ANTITRUST FALL-OUT: TENSIONS IN THE AUSTRALIAN-AMERICAN RELATIONSHIP

By Laurence W Maher*

This article examines the Foreign Antitrust Judgments (Restriction of Enforcement) Act 1979 (Cth) ("the 1979 Act"). It was the second legislative response of the Australian Government to steps taken by the Westinghouse Electric Corporation ("Westinghouse") in its international uranium cartel antitrust suit in the United States District Court in Chicago. That suit and other legislation attributable to the uranium cartel which operated between 1972 and 1975[1] proceeded for more than four years and, until a recent spate of settlements mentioned later in the article, had been expected to continue well into the 1980s. At the outset it is necessary to say something of the events which provoked the District Court suit and related litigation.

1 YELLOWCAKE WOES

In September 1975 Westinghouse announced in the United States that it was unable to fulfil its contractual obligations for the supply of uranium oxide (U_3O_2). Westinghouse's primary involvement in the nuclear energy industry is as a manufacturer of nuclear power plants ("reactors") and not as a uranium miner. In the late 1960s reactor sales soared and Westinghouse offered electric utilities low price reactor fuel over long terms as an inducement to capture reactor sales. Westinghouse, however, sold short on the uranium fuel. It gambled on being able to acquire sufficient fuel inventories at economic prices as its fuel delivery obligations crystallized. At the time it undertook those obligations U_3O_2 was selling at about $US4 per pound. This short selling technique created a major crisis for Westinghouse when the market price leapt to $US40 per pound. Its inventories were woefully inadequate and it had not protected itself by making sufficient advance fuel purchase contracts. Its September 1975 announcement attracted a torrent of breach of contract suits from its utility customers in the United States and elsewhere.[2] At first it appeared that Westinghouse's only means of saving itself from annihilation was to invoke provisions of the United States Uniform Commercial Code which permit "commercial impracticability" to be raised as a defence to a breach of contract claim,[3] and a

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1 See generally J Wood and V Carrera, "The International Uranium Cartel: Litigation and Legal Implications" (1979) 14 Texas International Law Journal 59; J Taylor and M Yokell, *Yellowcake: The International Uranium Cartel and its Aftermath* (London, 1980); G Rothwell, "Market Coordination in the Uranium Oxide Industry" (1980) 25 The Antitrust Bulletin 233.

2 All seventeen suits by US utilities have now been settled: the *New York Times*, 19 April 1981.

3 S 2-615.

second stage of litigation commenced when Westinghouse issued proceedings seeking appropriate relief against the utilities.[4] This was a very slender reed on which to rest.[5] However, within a year of the 1975 announcement the situation changed dramatically with the detailed revelation that an elaborate international cartel of uranium producers had operated from early 1972. Armed with copious documentary proof of the cartel[6] and claiming that the cartel had caused the dramatic hike in the market price, Westinghouse went on the offensive. At the same time the Tennessee Valley Authority ("TVA"), a major electric utility, sued Westinghouse alleging repudiation of certain fuel supply contracts and also issued antitrust proceedings against some of the cartel participants including ten of the foreign corporations involved. The result was a pattern of litigation which, if and when the last action is finally disposed of at trial, may well eclipse all other large scale litigation in United States history including the pending record-breaking IBM antitrust case.[7] This third litigious foray began in October 1976 when Westinghouse filed the District Court suit against 29 United States and foreign corporations seeking treble damages (said by some to involve as much as six billion dollars) for alleged antitrust and other violations based on the activities of the cartel.[8] The cartel participants were the Governments of Australia, Canada, France, South Africa and uranium miners from those nations and from the United Kingdom and the United States. The cartel involved an elaborate mechanism of orchestrated price bidding and fixing, and limitations on mining output. Although the cartel was supposedly confined to the non-United States market in uranium oxide Westinghouse alleged that the cartel had to some extent actually operated in the United States and that whether intended or not it had a direct and substantial effect on United States commerce particularly in the form of higher reactor fuel prices and electricity charges.[9] The suit was brought in Chicago partly

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[4] See generally P Joskow, "Commercial Impossibility, the Uranium Market and the Westinghouse Case" (1977) 6 Journal of Legal Studies 119; W Eagan, "The Westinghouse Uranium Contracts: Commercial Impracticabilities and Related Matters" (1980) 18 American Business Law Journal 281.

[5] The defence failed: the *New York Times*, 30 October 1978; W Eagan, *op cit* 287. See *Matter of Westinghouse Electric Corporation Uranium Contracts Litigation* 517 F Supp 440 (ED Va, 1981).

[6] See the material reproduced in: US Congress, House of Representatives, Committee on Interstate and Foreign Commerce, Sub-Committee on Oversight and Investigations, *International Uranium Supply and Demand* 94th Congress, 1976, Serial 94-150 and *International Uranium Cartel* 95th Congress, 1977, Serial 95-99.

[7] The Westinghouse and TVA antitrust suits were later consolidated. At the time of writing Westinghouse had settled its claims against all 29 defendants in the Chicago suit. The TVA action had been settled with the London-based RTZ group defendants (who did not include either of the Australian subsidiaries of RTZ in the Westinghouse suit) but was otherwise apparently continuing. An indication of the magnitude of the Chicago case is given by the fact that it had generated 7 million pages of documents in the discovery stage, and in 1976 alone, Westinghouse spent $US25 million in outside lawyers' fees: W Eagan, *op cit* 282. The TVA-Westinghouse suit was settled in May 1979 with Westinghouse paying TVA $US130 million.

[8] It has been suggested that Westinghouse's 1972 agreement licensing the French Government to build reactors may have influenced its decision not to sue the French cartel participant Uranex. In early 1981 the French Government announced that it had developed its own technology for building pressurized water reactors, that it intended to enter the world market, and that the licence agreement was being terminated amicably: the *New York Times*, 24 January 1981.

[9] *Westinghouse Electric Corporation* v *Rio Algom Ltd* United States District Court for the Northern District of Illinois, Eastern Division, No 76-C38330: Complaint,

because the world's largest facility for the conversion of uranium concentrate (U_3O_8) to uranium hexafloride (UF_6) is located at Metropolis, Illinois.[10] In its Chicago suit Westinghouse sued four Australian-based uranium producers as conspirators.[11] The Australian Government, which had encouraged, if not directed, the Australian-based defendants' participation in the cartel, came to their aid by denouncing the allegedly extra-territorial claims which the Westinghouse suit contained and, in a display of unparalleled parliamentary urgency, secured the enactment of the Foreign Proceedings (Prohibition of Certain Evidence) Act 1976 ("the 1976 Act").[12]

All the foreign Governments concerned asserted that Westinghouse was seeking to invoke the aid of United States law in respect of activities which took place outside the United States and that this was a clear violation of international law.[13]

The 1976 Act empowers the Commonwealth Attorney-General to make certain classes of orders prohibiting the production of documents or the giving of evidence in foreign proceedings in circumstances where the Attorney-General is satisfied the national interest requires such orders to be made. Orders were made under the 1976 Act which itself was, for a time in 1980, the subject of a constitutional challenge in the High Court of Australia.[14] The 1976 Act enabled the Attorney-General to permit the production of documents or the giving of evidence and, although a number of applications for such permission were made by Westinghouse and several of the defendants in its Chicago suit, most of the applications were denied.[15]

2 FOREIGN JUDGMENTS—OLD AND NEW SAFEGUARDS

Westinghouse, though no doubt frustrated by the 1976 Act did not concede defeat as regards the Australian-based defendants who, along with

Preamble: copy in author's possession. Westinghouse was specifically mentioned in the cartel documents. It appeared that some concerted actions of the cartel participants were deliberately aimed at prejudicing Westinghouse and its role as a "middleman" or broker in the international uranium trade.

10 *Ibid* Count one, para A2(b).

11 Conzinc Riotinto Australia Ltd ("CRA"), Mary Kathleen Uranium Ltd ("MKU"), Pancontinental Mining Ltd ("Pancontinental") and Queensland Mines Ltd. These were not the only Australian or Australian-based companies which were involved in the cartel.

