December 31, 1975 involving that person or any other person or any government, crown corporation, agency or other organization in respect of the production, import, export, transportation, refining, possession, ownership, use or sale of uranium or its derivatives or compounds shall
>
> (a) release any such note, document or material, or disclose or communicate the contents thereof to any person, government, crown corporation, agency or other organization unless
>
> (i) he is required to do so by or under a law of Canada, or
>
> (ii) he does so with the consent of the Minister of Energy, Mines and Resources; or
>
> (b) fail to guard against or take reasonable care to prevent the unauthorized release of any such note, document or material or the disclosure or communication of the contents thereof.[58]

The contrast with the circumstances giving rise to the passage of the Australian Act and with the quite specific content of the Canadian Regulations is marked. At the time the Canadian Regulations were made the Minister for Energy, Mines and Resources made a detailed public statement, and published an accompanying lengthy background paper, in which particulars were given of the alleged threat to Canadian sovereignty which, in the opinion of the Canadian Government, the Westinghouse manoeuvre and the Federal Grand Jury investigation created. The gist of the official Canadian position was that the Canadian Government had "initiated discussions with producing nations which led ultimately to an informal marketing arrangement among non-U.S. producers", that "the arrangements excluded the U.S. market" and that since the evidence being sought in Canada related to "activities approved and supported by the Canadian Government" the issue was clearly one of sovereignty.[59]

The candour which accompanied the Canadian Government's policy statement was calculated to make the issue of sovereignty obvious.

The Australian Government, however, has not seen fit to particularise the national interest which the Act is meant to guard.[60] If the Govern-

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[58] In *Clark* v. *Attorney-General of Canada* (1977) 81 D.L.R. (3d) 33, Evans C.J. of the Supreme Court of Ontario, in an action brought by members of the Federal Opposition in the Canadian Parliament, declared that reg. 2(a)(ii) was *ultra vires* the Atomic Energy Control Board and the Governor in Council under s. 9 of the Atomic Energy Control Act 1970. See also *Re Westinghouse Electric Corporation and Duquesne Light Co.* (1977) 78 D.L.R. (3d) 3.

[59] First Canadian Statement.

[60] In the debate on the amending Bill the Attorney-General did, however, offer the following comment: "This legislation is concerned with the rights of Australia in relation to this matter and the intrusion of anti-trust laws in the United States of America into what basically is Australia's concern, namely, the price at which we will fix our uranium. We are acting in our national interests." H.R. Deb. 1976, Vol. 102, 3496.

ment's sensitivity about official Australian participation in the cartel (rather than general concern for sovereignty) is the main reason for its silence it would surely be preferable for it to follow the Canadians in every respect, candidly admit that participation and specify the reasons why no organ of a foreign government is entitled to inquire into any aspect of Australian involvement. Such a course at least has the potential for convincing the Australian public of the wisdom of the Government's policy of refusing co-operation, and would have been accorded full respect by the United States courts since, as appears later, the wide foreign anti-trust jurisdictional claims made by those courts take account of questions of sovereign immunity and sovereign compulsion.

There is good reason to expect the Government to justify in meaningful and specific terms its deliberate obstruction of the judicial processes of a friendly foreign nation since, as it freely concedes, the principal of comity is at stake. The mere fact that a matter of Australian national interest is involved should not automatically require a competing national interest to yield.

Yet the question of comity received quite perfunctory treatment in the debates on the Act. Whilst the Government claimed to be upholding the comity principle it should not come as a surprise to learn that the United States Government considered that official Australian obstruction of the uranium cartel litigation was a serious assault on the principle. The Attorney-General of the United States commented on the comity principle and that obstruction in the following terms during the course of an address before an assembly of the American Bar Association on 8 August 1977.