12 See L Maher, "Time, Uranium and the Legislative Process" (1978) 9 FL Rev 399; Note (1978) 52 ALJ 480.

13 The views of the Governments of the United Kingdom, Canada, South Africa and Australia are set out in the *amicus curiae* briefs filed by them at various stages in the Chicago suit and in interlocutory appeals in that suit: *eg Memorandum of Government of Canada as Amicus Curiae on Motions for Summary Judgment on Jurisdictional Grounds*, 1 July 1980 (US District Court); *Memorandum of Government of the Republic of South Africa as Amicus Curiae*, 19 October 1979 (United States Court of Appeals for the Seventh Circuit). The view of the Government of France is contained in *Memorandum—Position of Government of France—Uranium Antitrust Litigation*, 27 October 1978. Copies of each in author's possession.

14 Details of Orders made under the 1976 Act are referred to in L Maher, *op cit* 404. The challenge was instituted by Getty Oil Development Company. It was not pursued after the parent corporation, Getty Oil Company, settled the Westinghouse claim against it.

15 See Attorney-General Durack's Press Release 73/80, 5 October 1980 and annexures.

several other foreign defendants, refused to take any part in the Chicago proceedings even to the extent of making a decision not to appear under protest to contest, as a matter of international and domestic law, the District Court's threatened assumption of jurisdiction. (The 1976 Act has, ironically, assisted Westinghouse in settling its claim against one of the United States defendants, the Getty Oil Company. On 12 January 1981 Getty announced that it had agreed to pay Westinghouse $US13 million. Apart from the high legal costs Getty drew attention to a "Catch-22" problem which it faced:

> The US District Court in Chicago has demanded that Getty produce certain documents in the possession of a Getty subsidiary in Australia. However, if Getty were to produce such documents, the personnel involved in removing those documents from Australia would be committing a criminal act under Australian law.[16]

On 3 January 1979 the District Court, on the application of Westinghouse, entered judgment (with damages to be assessed) against the non-appearing defendants and almost immediately Westinghouse moved to protect those default judgments by seeking injunctive relief in respect of United States-based assets of those defendants.[17] At the same time the Australian Government was preparing to secure the enactment of a law which would prevent Westinghouse enforcing the judgments in Australia.

Before considering the 1979 Act it is necessary to consider briefly the common law and pre-existing statutory context of enforcement of foreign judgments in Australia.

A *Common Law*

The judge-made rules for resolution of conflicts of laws make limited provision for *indirect* recognition and enforcement of foreign judgments in Australia.[18] Those rules do not permit direct or immediate enforcement. But in some circumstances a foreign judgment will be seen as giving rise to a debt between the parties to the judgment, "the debtor's liability arising on an implied promise to pay the amount of the foreign judgment".[19] To succeed in a common law enforcement action based on the debt deriving from the foreign judgment the plaintiff must comply with the following requirements.

(1) *Jurisdiction*: To begin with, the foreign judgment-creditor must convince the Australian court that according to the Australian court's

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[16] Getty Oil Company, Los Angeles, Press Release, 12 January 1981.

[17] *In Re Uranium Antitrust Litigation* 473 F Supp 382 (ND Ill, 1979). Several of the defendants filed counterclaims alleging antitrust and related violations by Westinghouse. A motion to dismiss the counterclaims was denied on 30 April 1979: 473 F Supp 393 (ND Ill, 1979). Details of the injunctive relief obtained by Westinghouse can be found in the Court of Appeals decision of 15 February 1980: *In Re Uranium Antitrust Litigation* 617 F 2d 1248 (7th Cir, 1980).

[18] This purports to be no more than a background summary of the law. See generally H Read, *Recognition and Enforcement of Foreign Judgments* (Cambridge, Mass, 1938); P Nygh, *Conflict of Laws in Australia* (3rd ed, 1976) Ch 6; *Halsbury's Laws of England* (4th ed) viii, paras 715-742; A Dicey and J Morris, *The Conflict of Laws* (9th ed, 1973); E Sykes and M Pryles, *International and Interstate Conflict of Laws* (2nd ed, 1981); A Ehrenzweig, *A Treatise on the Conflict of Laws* (St Paul, Minn, 1962) Ch 2.

[19] *Halsbury, op cit* para 715.

conflicts of laws rules the foreign court exercised a jurisdiction recognised by the Australian court. In his book *Conflict of Laws in Australia*, Professor Nygh (as he then was) observes that 70 years ago in *Emanuel* v *Symon*,[20] Buckley LJ identified five categories of acceptable assumption and exercise of foreign jurisdiction.[21] These are based respectively on the debtor's nationality, residence at the date of personal service of process, choice of forum, voluntary appearance, and contractual submission. Of these the first, nationality, is now probably no longer sufficient standing alone. Nor apparently do the debtor's domicile, or reciprocity between the two nations concerned, as such afford bases for recognition and enforcement.[22] The operation of the four remaining categories is generally regarded, subject to the plaintiff satisfying other requirements, as enabling recognition and enforcement—

(a) where the defendant was personally served with the foreign court's originating process within its physical jurisdiction. For individuals, "presence" rather than "residence" is probably enough but neither will suffice for corporations whose amenability to the foreign jurisdiction must be based on the carrying on of business within that jurisdiction;[23]

(b) where the defendant has, as a plaintiff, chosen to bring suit in the foreign court and is subsequently sued in that court by way of counterclaim or separate action;[24]

(c) where the defendant agrees expressly and explicitly to submit to the jurisdiction of the foreign court in which the judgment is entered. Moreover, it has been said that "(t)he foreign court similarly has jurisdiction where the defendant has agreed to accept service of process in the foreign country".[25]

(d) where the defendant voluntarily files an appearance in the foreign court and contests the merits of the foreign suit.[26] One area of significant uncertainty directly affecting the Westinghouse District Court suit is the status of resort to limited appearance under protest to contest the assertion of jurisdiction in the foreign court.

The question as to whether submission to the foreign court's jurisdiction must be complete to satisfy alternative (d) has exercised the courts over many years and there are conflicting streams of authority. On one side there are the decisions such as those in *Re Dulles' Settlement Trusts; Dulles* v *Vidler*[27] and *Daarnhouwer (NV) & Co Handelmaatschappij* v *Boulos*[28] to the effect that a partial submission to contest jurisdiction is inadequate. On

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[20] [1908] 1 KB 302.
[21] P Nygh, *op cit* 79.
[22] P Nygh, *op cit* 79; *Vogel* v *Kohnstamm Ltd* [1973] 1 QB 133.
[23] P Nygh, *op cit* 80; *Littauer Glove Corporation* v *FW Millington (1920), Ltd* (1928) 44 TLR 746; *Okura & Co Ltd* v *Forsbacka Jermverks Aktiebolag* [1914] 1 KB 715.
[24] P Nygh, *op cit* 80.
[25] *Ibid* 83.
[26] *Ibid* 80.
[27] [1951] Ch 842.
[28] [1968] 2 Lloyd's Rep 259. This decision was overruled in *Henry* v *Geopresco International Ltd* [1975] 2 All ER 702.

the other side there are decisions such as those in *Harris* v *Taylor*,[29] *Luke* v *Mayoh*[30] and *Henry* v *Geopresco International Ltd*,[31] which support the less burdensome requirement (for the plaintiff) that an unsuccessful limited appearance to contest jurisdiction will involve a submission to jurisdiction for foreign enforcement purposes. It seems clear that part of the reason why the four Australian-based defendants declined to make a limited appearance in the Chicago suit to argue against Westinghouse's jurisdictional claims was that the companies feared that, regardless of the outcome of such a limited appearance, they would thereby have lost an advantage under Australian law.

In *Henry* v *Geopresco International Ltd*, in an *obiter dictum*, the Court of Appeal hinted quite strongly that an appearance solely to protest against the jurisdiction of the foreign court, might constitute a voluntary submission to the jurisdiction of that court. In that case the plaintiff obtained a default judgment in the Supreme Court of Alberta for damages for wrongful dismissal. The defendant was a company incorporated in Jersey. The plaintiff served a statement of claim on the defendant in Jersey pursuant to leave given for that purpose. The Alberta Court's rules did not contain any provision for the entry of an appearance by a defendant. The defendant unsuccessfully applied in Alberta to set aside service or for a stay of proceedings because of an arbitration clause in the employment contract. But the defendant did not contest the jurisdiction of the Alberta Court. The defendant did not take any further part in the proceedings and argued that the plaintiff could not sue on the judgment in England because the defendant had not submitted to the jurisdiction of the Alberta Court on the merits of the claim. The English enforcement action succeeded. The Court of Appeal held that the defendant's interlocutory application in Alberta amounted to a voluntary submission because in relation to service of the process and the arbitration argument it invited the foreign Court to rule at least on the merits of *part* of the defendant's defence.

(2) *Finality*: Next, it must be shown that the foreign judgment is final and conclusive. This involves an inquiry into the exact nature and circumstances of the judgment. The judgment must be *res judicata*.[32]

(3) *A Fixed Debt*: The foreign judgment must be for a definite or "readily calculable" sum. This excludes equitable decrees unless accompanied by an order for "payment of an ascertained sum by one party to the other as, for example, a balance due on a dissolution of partnership, or in connection with a trust or an executorship".[33]

(4) *Defences*: Even where the plaintiff suing on a foreign judgment complies with those three requirements, recognition and enforcement may be denied in an Australian court where the defendant raises one or more of the following well established defences—(a) fraud and duress;[34] (b)

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[29] [1915] 2 KB 580.
[30] [1922] SASR 385.
[31] [1975] 2 All ER 702.
[32] P Nygh, *op cit* 85.
[33] *Halsbury*, *op cit* para 732.
[34] P Nygh, *op cit* 93, 94.

denial of natural justice;[35] (c) that the judgment is contrary to public policy;[36] or (d) that the judgment is of a penal or revenue character.[37]

B *Pre-Existing State Legislation*

The States and Territories have substantially uniform legislation facilitating the enforcement in the States or Territories concerned of judgments given in courts of the United Kingdom and in the courts of other countries which accord reciprocal treatment to judgments given in the State or Territory, as the case may be.[38] Although the legislation does not codify the common law rules it does closely resemble them. Under the legislative scheme a judgment will only be capable of enforcement if—

(1) It is final and conclusive as between the parties thereto;

(2) There is payable thereunder a sum of money, not being a sum payable in respect of taxes or other charges of a like nature or in respect of a fine or other penalty; and

(3) It is given after the coming into operation of an order extending the enforcement scheme to the foreign country concerned.[39]

None of the States or Territories have made orders extending the statutory scheme to judgments of United States District Courts although the Commonwealth Attorney-General drew attention in 1979 to a suggestion that such an order may not be necessary under the South Australian Act.[40]

C *Parliamentary Debate on 1979 Bill*

In introducing the Bill in the Senate on 21 February 1979 the Commonwealth Attorney-General, Senator Peter Durack, expressed the Australian Government's policy in the following terms:[41]

- Australia's national interest demanded rejection of Westinghouse's claims because they purported to give the antitrust and related laws "a greater extra-territorial operation than that generally conceded in international law".
- The 1976 Act had been effective in preventing the Australian-based evidence from being used for the purpose of the United States proceedings.

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[35] *Halsbury, op cit* para 729.

[36] *Ibid* para 728.

[37] *Ibid* para 733; *Huntington* v *Attrill* [1893] AC 150; *Banco de Vizcaya* v *Don Alfonso de Borbon Austria* [1935] 1 KB 140; *Re Ayres; ex parte Evans* (1981) 34 ALR 582.

[38] Foreign Judgments (Reciprocal Enforcement) Act 1973 (NSW); Reciprocal Enforcement of Judgments Act 1959 (Qld); Foreign Judgments Act 1971 (SA); Foreign Judgments (Reciprocal Enforcement) Act 1962 (Tas); Foreign Judgments (Reciprocal Enforcement) Act 1962-1973 (WA); Foreign Judgments (Reciprocal Enforcement) Ordinance 1954 (ACT); Foreign Judgments (Reciprocal Enforcement) Ordinance 1955 (NT). For a list of countries with whom reciprocal arrangements have been made see H Reps Deb 1978, Vol 109, 2359-2360.

[39] *Eg* Foreign Judgments Act 1962 (Vic) s 4. In *BP Exploration Co (Libya) Ltd* v *Hunt* [1980] 1 NSWLR 496, an unsuccessful attempt was made to invalidate the Foreign Judgments (Reciprocal Enforcement) Act 1973 (NSW) on the basis that the obligation imposed by the Act on a judgment debtor to pay the amount of the registered foreign judgment was inconsistent with the prohibition on such a payment in regs 8(1)(a) and 8(3A) of the Banking (Foreign Exchange) Regulations (Cth). See also *Re Hunt; ex parte BP Exploration Co (Libya) Ltd* [1979] 2 NSWLR 406; *Hunt* v *BP Exploration Co (Libya) Ltd* (1980) 54 ALJR 205.

[40] Sen Deb 1979, Vol 80, 128.

[41] Sen Deb 1979, Vol 80, 127-129.

- A United States Grand Jury investigation into the cartel had concluded and no proceedings by the United States Justice Department had been instituted against any Australian company in consequence of that investigation.
- The prospect of Westinghouse securing an assessment of the amount of the judgments in the near future and endeavouring to enforce the default judgments justified a legislative response.
- It would be unsatisfactory to expect the defendants to rely on common law defences to any such enforcement action. Given that the Government was clearly of the view that the Westinghouse litigation was against the national interest, it was desirable that legislative and executive action should be taken to leave no doubt that a repugnant judgment would not be recognised or enforced in Australia.

The Government's handling of the 1979 Bill lacked the phrenetic quality of the conduct of the 1976 Bill which was rushed through both Houses in several hours in the mistaken belief that certain proceedings were already on foot in the Supreme Court of New South Wales, and that therefore irreparable harm to the national interest would occur if the Bill was not urgently passed.[42] In 1979 the Opposition did not oppose the Bill but unsuccessfully endeavoured to have it withdrawn and redrafted.[43] The Opposition pressed for requirements that the Attorney-General notify the Parliament of his reasons for deciding to prevent the recognition and enforcement of a foreign judgment, and that any determination to prevent recognition and enforcement be dependent on the prior consent of both Houses of Parliament. The Government refused to accept the suggested amendments. The overall mood of the debate was one of concern that Australia's mineral export trade should remain subject to Australian Government control and direction. Beneath the mildly nationalistic reaction to the apparent extra-territorial application of United States laws against anti-competitive behaviour, there was a strong bipartisan commitment to the view that competition is out of place in the international mineral trade. It was not so much the purported extra-territorial application of a foreign legal regime, as the policy underlying that regime, namely competition, which provided the justification for retaliatory legislation.

Several other features of the debate warrant particular consideration. The first is the Government's concern that the default judgments themselves are damaging. According to Senator Durack:

> in one sense the damage has been done in that judgments have been entered, but there does not seem to be any way under American law and from negotiations we have had with the United States Government to undo that situation.[44]

The second is the Government's desire to achieve agreement with the United States Government to prevent the occurrence of the problems prompting introduction of the Bill. At the time of writing such an agreement has not been secured despite extensive negotiations between the two Governments.[44a]

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[42] L Maher, *op cit* n 12, 406-414.
[43] Sen Deb 1979, Vol 80, 418-419; H Reps Deb 1979, Vol 113, 567-569 and 730-741.
[44] Sen Deb 1979, Vol 80, 424.
[44a] But see now the Postscript to this article.