> "Comity" is a very small word that stands for a very large principle. Comity is a way of saying fair play—that each of two parties will yield to the one which has interests that are clearly paramount. It is a word signifying a concern for common courtesy and decency toward others.
>
> Where conflicts arise between sovereigns, the sovereigns have an obligation to resolve the conflicts with restraint, co-operation, and good will. That is the essence of comity . . .
>
> Although reciprocity is an implied part of comity, the United States has made it clear that the assistance that we render comes without regard to reciprocity, but is given as a matter of law. . . . We have clearly set ourselves up as an example, and we hope other countries will follow suit. . . .
>
> Comity should work both ways. We owe deference to other nations when their vital national interests are at stake and the conflicting United States interest carries a lesser weight. But other nations owe us, in turn, deference at least to the extent of working toward a compromise arrangement if our fundamental national interests are directly affected. Of course, there will be unavoidable situations where two sets of interests conflict, each country viewing its own as supreme. Such situations provide a test of each nation's

> sense of comity, and perhaps its diplomatic skills as well. But I see no such excuse for deliberately enacting "blocking" legislation solely to frustrate United States anti-trust laws, without regard to the seriousness of the case or the national interest at stake. Blanket prohibitions by foreign governments against co-operation with United States investigations, by their nationals or even by United States citizens located in their territory, are not only inconsistent with comity but may also harm those who invoke prohibitions. Co-operating with investigations is the best way of bringing exculpatory information to our attention. Co-operation by a foreign firm or Government is a significant factor influencing our prosecutorial judgment. . . .
>
> We are obligated to do all that we reasonably can to prosecute foreign private cartels which have the purpose and effect of causing significant economic harm in the United States in violation of anti-trust laws. To my mind there is a fundamental United States interest in not having our citizens pay substantially higher prices for imports because private firms get together and rig international markets. There is also a fundamental United States interest at stake when private businesses, although foreign, get together to injure and perhaps destroy an American competitor.[61]

Although the Australian Attorney-General in the debates on the Act invoked the principle of comity, he did not attempt to show why comity required the foreign national interest to yield.

It is hard to conceive of a manoeuvre more calculated to damage comity than the enactment, without any proper explanation or justification, of emergency legislation to thwart processes of a foreign superior court sharing the same legal tradition.

The perfunctory manner in which the Australian Government rejected the jurisdiction being asserted in the Westinghouse suits deserves to be deplored because it impedes, rather than upholds, comity. The Government was (and is) indirectly involved in the Westinghouse litigation through the Atomic Energy Commission, which was named in the Letters of Request issued in the Richmond and Chicago suits, and which was the vehicle through which the Government held a substantial shareholding in one of the defendants in the Chicago suit. Whatever the national interest there is no reason to doubt that the Government would have been entitled to intervene in proceedings in the Supreme Court of New South Wales to protect that interest, had that Court been asked to facilitate the reception of evidence and documents. One could easily see, for example, why an Australian Government would feel concern about a foreign court investigating the internal operations or policies of the Australian Government or one of its agencies. For reasons known only to the Government, this matter was not raised as a

[61] The address is reprinted in Bell, "International Comity and the Extra-territorial Application of Anti-Trust Laws" (1977) 51 A.L.J. 801-803.

justification. The claim that "Australian" companies were involved failed, for example, to take account of the fact that of the four "Australian" defendants in the Chicago suit two (Conzinc Rio Tinto Limited and Mary Kathleen Uranium Limited) were owned as to at least 51 per cent by Rio Tinto Zinc Corporation Limited (through a holding company) which, on the evidence available, was one of the instigators of the cartel.[62]

(c) *Jurisdiction*

The scope, if any, for extra-territorial application of the anti-trust laws of the United States has long been the subject of debate inside and outside the United States. The debate is a complicated one.[63] However, since the jurisdictional question was central to the Australian Government's concern about the national interest the main features of the debate need to be identified. The following description is something of a crude summary. A remarkable feature of the debate on the Act was

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[62] In its nationalist haste and zeal the Government overlooked mentioning at least one strong supporting piece of evidence, namely the fact that so far as Queensland Mines Ltd was concerned Australian ownership and control had been preserved by special legislation. See Companies (Uranium Mining Companies) Ordinance 1970 (A.C.T.). Somewhat ironically, s. 7 of the Ordinance gives the Ordinance extra-territorial operation in the following terms: "This Ordinance extends to acts done or omitted to be done outside the Territory, whether in Australia or not."