Those negotiations are directed at achieving an agreement establishing formal machinery for consultation and discussion prior to the institution of any Government investigation of alleged antitrust violations. Thirdly, as was the case with the 1976 Act, the Government's commitment to a legislative reaction reflected uneasiness about leaving the so-called problem for judicial solution. Finally, the statutory criteria governing the Attorney-General's exercise of discretion under the 1979 Act were seen by the Attorney-General as requiring consultation with his "political colleagues" as distinct from the "type of discretion exercised in other spheres, that is by the Attorney-General alone and without political considerations".[45]

D *Scheme of the 1979 Act*

(1) *Attorney-General's Discretion*: The Act, which came into effect on 15 March 1979, empowers the Attorney-General to declare by order in writing (a copy of which shall be published in the Commonwealth of Australia *Gazette*) that certain judgments of foreign courts given in proceedings instituted under an antitrust law shall not be recognised or enforceable in Australia[46] (hereinafter "a general order") and to declare in the case of judgments for a specified amount of money that for the purposes of recognition or enforcement the amount of the judgment shall be reduced to a specified amount[47] (hereinafter "a reduction order").

The power to declare a reduced amount for the purposes of recognition and enforcement is designed to cover "the possibility of a judgment for treble damages being unobjectionable to the extent that it provides only compensation for loss suffered".[48]

(2) *Definitions*: The Act provides that "antitrust law" means:

> any law of a kind commonly known as an antitrust law and includes any law having as its purpose, or as its dominant purpose, the preservation of competition between manufacturing, commercial or other business enterprises or the prevention or repression of monopolies or restrictive practices in trade or commerce.[49]

It provides that "foreign court" means:

> a court of a country outside Australia or of part of such a country but does not include the Judicial Committee of the Privy Council in the exercise of jurisdiction in respect of appeals from any court in Australia.[50]

The term "judgment" includes any decree or order.[51]

(3) *Pre-conditions for Exercise of Discretion*: Before the Attorney-General may make either kind of declaration he must be "satisfied" that:

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45 Sen Deb 1979, Vol 80, 425.

46 S 3(2). For notes on the Act see (1979) 53 ALJ 168; C Nakamura, "Antitrust: Australian Restrictions on Enforcement of Foreign Judgments" (1979) 20 Harvard International Law Journal 663.

47 S 3(2)(d).

48 Foreign Antitrust Judgments (Restriction of Enforcement) Bill 1979, *Explanatory Memorandum*.

49 S 3(1).

50 *Ibid.*

51 *Ibid.*

(i) the [foreign] court, in giving that judgment, exercised jurisdiction or powers of a kind or in a manner inconsistent with international law or comity and the recognition or enforcement of the judgment in Australia would or might be detrimental to, or adversely affect, trade or commerce with other countries, the trading operations of a trading or financial corporation formed within the limits of the Commonwealth or any other matters with respect to which the Parliament has power to make laws or to which the executive powers of the Commonwealth relate; or

(ii) it is desirable for the purpose of protecting the national interest in relation to trade or commerce with other countries, the trading operations of trading or financial corporations formed within the limits of the Commonwealth or any other matters with respect to which the Parliament has power to make laws or to which the executive powers of the Commonwealth relate that the judgment should not be recognized or enforceable in whole or in part in Australia.[52]

(4) *Effect of Declaration*: While a general order is in force the judgment shall not be recognised and is not enforceable in Australia.[53]

Where a reduction order is in force the judgment *may* be recognised or enforced in Australia as if the amount specified in the order were substituted for the amount of the judgment, and not otherwise.[54]

The making of a general order is a complete bar to recognition or enforcement regardless of whether, apart from the existence of such order, the judgment would be enforceable at common law or under one or more of the State or Territory Foreign Judgments Acts. However, the making of a reduction order does not involve recognition or enforcement of the judgment as such. It is merely facultative. It remains for the plaintiff to make out a case at common law or in accordance with one or more of the Foreign Judgments Acts.

E *The General Order of 6 June 1979*

On this date the Attorney-General made a general order under section 3 of the Act declaring that the following judgments shall not be recognised or enforceable in Australia:

(1) final judgment order on issues of liability given on 3 January 1979 in favour of the Westinghouse Electric Corporation against nine specified defendants;[55]

(2) a preliminary injunction in favour of Westinghouse against the same nine defendants.[56]

That general order recites that the proceedings had been instituted under antitrust laws of the United States of America, that four of the nine defendants are trading corporations formed within the limits of the Commonwealth and that the Attorney-General is satisfied that it is desirable for the purpose of protecting the national interest in relation to the trading

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52 S 3(2)(b).
53 S 3(3)(a).
54 S 3(3)(b).
55 Above n 15.
56 *Ibid.*

operations of the said trading corporations that each of the judgments should not be recognised or enforceable in Australia.

That order was published on 8 June 1979[57] and on that date the Attorney-General informed the Senate of the background to the order and went on to say:

> If the ... judgments were permitted to be enforced in Australia against the corporations referred to, the consequence could be of such an order that the very ability of those corporations to maintain their Australian operations would be endangered. Moreover, the positions which the corporations collectively occupy in the Australian economy, particularly in relation to the marketing of Australian resources, is such that it is in the national interest that their ability to continue those operations be protected from such a liability under a law of a foreign state. This is particularly so where, as here, the law is being applied to conduct of Australian corporations outside that foreign state contrary to the expressed views of the Australian Government as to what is appropriate in that regard.[58]

F *Was the 1979 Act Necessary?*

The concern of the Australian defendants, that a limited appearance in the Chicago suit would have been enough to enable Westinghouse to satisfy one of the Australian conflicts of laws requirements for recognition and encorcement of foreign judgments in Australia, namely voluntary submission to the jurisdiction of the Chicago Court, seems misplaced. Even if an Australian court, faced with an enforcement action by Westinghouse, were to prefer the more liberal approach hinted at in *Henry* v *Geopresco*[59] there are several reasons why, apart from the 1979 Act, such an action could be expected to fail. First, there is the likelihood that such an action would attract an intervention by the Commonwealth Attorney-General to argue that government policy required such an action to fail. Such authority as there is indicates that in this area an Australian court, rightly or wrongly, would be inclined to defer to the foreign policies of the executive as urged by the Attorney-General.[60] Secondly, even without such an intervention the Australian defendants would no doubt argue vigorously that, according to Australian conflicts of laws rules and international law, the Chicago Court lacked jurisdiction.[61] Thirdly, the Australian-based defendants would no

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[57] Commonwealth of Australia *Gazette*, No S105, 8 June 1979; Sen Deb 1979, Vol 81, 2930; Note, (1979) 53 ALJ 685. As a result of the settlement in those proceedings the Attorney-General, on 22 June 1981, revoked the general order he had made on 6 June 1979: Commonwealth of Australia *Gazette*, No G28, 14 July 1981. See Sen Deb 1981, Vol 91, 1071.

[58] Sen Deb 1979, Vol 81, 2931.

[59] [1975] 2 All ER 702.

[60] *The Fagernes* [1927] P 311; *Rio Tinto Zinc Corporation* v *Westinghouse Electric Corporation* [1978] AC 547, 616 *per* Lord Wilberforce, 630 *per* Viscount Dilhorne, 651 *per* Lord Fraser of Tullybelton; *Gulf Oil Corp* v *Gulf Canada Ltd* (1980) 111 DLR (3d) 74, 92.

[61] There is an enormous literature on this subject. A sampling is contained in L Maher, *op cit* n 12, 419 (n 63). Reference should also be made to G Triggs, "Extraterritorial Reach of United States Antitrust Legislation: The International Law Implications of the Westinghouse Allegations of a Uranium Producers' Cartel" (1979) 12 Melb U L Rev 250; K Ryan, "The International Application of United States Antitrust Legislation", Paper presented to AULSA Conference, Perth, August 1978;

doubt also argue that there were good public policy reasons why enforcement should be denied. Courts in Canada[62] and the United Kingdom[63] had refused to facilitate the taking of evidence in those countries in the cartel litigation for reasons which an Australian court might be expected to find persuasive. That being the case, it is almost inconceivable that an Australian court would enforce a judgment arising from proceedings so frowned upon in the interlocutory stages. Finally, even if all else failed there is the defence of non-enforcement of penal judgments.[64] There does not appear to be any direct authority outside the United States supporting the proposition that at least two-thirds of a treble damages judgment is penal in character. However, the force of an argument to that effect is abundantly clear and the Australian Government has constantly referred to the "penal" quality of treble damages.[65]

3 FALL-OUT

A *The Offending Judgments*

The circumstances leading up to the judgments involved the following steps. In February 1977, a formal default judgment was entered against each of the nine corporations.[66] In August 1977 Westinghouse applied to the District Court to implement the default by seeking the entry of final default judgment as to liability and the entry of detailed findings of fact and conclusions of law. Westinghouse's application was resisted by the eighteen appearing defendants principally on the basis that the decision of the Supreme Court of the United States in *Frow* v *De La Vega*[67] prohibited

K Ryan, "The Impact of Overseas Antitrust Laws Upon the Marketing of Mineral Exports" (1979) 2 Australian Mining and Petroleum Law Journal 121; G Bell, "International Comity and the Extraterritorial Application of Antitrust Laws" (1977) 51 ALJ 801; B Hawk (ed), *International Antitrust* (Law and Business, Inc, New York, 1979), Part 5; F Rowe, F Jacobs and M Joelson (eds), *Enterprise Law in the 80's* (American Bar Association, Chicago, 1980); M Joelson, "Challenges to United States Foreign Trade and Investment: Antitrust Law Perspectives" (1980) 14 The International Lawyer 103; P O'Keefe and M Tedeschi, *Law of International Business in Australia* (1980) Ch 8.

[62] *Re Westinghouse Electric Corp and Duquesne Light Co* (1977) 78 DLR (3d) 3; *Gulf Oil Corp* v *Gulf Canada Ltd* (1980) 111 DLR (3d) 74.

[63] *Rio Tinto Zinc Corporation* v *Westinghouse Electric Corporation* [1978] AC 547; see note by P Sutherland (1978) 5 Mon U L Rev 76; Note, (1978) 49 British Yearbook of International Law 282; S Isaacs, "The Westinghouse Case" (1978) 75 The Law Society's Gazette (London) 101. One commentator has argued as follows: ". . . I suggest that there may be considerable merit in an argument that the enforcement of any overseas anti-trust judgment based on conduct by Australian companies which is expressly countenanced by *our* trade practices laws would in fact be contrary to our public policy." A Browne, "Comment on the Impact of Overseas Antitrust Laws Upon the Marketing of Mineral Exports" (1979) 2 Australian Mining and Petroleum Law Journal 130, 133. This is a reference to s 51(2)(g) of the Trade Practices Act 1974 (Cth) which excludes certain conduct in the export trade from the prohibitions of that Act.

[64] Above n 37.

[65] In his Press Release 73/80 of 5 October 1980 Attorney-General Durack made this point in the following terms: "The 'treble damages' remedy is penal in its purpose and effect. Private antitrust suits serve to supply an ancillary force of private investigators to supplement the Department of Justice's law enforcement. In the literature of United States antitrust law, plaintiffs in such suits are referred to as 'private Attorneys-General'."

[66] *In Re Uranium Antitrust Litigation* 473 F Supp 382, 385 (ND Ill, 1979).

[67] 82 US 552 (1872).

the entry of judgment against any defaulting defendants until a full trial on the merits had occurred. Judge Prentice Marshall in the District Court granted the first request but denied the second.[68] On 12 January 1979 Westinghouse moved *ex parte* for a temporary restraining order and for a preliminary injunction seeking to require the defaulting to give twenty days prior notice to the Court of any transfers of assets in excess of $US10,000 out of the United States. Following a hearing on 24 January 1979 the District Court entered the preliminary injunction sought by Westinghouse.[69]

After the 1979 Act came into operation the District Court made further orders enjoining the transfer of funds by defendants and requiring them to deposit funds in a trust account with the Court, but none of these orders was made the subject of an order under the 1979 Act presumably because they only affected transfers of funds out of the United States by one of the non-Australian defaulting defendants.[70] On 3 January 1979 the District Court denied motions filed by the appearing defendants seeking to postpone any hearing on damages as to the default until after the trial on the merits[71] and on 15 February 1980 the United States Court of Appeals for the Seventh Circuit dismissed appeals against the entry of the default judgment and the injunctions but stayed the determination of damages to be awarded against the defaulters until after a trial on the merits.[72] There were other interlocutory steps affecting the four Australian-based defendants and the Australian Government. Even without the intercession of the Australian Government, those four defendants had the indirect benefit of extensive argument on the major issues put to the District Court by the appearing defendants.[73]

B *Australia's Intervention in the Proceedings*

(1) *Default Proceedings*: In a letter dated 25 May 1979, the then Australian Ambassador to the United States, Mr Alan Renouf, wrote to the District Court in response to an invitation which Judge Marshall had issued seeking, for the Court's benefit, a statement of the Australian Government's attitude to the production of documents for the litigation.[74] The Ambassador's letter was accompanied by copies of the 1976 Act, the second reading speech on the original 1976 Act, a large amount of material relating to the Australian Government's refusal to consent to the identification or produc-

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[68] Above n 17.

[69] *Ibid.*

[70] Large amounts of money were transferred out of the United States: *In Re Uranium Antitrust Litigation* 617 F 2d 1248 (7th Cir, 1980).

[71] 473 F Supp 382 (ND Ill, 1979). On 7 November 1979 Judge Marshall made an order compelling several of the parties to produce foreign-based documents: 480 F Supp 1138. In a footnote to this decision Judge Marshall stated (at 1142): "We have delayed this ruling in the hope that the question here decided might be amicably resolved among the parties to these actions and the foreign governments involved (particularly Canada and Australia). . . . But our hope has turned to despair. This litigation must proceed".

[72] *In Re Uranium Antitrust Litigation* 617 F 2d 1248 (7th Cir, 1980).

[73] *Eg Memorandum of Gulf Oil Corporation and Gulf Mineral Canada Limited in Support of their Motion for Summary Judgments* . . . 11 April 1980. Copy in author's possession.

[74] *In Re Uranium Antitrust Litigation* and *In Re Tennessee Valley Authority Uranium Antitrust Litigation* Joint Pretrial Order No 5, 27 February 1979, para 7. Copy in author's possession.

tion of documents in the litigation, and a copy of a Diplomatic Note delivered to the United States State Department on 23 March 1978.[75] That Note recites the history of Australian Government involvement in uranium marketing and states that "the arrangements which were made by Australian uranium producers for the marketing of Australian uranium were made with the approval of the Australian Government".[76] The Australian Government did not file an *amicus curiae* brief in the District Court default proceedings but the United Kingdom Government did and it is doubtful that an Australian submission would have added to the concise and well-argued United Kingdom brief.[77]

(2) *Appeal*: On 21 October 1979 the Attorney-General announced that the Commonwealth Government had been granted leave by the United States Court of Appeals for the Seventh Circuit to present submissions in the appeal by the appearing defendants against the decision of Judge Marshall in the District Court permitting an assessment of damages prior to the trial on the merits.[78] The Attorney-General said that the Commonwealth Government had presented the submissions to the Court for two reasons—the matter was vital to Australia's national interest and important principles of comity were involved. The Attorney-General said that the Government was making the submissions on its own initiative and not on behalf of the Australian companies involved in the default judgment proceedings.

The Australian Government's first *amicus curiae* memorandum filed in the appeal emphasised the following matters:

- Recent United States Courts of Appeal decisions strongly suggested that consideration of foreign policy, reciprocity, comity and limitation of judicial power will override antitrust enforcement policy.[79]
- The Australian Government had controlled the exportation of uranium since 1961.[80] Following the 1964 embargo upon the enrichment in the United States of foreign uranium for domestic use and the effect which that policy had on the world market for uranium, it was the policy of the Australian Government that producers should engage in discussions with uranium producers of other countries, outside the United States, with respect

[75] The letter was among a number of documents released by the Australian Attorney-General on 5 October 1980 in conjunction with his Press Release 73/80.

[76] Note No 13/78 from the Australian Embassy Washington to the State Department, 6.

[77] *Amicus Curiae Brief of the Government of the United Kingdom of Great Britain and Northern Ireland*, August 3, 1979. Copy in the author's possession. The Australian and United Kingdom Governments were represented by the same attorneys.

[78] Press Release by Attorney-General 78/79, 21 October 1979.