[63] The literature is vast. The non-U.S. commentators are disinclined to accept the validity of the widest applications of extra-territorial anti-trust jurisdiction such as that in *United States* v. *Aluminium Co. of America* (1945) 148 F. 2d. 416 (2nd Cir.). The U.S. commentators, reflecting the fundamental position which the anti-trust laws have in the U.S. economic system, tend to be convinced that the wide jurisdictional claim is necessary to protect vital national interests. But the U.S. commentators are not always unanimous. See for example, the debate between Timberg and Haight (1956) 11 Record of Association of the Bar of New York 101 ff. See generally Neale, *The Antitrust Laws of the U.S.A.* (2nd ed. 1970) 360-372; Jennings, "Extraterritorial Jurisdiction and the United States Antitrust Laws" (1957) British Yearbook of International Law 146; Akehurst, "Jurisdiction in International Law" (1972-1973) 46 British Yearbook of International Law 145; Brownlie, *Principles of Public International Law* (2nd ed. 1973) Ch. XIV; Mann, *Studies in International Law* (1973) Ch. I; Brewster, *Antitrust and American Business Abroad* (1958); Fugate, *Foreign Commerce and the Antitrust Laws* (2nd ed. 1973); United States Department of Justice, *Antitrust Guide for International Operations* (1977); *Report of Attorney-General's National Committee to Study the Antitrust Laws* (1955) 66-77. Of the periodical literature the following is a very brief random sampling: Note, "Application of the Anti-trust Laws to Extraterritorial Conspiracies" (1940) 49 Yale Law Journal 1312; Hale, "Monopoly Abroad: The Antitrust Laws and Commerce in Foreign Areas" (1953) 31 Texas Law Review 493; Timberg, "Antitrust and Foreign Trade" (1953) 48 Northwestern University Law Review 411; Haight, "International Law and Extraterritorial Application of the Antitrust Laws" (1954) 63 Yale Law Journal 639; Whitney, "Sources of Conflict Between International Law and the Antitrust Laws" (1954) 63 Yale Law Journal 655; Maechling, "Uncle Sam's Long Arm" (1977) 63 American Bar Association Journal 372; Jones, "Extraterritoriality in U.S. Antitrust: An International 'Hot Potato'" (1977) 11 International Lawyer 415; Ryan, "The International Application of United States Anti-Trust Legislation", paper delivered to Fifth International Trade Law Seminar in Canberra on 25 June 1978.

that far from being argued in depth, the arguments for and against the extra-territorial jurisdiction of the U.S. anti-trust laws were not mentioned. Nor was any consideration given to the issues in the civil suits which prompted the Australian legislative reaction.

The application of the rules of public international law concerning the jurisdiction of states to the regulation of anti-competitive business behaviour often involves difficulties concerning the identification of the territorial locality of that behaviour. The nature and extent of international trade and the activities of transnational corporations will on occasions inevitably lead to conflicting jurisdictional claims. The territorial principle of jurisdiction requires the state asserting jurisdiction to establish that the person against whom jurisdiction is claimed has done some act on the state's territory.[64] Difficulties arise because the consequences and effects of an act may not be confined to the territory of the state where the act occurred.[65] Moreover, in the context of legislative regulation of anti-competitive and collusive business practices, the proscribed conduct is itself seldom defined without reference to some economic consequence of that conduct. To describe the way in which jurisdiction is assumed as involving the extra-territorial application of legal rules is to assume that which is sought to be proved since, as Akehurst observes:

> It is often difficult to localize restrictive business practices for the purposes of the territorial principle of jurisdiction; unlike ordinary crimes, they frequently take the form of complicated patterns of conduct, extending over a long period of time and over a wide geographical area.[66]

The American commentator, Timberg, identifies the tendency to oversimplify the application of the territorial principle in foreign anti-trust cases in the following terms:

> [Yet] a Sherman Act "conspiracy" or illegal "monopolization" is no mere "act"; it is a continuing course of business conduct involving an elaborate complex of business institutions, cutting across national territorial boundaries.[67]

The attitude of successive United Kingdom Governments has been that the anti-trust laws "should not provide jurisdiction for U.S. courts

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[64] *E.g.* Akehurst, *op. cit.* 193.

[65] *County Council of Fermanagh* v. *Farrendon* [1923] 2 I.R. 180 (malicious discharging of firearm in County Donegal with bullet passing border with Northern Ireland and striking victim in County Fermanagh); *D.P.P.* v. *Stonehouse* [1977] 3 W.L.R. 143 (fabricated appearance of death in United States, with a view to securing for spouse proceeds of life assurance policy effected in England, sufficient to sustain charge in England of attempting to obtain property by deception).

[66] *Op. cit.* 192.