[79] *Timberlane Lumber Co* v *Bank of America* 549 F 2d 597 (9th Cir, 1976); *Mannington Mills Inc* v *Congoleum Corp* 595 F 2d 1287 (3rd Cir, 1979); *Dominicus Americana Bolus* v *Gulf & Western Industries Inc* 473 F Supp 680 (SDNY, 1979). In *Timberlane* and *Mannington* the parties were all United States corporations.

[80] Customs (Prohibited Exports) Regulations, reg 11 and Item 23 of the Ninth Schedule. See Statutory Rules No 117 (1961). In 1978 the Commonwealth Government announced a new scheme for the orderly development of the uranium export trade following a review which had fully examined the implications of foreign antitrust laws: see Statement of Minister for Trade and Resources, H Reps Deb 1978, Vol 109, 2907.

to the stabilization of prices in the world market which, as a result of the United States Government decision, excluded the United States market.[81]

- Australia's national interest was affected by Judge Marshall's decision because:

(a) four of the defaulting defendants were Australian companies;[82]

(b) the damages claimed and potentially recoverable were enormous, the appearing defendants had denied that there had been a violation of the law and that Westinghouse had sustained any damage as a result of any alleged violation;

(c) the Australian defendants collectively occupied a significant position in the national economy and recovery or attempted enforcement would therefore have a very serious and detrimental effect;

(d) Australian reliance on substantial mineral development and exports is such that the viability of new uranium projects will depend on securing long-term reliable export contracts;

(e) the assets of the Australian companies in the United States and countries other than Australia would be subject to enforcement of a judgment before a trial on the merits;

(f) the existence of the judgment would seriously affect foreign investment;

(g) the Australian Government was compelled by the force of circumstances to act because the Australian companies, on the advice of counsel, had declined to enter an appearance:

> The Australian companies are private companies with independent interests. The Australian Government has taken no part in decisions of those companies in the proceedings nor could it direct them as to any course of action in this litigation.[83]

The Memorandum goes on to refer to the 1979 Act and to the *penal* nature of the proceedings. Moreover, it recites that:

> The Australian Government is concerned that the effect of a judgment for damages against the Australian defendants and the continuing enforcement of that judgment may constitute a serious irritant of

[81] The embargo was imposed in 1964 pursuant to s 16 of the Private Ownership of Special Nuclear Materials Act 1964 (US).

[82] Two of the four defendants, CRA and MKU, were and are foreign-owned. As to the ownership profile of CRA see H Reps Deb 1981, Vol 121, 1156. It is believed that Pancontinental is substantially foreign-owned.

[83] The Australian Government (through the Australian Atomic Energy Commission) owns 41.6% of MKU. The High Court sustained the legality of that shareholding in *Kathleen Investments (Australia) Ltd* v *Australian Atomic Energy Commission* (1977) 139 CLR 117. For details of Commonwealth Government loans to MKU see Sen Deb 1980, Vol 84, 153. Elsewhere the writer has criticised the over-simplified description by the Australian Government of the four Australian-based defaulting defendants as "Australian companies": L Maher, *op cit* n 12, 419. The uranium cartel was very much an enterprise of transnational corporations. The difficulties which are created by trying to apply traditional domestic legal techniques in dealing with transnational corporations are illustrated, for example, by the decision of the High Court of Australia in *Commonwealth Aluminium Company* v *Commissioner of Taxation* (1980) 143 CLR 646 and the decision of the House of Lords in *Lonrho Ltd* v *Shell Petroleum Co Ltd* [1980] 1 WLR 627.

indefinite duration in bilateral relations between Australia and the United States of America.

(3) *Jurisdiction and Sanctions Motions*: On 8 June 1980 the Attorney-General announced that the Australian Government had filed a second *amicus curiae* brief, this time in the District Court. Four of the appearing defendants had filed motions contending that the Court lacked, or alternatively should refrain from exercising, jurisdiction. At about the same time Westinghouse and the TVA had moved the Court to impose sanctions against certain defendants for failure to produce documents whose production was prohibited by the 1976 Act.[83a] This second brief repeated the history of Australian involvement and concern and then argued in detail why the Court should decline to take or exercise jurisdiction and not impose sanctions on the defendants because of their compliance with foreign laws. The brief reveals documents not previously published in Australia and is a good deal more candid about the existence of the cartel and Australian participation in it than anything which the Australian Government had previously published.

(4) *Comment*: The first brief is at best a very meagre document and, at worst, it is misleading in its failure to make mention of the 1976 Act, of the orders made under that Act and of the Australian Government's substantial shareholding in the defendant MKU. It is also noteworthy that, at the time the brief was made public, documents relied upon in it had not previously been made available for public scrutiny in Australia.

The second brief is a more impressive document no doubt due in part to the fact that the Australian Government had engaged one of Washington's leading antitrust law firms—Arent, Fox, Kintner, Plotkin & Kahn, to prepare it.[84] In releasing the text of the brief the Attorney-General drew attention to a letter from the then United States Associate Attorney-General, John Shenefield, to the District Court urging that Court to give "appropriate deference and weight" to the views and representations advanced by foreign Governments.[85]

Whilst the Attorney's public announcements have emphasised the Shenefield letter it is significant that the United States Government was more than a little peeved at the Australian Government's determined use of the 1976 Act. There seems little doubt that the United States Government felt constrained to intervene in the proceedings in part because the Australian Government was preventing a United States national, resident in Australia, from testifying in the Grand Jury investigation and the Westinghouse proceedings.[86] There is also a disappointing selectiveness about the way in which the Australian Government has made use of official United States Government documents and decisions which appear to support the official

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[83a] Production had been ordered on 7 November 1979. Above n 71.

[84] Sen Deb 1981, Vol 89, 1524.

[85] The full texts of the brief and letter were attached to the Attorney-General's Press Release 31/80, 8 June 1980. It appears that the proceedings were settled before a decision had been given on these motions.

[86] The person concerned, who was willing to testify, was an officer of the Getty Oil Company. His testimony was sought in relation to documents located in the United States: United States *Aides Memoire* of 6 and 7 February 1978 annexed to Attorney-General's Press Release 73/80, 5 October 1980.

Australian position since the dispute arose. The most striking illustration of this has been the way in which the Australian Government has repeatedly pointed to the outcome of the Grand Jury investigation (which the Australian Government deliberately hindered) as supporting the denial of antitrust liability. The Grand Jury did indict one of the major cartel participants, the Gulf Oil Corporation, but the prosecution aborted when Gulf pleaded "no contest" and was fined $US50,000. What the Australian Government's statements fail to acknowledge is that the refusal of the Justice Department to institute criminal proceedings was despite a unanimous departmental staff recommendation to the contrary. It appears that the Justice Department decision to be content with Gulf's "no contest" plea was directly attributable to the involvement in the cartel of a Canadian subsidiary of Gulf and very impassioned diplomatic efforts by the Canadian Government to minimise the impact of the Grand Jury investigation.[87]

The argument that the embargo, above all else, is proof positive that the cartel did not cause the enormous rise in uranium oxide prices in the United States is an over-simplification. If the situation had been so obvious and uncomplicated a question arises as to why the defaulting defendants were not prepared simply to put Westinghouse to the proof. However, there is evidence in the cartel's own documentation that the ending of the embargo was considered likely and that the long term price fixing and production rigging arrangements were deliberately aimed, in part, at affecting future United States domestic prices and supplies of uranium oxide. Certain United States utilities entered into future purchase contracts with cartel members.

4 ULTIMATE SAFEGUARDS?

A *Complementary State Legislation*

In July 1980 the Standing Committee of Commonwealth and State Attorneys-General agreed unanimously on the need for State and Territory legislation to prevent enforcement of objectionable judgments of foreign courts.[88] This followed a request by Senator Durack that the State and Territory Attorneys-General introduce legislation complementing the 1979 Act. At the date of writing no such legislation has been enacted.

More significantly, however, on several occasions in 1980 Senator Durack referred to the likelihood of a third Australian legislative response modelled on the United Kingdom Protection of Trading Interests Act 1980. In April 1980 Senator Durack took Australia's case to an international forum when he presented a paper at a meeting of Commonwealth Law Ministers in Barbados in which he argued that judgments for multiple damages in private proceedings should be treated as penal in character for the purpose of recognition and enforcement. The Attorney-General noted that although the 1979 Act "would preclude enforcement of the Westinghouse judgment

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[87] D Burnham, "Data Show US Rejected Effort to Prosecute a Uranium Cartel" the *New York Times*, 4 December, 1979. See also *Confirmation Hearings on John H Shenefield, Associate Attorney-General*: Senate Committee on the Judiciary, 96th Cong, 1st and 2nd Sess (1979-1980), 28; "Performance of Antitrust Official Sharply Questioned by Senators" *New York Times*, 8 December 1979.

[88] Attorney-General Durack's Press Release 41/80, 6 July 1980.

in Australia . . . the companies concerned have assets in other countries including those within the Commonwealth".[89] In May 1981 amendments to the 1979 Act modelled on part of the 1980 United Kingdom Act, were introduced in the Senate.

B *"Clawback"—UK Style*

The long title of the 1980 United Kingdom Act is:

> An Act to provide protection from requirements, prohibitions and judgments imposed or given under the laws of countries outside the United Kingdom and affecting the trading or other interests of persons in the United Kingdom.

In summary, it provides as follows:

(1) The Secretary of State for Trade is empowered, where he considers that measures taken or proposed to be taken under the law of any overseas country are detrimental to the trading interests of the United Kingdom, to promulgate subordinate legislation requiring a person carrying on business in the United Kingdom to give notice to him of any requirement or prohibitions imposed or threatened to be imposed on that person pursuant to any such "measure", or directing any person carrying on business in the United Kingdom not to comply with any such requirement or prohibition in order to avoid damage to the trading interests of the United Kingdom.[90]

(2) Where a court, tribunal or authority of an overseas country imposes on a person in the United Kingdom a requirement for the production of a commercial document not within the territory or jurisdiction of that country or the furnishing of any commercial information or a requirement for publication of any such document or information, the Secretary of State may give directions for prohibiting compliance with such a requirement. Such a requirement is considered to be "inadmissible" if:

> (a) it infringes United Kingdom jurisdiction or prejudices United Kingdom sovereignty;
> (b) compliance would be prejudicial to the security of the United Kingdom or its foreign relations;
> (c) it is made otherwise than for the purposes of civil or criminal proceedings which have been instituted in the overseas country; or
> (d) it requires a person to state what documents relevant to any such proceedings are or have been in his possession, custody or power or to produce for the purposes of any such proceedings any documents other than particular documents specified in the requirement.[91]

(3) The Act prohibits registration or enforcement of an overseas judgment being:

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[89] The paper is referred to in the Attorney-General's Press Release 25/80, 1 May 1980.

[90] S 1(2). See note by G Marston (1980) 14 Journal of World Trade Law 461; G McFarlane, "Fair Trading at Home and Away" (1980) 124 Sol J 419; E Gordon, "Extraterritorial Application of United States Economic Laws: Britain Draws the Line" (1980) 14 The International Lawyer 151; A Lowe, "Blocking Extraterritorial Jurisdiction: The British Protection of Trading Interests Act, 1980" (1981) 75 The American Journal of International Law 257 and the reply to Lowe by A Lowenfeld, *ibid* 629.

[91] S 2.

(a) a judgment for multiple damages;
(b) a judgment based on a provision or rule of law as specified; or
(c) a judgment on a claim for contribution in respect of damages awarded by either of those types of judgments.[92]

(4) The Act permits a United Kingdom party which has paid a multiple damages award, to recover or "clawback" from the party in whose favour the judgment was given, "so much of the amount . . . as exceeds the part attributable to compensation". Recovery is not permitted where the defendant:

(a) is an individual who was ordinarily resident in the overseas country at the time when the proceedings in which the judgment was given were instituted;
(b) is a body corporate which had its principal place of business there at that time;
(c) carried on business in the overseas country and the proceedings in which the judgment was given were concerned with the activities exclusively carried on in that country.[93]

C *"Clawback"—Australian Style*

The 1981 Australian Bill

> provides a new cause of action to an Australian defendant who has had a judgment in proceedings instituted under an antitrust law of a foreign country enforced against him outside Australia.[94]

The new action is available where a general order has been made by the Attorney-General under the 1979 Act denying recognition and enforcement of a foreign antitrust judgment and the plaintiff in the foreign action has recovered, in a country outside Australia, an amount pursuant to that judgment.[95] If those pre-conditions exist the foreign plaintiff including, in the case of a corporation, a "body corporate that is related to the plaintiff" is liable to pay to the Australian defendant in the foreign action an amount equal to that recovered by the plaintiff.[96] A separate provision deals with the situation where the Attorney-General has made a reduction order under the 1979 Act. For the purpose of the scheme a person is an Australian if the person is an Australian citizen, a company incorporated or deemed to be incorporated under State or Territory law or a government or governmental authority. The cause of action, which can only be resorted to in the Federal Court of Australia, is also available to a corporation that is related to the Australian corporate defendant in the foreign action.[97] Provision is also made for enforcement in Australia of a clawback judgment in another country where there is an agreement between Australia and the country for reciprocal enforcement of clawback judgments.[98]

When introducing the Bill, the Attorney stated that whilst the Westinghouse suit had been settled there remained a "jurisdictional threat to our

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92 S 5.
93 S 6.
94 Foreign Antitrust Judgments (Restrictions of Enforcement) Amendment Bill 1981, *Explanatory Memorandum*, para 1.
95 Cl 5 (proposed s 4(1)).
96 *Ibid* (proposed s 4(2)).
97 *Ibid* (proposed s 4(8)-(11)).
98 *Ibid*. (proposed s 5).

export and other trading policies" from private antitrust suits which justified further protection of those policies.[99] Whether or not the 1981 amendments, if enacted, will promote Australia's trading interests is open to question. It has been argued that the clawback technique is too time-consuming to be effective and that it could provoke the United States to respond by passing a reverse or double clawback statute.[1]

5 "A BILLION DOLLAR CRAPSHOOT"

Events in late 1980 and 1981 resulted in settlement of the Westinghouse litigation. On 23 December 1980 one of the eighteen United States defendants in the Chicago suit, Homestake Mining Company, announced that it had settled Westinghouse's claim against it. Homestake, whilst denying liability, agreed to deliver 450,000 pounds of uranium to Westinghouse at a price of $US14 per pound and to make a cash payment of $US2 million. Homestake was influenced by the two great institutional factors of time and money. At one stage it was spending $US170,000 per month in legal fees and its executives' time was being diverted from productive activities.[2] Less than a month later another United States defendant, Getty Oil Company, announced a settlement with Westinghouse under which Getty, also denying liability, agreed to pay $US13 million. In addition to the difficulties already mentioned earlier concerning its inability to comply with both United States and Australian law, Getty also emphasised the extremely high legal costs and diversion of valuable executive time which continuation of the litigation involved.[3] Next to quit was Gulf Oil Company. On 28 January 1981 it announced an even larger settlement pay-out to Westinghouse involving $US25 million in cash and the assumption by Gulf of complete responsibility for delivery of up to 13 million pounds of uranium, currently valued at approximately $US350 million, to six of Westinghouse's utility customers. Gulf's associate general counsel was reported as saying that he estimated Gulf's legal costs in the trial and subsequent appeals would have exceeded the $US25 million cash settlement. Gulf had defied the District Court's order to produce certain documents because disclosure would involve a violation of Canadian law. He also stressed the uncertainty of the jury trial in the following terms:

> In my vernacular, we were looking at a billion dollar crapshoot, with a group of people off the street, deciding who owed whom a billion dollars on the basis of some extremely complex issues.[4]

More significantly from the Australian point of view was the announcement on 18 March 1981 that three of the four Australian-based defendants had settled with Westinghouse. CRA, MKU and Pancontinental agreed to

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[99] Sen Deb 1981, Vol 90, 3067.

[1] T Dunfee, "Uranium Shows the Need for a Trade Law Treaty" *Sydney Morning Herald*, 27 March 1981.