[67] Timberg, *op. cit.* 103.

to investigate non-U.S. companies and non-U.S. individuals in respect of their actions outside the U.S.".[68]

Courts in the United States have made it clear that substantial and direct effects felt within the United States as a consequence of anti-competitive or collusive business conduct carried out by foreigners abroad will attract anti-trust jurisdiction.[69] More particularly, the areas in which foreign legal systems have been drawn into conflict with the anti-trust laws of the United States have been (1) cases concerning the procedural right to serve process on foreign corporations; (2) cases concerned with *subpoenas duces tecum* to produce documents; (3) cases concerned with substantive jurisdiction and (4) cases concerned with the granting of relief.[70] Only items (2) and (3) are relevant for present purposes.

So far as area (3) is concerned, much will depend in any given case on the nature and extent of the anti-competitive effects. In his second reading speech on the original Bill, the Attorney-General castigated the jurisdiction being claimed on the basis that it relied on mere effects.[71] However, in the relatively few cases in which United States courts have asserted such jurisdiction, it has been clear that substantial intended economic effects were involved, and that mere effects without intention to bring them about is no more subject to jurisdiction than mere intention to cause economic effects when no effects occur.[72] In the context of the uranium cartel there is a serious question as to whether the elaborate pricing and market allocation arrangements had any economic consequences in the United States. Those who argue that the cartel did affect the domestic commerce of the United States have asserted that the consequences were both direct and substantial.[73] They therefore rely on the famous dictum of Judge Learned Hand in the *Alcoa Case* 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".[74]

So far as the Australian defendants in the Chicago suit were concerned, the situation can be characterised as follows. If, as some of

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[68] Submission of H.M. Attorney-General to House of Lords in *Rio Tinto Zinc Corporation* v. *Westinghouse Electric Corporation* [1978] 2 W.L.R. 81. Copy in author's possession.

[69] *United States* v. *Aluminium Co. of America* (1941) 44 F. Supp. 97; on appeal (1945) 148 F. 2d. 416 (2nd Cir.).

[70] Wilberforce, Campbell and Elles, *Restrictive Trade Practices and Monopolies* (2nd ed. 1966) 669-672.

[71] H.R. Deb. 1976, Vol. 102, 2910.

[72] *United States* v. *Aluminium Company of America* (1945) 148 F. 2d. 416 (2nd Cir.); *United States* v. *Timken Roller Bearing Co.* (1949) 83 F. Supp. 284, affirmed (1951) 341 U.S. 593; *United States* v. *General Electric Co.* (1949) 82 F. Supp. 753, (1953) 115 F. Supp. 835.

[73] For example, the testimony of the officials of the Tennessee Valley Authority in *Uranium Cartel Hearings*, 346-411.

[74] *United States* v. *Aluminium Co. of America* (1945) 148 F. 2d. 416, 443.

the major participants have candidly claimed, the cartel was intended to exclude the United States market for yellowcake, and if there were no *intended* or actual consequences in the United States, then they had nothing to fear since, regardless of their legal merits, the Westinghouse claims were bound to fail because of the lack of factual foundation. If, on the other hand, the cartel had intentionally affected the domestic commerce of the United States then it would do well to assess the jurisdictional claims by considering how an Australian Government (or indeed Australian companies or individuals) would have reacted had the situation been reversed, and had, for example, the price of domestic electricity doubled as a result of the cartel's activities. In a time of growing concern about the activities of transnational corporations it appears highly artificial to disregard serious economic consequences because "foreigners" and not one's own nationals are concerned, or because the effect is somehow qualitatively inferior to the act or conduct which initiates the effects.

The objective territorial basis of United States anti-trust jurisdiction is, in any event, qualified by the availability of several specific defences,[75] including the act of state doctrine,[76] foreign governmental compulsion[77] and defences based on comity.[78] None of those matters was mentioned in the debates on the Bills.

What does emerge from a close consideration of the extent to which American courts have assumed substantive and procedural jurisdiction over foreign enterprises in respect of alleged anti-trust infringements is that there is considerably more to the long-standing controversy than the Australian Government suggested in those debates. In the circumstances the Government should have published a detailed policy statement instead of relying on the vague and almost melodramatic appeal which characterised its position in the debates.

The questions of urgency, national interest and jurisdiction are the most serious issues arising out of the enactment and operation of the Act. In the remainder of the article three subsidiary issues are briefly considered.

(d) *Discretionary Lawmaking*

Regardless of differing views concerning the wisdom of the Act's policy, the provisions of sections 4 and 5 of the Act should be closely

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[75] United States Department of Justice, *Antitrust Guide for International Operations* (1977) 7-8.

[76] *American Banana Co.* v. *United Fruit Co.* (1909) 213 U.S. 347; *United States* v. *Sisal Sales Corp.* (1927) 274 U.S. 268; *Continental Ore Co.* v. *Union Carbide & Carbon Corp.* (1962) 370 U.S. 690. See also Triggs, "Sovereign Immunity: A New Rule of International Law", paper delivered to Fifth International Trade Law Seminar in Canberra on 25 June 1978.

[77] *Interamerican Refining Corp.* v. *Texas Maracaibo, Inc.* (1970) 307 F. Supp. 1291. See also Triggs, *op. cit.*

[78] United States Department of Justice, *Antitrust Guide for International Operations* (1977) 8.

examined by lawyers. The extent of the Attorney-General's discretionary lawmaking powers is extremely wide. The orders gazetted to date are cast as widely as section 4 permits. The current order recites that the Attorney-General is satisfied that the imposition of the restrictions specified in the order "is desirable for the purpose of protecting the national interest in relation to matters to which the laws and executive powers of the Commonwealth relate". The Act does not, however, provide any guidelines for ascertaining "the national interest". The current order, consistent with the perfunctory approach of the Government in this whole matter, does no more than recite formalities. It does not identify the relevant national interest nor does it demonstrate the need for restrictions.

The public is, in the author's view, entitled to insist on particulars. For example, is the national interest in safeguarding the activities of the Australian Atomic Energy Commission co-extensive with the national interest in coming to the aid of individual citizens and private corporations? Is the national interest in safeguarding the international commercial activities of "Australian" corporations identical with the national interest in safeguarding the international commercial activities of Australian satellites of transnational corporations?

Section 4 enables the Attorney-General to impose restrictions "where he is satisfied" that certain circumstances exist. He is not, however, required to indicate the basis on which he comes in any given case to be so satisfied. Moreover, in section 5 he is given a general dispensing power to permit conduct which would otherwise contravene an order made under the Act. Such a widely cast scheme of discretionary lawmaking, without an effective mechanism for reviewing the exercise of the discretionary power, is quite at odds with the spirit of contemporary administrative law reform. The contrast is quite marked when it is recalled that the whole purpose of the Act was to nullify any resort to the courts. It is also a matter of interest that in the debate on the original Bill the then Attorney-General said he was already satisfied that an order should be made. In view of the argument advanced earlier in this article concerning the urgency surrounding the Bill's introduction, it might be thought that the Attorney-General could not be satisfied. Be that as it may, there is the further question of the reviewability of the Attorney-General's satisfaction.[79]

(e) *Constitutionality*

It was claimed during the debate on the original Bill that the external affairs power supported the proposed enactment.[80] There is no suggestion that the Act implements treaty or convention obligations.[81]

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[79] (1976) 50 A.L.J. 607, 609 and the cases cited there.

[80] H.R. Deb. 1976, Vol. 102, 2914.

[81] The Foreign Tribunals Evidence Act 1856 (Imp.), which forms the basis of Australian law enabling the giving of effect to requests for evidence from foreign

If the Act's provisions cannot otherwise be characterised as being with respect to external affairs,[82] it is difficult to locate any possible alternative source of legislative power save perhaps the foreign commerce or express incidental legislative powers in section 51(i) and (xxxix) of the Constitution.

Any attempt to impugn the validity of the entire Act or of its central provisions would probably focus on the indiscriminate application of those provisions to all tribunals in Australia. The Act is essentially concerned to interdict the flow of information and documentation to foreign tribunals. Normally that flow will be channelled through a superior court of record. The Act is not confined to Federal courts. It is not drafted in such a way that it is incapable of application to proceedings in State courts. Of course the whole purpose of the Act was to thwart proceedings which the Government (mistakenly) believed were pending in the Supreme Court of New South Wales. The orders refer to those proceedings, but the orders can only be sustained if the Act survives. Is the Act a law with respect to external affairs or a law with respect to some other subject matter such as, for example, State courts or tribunals?

The decision of the High Court in the *Seas and Submerged Lands Case*[83] supports an expansive interpretation of the external affairs power. If, for the sake of argument, it is accepted that the Act is a law with respect to external affairs, a further question possibly arises as to whether the Act, and in particular the central provisions of sections 4, 5 and 8, exceed the limits of the power even on the most expansive view. As the Australian Law Journal commentator succinctly observed, the implicit reliance by the Government on the rationalisations of some of the judges in the *Seas and Submerged Lands Case* do "not necessarily mean that State Supreme Courts could be validly fettered by Commonwealth action because they were approached by persons or courts outside Australia".[84]

(f) *Interpretation*

The Act bristles with difficult questions of interpretation. Some of these, but by no means the most important ones, were recognised by

tribunals, was repealed in the United Kingdom by the Evidence (Proceedings in Other Jurisdictions) Act 1975, which was passed to give effect to the *Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters of 1970* (see Cmnd 3991), which the United Kingdom ratified in 1976. See also *Ukley* v. *Ukley* [1977] V.R. 121.

[82] Constitution, s. 51(xxix).

[83] *New South Wales* v. *Commonwealth* (1975) 50 A.L.J.R. 218. See generally Goldsworthy, "Ownership of the Territorial Sea and Continental Shelf of Australia: An Analysis of the Seas and Submerged Lands Act Case (State of New South Wales and Ors v. The Commonwealth of Australia)" (1976) 50 A.L.J. 175.

[84] (1976) 50 A.L.J. 607, 609.

the Government soon after the Act was passed, and their existence can be put down to the pitfalls normally encountered when legislative action is embarked on urgently and without the benefit of full and proper planning. The necessity to exclude the Judicial Committee of the Privy Council in the exercise of jurisdiction in respect of appeals from any court in Australia from the definition of "foreign tribunal" simply illustrates the ease with which politicians can get caught with egg on their faces. However, the Act as amended remains beset with uncertainty. Here are some examples of the difficulties involved in coming to grips with what the Act means and intends.

1. Section 4 requires the Attorney-General to impose restrictions only where he is satisfied that one or other of two circumstances exist. The first of those is that "a foreign tribunal is exercising or proposing or likely to exercise jurisdiction or powers of a kind or in a manner not consistent with international law or comity in *proceedings having a relevance to matters to which the laws or executive powers of the Commonwealth relate* being the only proceedings of a foreign tribunal in relation to which the restriction are to have effect" (emphasis supplied). What do the italicised words mean? In the context of the various Westinghouse suits it seems nigh on impossible to determine whether the Pittsburgh, Richmond or Chicago suits have "a relevance to matters to which the laws or executive powers of the Commonwealth relate" without subjecting each proceeding to the most intense scrutiny. Presumably the mere fact that an extra-territorial jurisdiction is being assumed by the foreign tribunal in a way which purports to affect Australian individuals or companies automatically provides the necessary "relevance".

2. The other circumstance which will compel the Attorney-General to impose restrictions pursuant to the Act is his being satisfied that the imposition of restrictions is "*desirable for the purpose of protecting the national interest in relation to matters to which the laws or executive powers of the Commonwealth relate*" (emphasis supplied). The vagueness of the italicised formulations is breathtaking. It would be difficult to conceive of a more subjective formulation. How is *desirability* to be ascertained? What is "the national interest in the laws or executive powers of the Commonwealth"?

5. CONCLUSION

The precipitate passage of the Act denied the public the opportunity to scrutinise and comment on the original and amending Bills.[85] It is to

[85] The *original Bill* was still not available for purchase by the author from the Australian Government Publishing Service bookshop in Melbourne at the time the amending Bill was being debated. To be fair to the former Attorney-General, it needs to be stated that he asserted in a letter to the author dated 17 March 1977 that the *Act* was available. This contradicts the author's actual experience.

be regretted that the Parliament acted hastily when there was no need for haste. Perhaps the decisive factor is the involvement of the nuclear energy industry. Uranium seems to bring out the worst in our legislators. The contrast between the haste which attended the enactment of the Foreign Proceedings (Prohibition of Certain Evidence) Act 1976 as amended, and the process of attrition which accompanied the enactment of the Aboriginal Land Rights (Northern Territory) Act 1976 (in relation to which uranium exploration and mining companies had more than a passing interest) is as striking as can be imagined. The disturbing influence which uranium mining and the nuclear power industry in general now exercise in Australia has again been manifested in the series of Bills introduced in the Federal Parliament in April 1978 when this article was in the course of preparation. We cannot afford to ignore the implications which this influence has for parliamentary processes in Australia.