[2] *Wall Street Journal*, 24 December 1980; *San Francisco Chronicle*, 24 December 1980; *Nuclear Fuel*, 5 January 1981, 1.

[3] Above n 12; *Business Week*, 26 January 1981, 28.

[4] The *New York Times*, 30 January 1981; *Wall Street Journal*, 30 January 1981; the *New York Times*, 12 March 1981. Gulf also faced difficulties like those confronting Getty.

make an undisclosed cash payment (later revealed as amounting to more than $US10 million) as part of a settlement involving CRA's London owner Rio Tinto-Zinc Corporation Ltd, and other defendants. Both CRA and MKU continued to deny any liability or wrongdoing and did not waive their jurisdictional objection to the Chicago suit. It was announced that the agreement was conditional on completion of certain additional steps including the obtaining of certain Governmental consents and the entry of a Court Order dismissing the antitrust case against CRA and MKU. In announcing the settlement the companies stated that they were:

> influenced by the possible constraints which could be imposed on the future conduct of their business, the large amounts of executive time involved and the substantial legal costs due to the litigation.[5]

The Attorney-General announced on the same day that the settlement agreement satisfied Australian national interest considerations.[6] Several weeks later Queensland Mines Ltd, announced that it had changed its attitude and was joining in the settlement. It indicated a willingness to contribute $A894,000.[7] The settlements appear to have been prompted by some divergence between the interests of the Australian-based defendants and the Australian Government deriving from the depressed state of the international uranium market, the dominant role of the United States in that market and the concern which CRA, in particular, felt for its foreign assets and the severe limitations which the case created for it in transacting business in the United States.[8]

6 CONCLUSION

Looking back it is not difficult to appreciate that the decision of the Australian-based companies to boycott the proceedings was bad tactically.

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[5] Joint Press Release by CRA Limited and Mary Kathleen Uranium Ltd, 18 March 1981. See also Statement by A J Grey, Chairman of Pancontinental Mining Limited, 18 March 1981. The announcements did not come as a complete surprise. It was known that settlement negotiations had recently taken place: *National Times*, January 25-31 1981; the Australian *Financial Review*, 2 February 1981, 12 February 1981. There were suggestions in 1979 that Westinghouse had approached the Australian Government with a settlement proposal: see the Australian *Financial Review*, 23 October 1979. The Government denied that any such approach had been made: Sen Deb 1980, Vol 84, 148. At the CRA annual meeting on 5 May 1981 it was announced that CRA would contribute $6.8 million and that its subsidiary MKU would contribute $870,000. Pancontinental agreed to pay $US3 million. See also *The Rio Tinto-Zinc Corporation Limited Annual Report and Accounts 1980* 13-14. The settlement also disposed of actions which an RTZ subsidiary had brought in the Supreme Court of Ontario in September 1979. Less than a fortnight later a Westinghouse subsidiary announced that it had sold its interest in a uranium project in Western Australia: the Australian *Financial Review*, 27 March 1981; the *Age*, 27 March 1981.

[6] Press Release by Attorney-General 18/81 of 18 March 1981. For some very critical editorial comment on the settlement see the Australian *Financial Review*, 23 March 1981 and the *Age*, 24 March 1981. For some amplification of the Government's attitude to the settlement see H Reps Deb 1981, Vol 123, 3531, 3542; Sen Deb 1981, Vol 90, 3305 and Sen Deb 1981, Vol 91, 810.

[7] The *Age*, 14 May 1981.

[8] Certain CRA executives were apparently reluctant to visit the United States for fear of being subjected to court process: the *Age*, 7 May 1980. CRA has significant commercial interests in the United States: the Australian *Financial Review*, 19 March 1981; 6 May 1981. The United States embargo was lifted in 1979. The United States has the world's largest market and the Chairman of CRA readily acknowledged that settlement of the Westinghouse case would enable CRA to get into that market. See L Maher, "Uncle Sam Exports His Laws" (1982) 54 The Australian Quarterly 4.

Given the history of the uranium cartel and, in particular, Australia's official participation in it, the four companies could reasonably have expected the Australian Government to legislate to protect them from any judgments which Westinghouse might have obtained. The Australian Government moved with great haste in enacting the 1976 Act following representations by the Australian Uranium Producers' Forum,[9] and again responded quickly to the default judgments early in 1979. The companies would have been scarcely worse off in practical terms (though, because of the high legal fees, they may have been poorer) had they appeared under protest to contest the District Court's threatened assumption of jurisdiction. The Australian Government could have intervened to support them at that stage. The climate of such an intervention would have lacked the storm clouds which the boycott subsequently provoked. Had the companies lost the jurisdictional point they could have courteously indicated their intention not to take any further part in the proceedings, and no doubt would then have appealed to the Australian Government to take the matter up at a diplomatic level.

As it was, the timing of the foreign governments' intervention (rightly or wrongly) simply added insult to the United States courts' feelings of injury at the boycott. The Court of Appeals scathingly described the governments as "surrogates" who "subserviently presented the absent defendants' " case against the exercise of jurisdiction.[10] According to the Court those defendants had behaved "contumaciously".[11] The boycott alone could not allay the fears which CRA had about attachment of its United States and other foreign assets. By allowing a default judgment to be obtained the absent foreign defendants lost the advantage of time in which to appeal against an adverse interlocutory decision on jurisdiction and to shift their assets out of the jurisdiction.[12] By staying away those defendants do not appear to have avoided incurring substantial legal expenses. The return for such an investment might have been more tangible had there been no boycott.

One aspect of the settlement which has yet to be explained is why the Australian Government sanctioned it. It requires a very elastic notion of "national interest" to reconcile, on the one hand, the Government's rhetoric about sovereignty and its programme of legislative resistance to Westinghouse and, on the other hand, its willingness to approve a settlement which, whilst it involved an express denial of liability, did result in the payment of a very large amount of money by the four companies. If the Government was really determined to live up to its rhetoric and thwart Westinghouse it should have prevented the four companies from buying out the Westinghouse claims against them.[13] The fact that the Australian Government apparently allowed the companies to dictate a settlement indicates that the national interest was subordinated to pragmatic commercial considerations.

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[9] H Reps Deb 1976, Vol 102, 3704.

[10] 617 F 2d 1248, 1256 (7th Cir, 1980).

[11] *Ibid* 1255.

[12] Judge Marshall's orders came too late to prevent some large-scale repatriation of funds. See n 70 above.

[13] To the extent that the settlement was to be effected by transfer of funds out of Australia the necessary approval required by the Banking (Foreign Exchange) Regulations could have been withheld.

Whatever else the Australian Government's decision to strengthen the 1979 Act *after* it had approved the Westinghouse settlement indicates, it clearly signals the Government's concern that similar international conflicts can be expected to arise in the 1980's. Throughout early 1981 Australia denounced antitrust proceedings instituted in the United States District Court in Pittsburgh by the Conservation Council of Western Australia against two American mining companies in relation to their activities in Western Australia.[14] The Australian Government also monitored steps taken in a United States District Court and in the Federal Maritime Commission in relation to Pacific shipping conferences.[15] There is little evidence to suggest that United States courts will retreat entirely from assumption of jurisdiction where some extra-territorial application is sought to be given to the antitrust laws. In a number of recent decisions Federal Courts have, however, re-examined this vexed question in an apparent attempt to bring some measure of certainty to it. In *Timberlane Lumber Co* v *Bank of America*[16] the Court of Appeals for the Ninth Circuit chose a balancing test to determine whether extra-territorial jurisiction should be exercised. A similar approach was adopted by the Court of Appeals for the Third Circuit in *Mannington Mills Inc* v *Congoleum Corporation*.[17] In the latter case the Court identified the following factors as relevant for that purpose:[18]

1 Degree of conflict with foreign law or policy;
2 Nationality of the parties;
3 Relative importance of the alleged violation of conduct [in the United States] compared to that abroad;
4 Availability of a remedy abroad and the pendency of litigation there;
5 Existence of intent to harm or affect American commerce and its foreseeability;
6 Possible effect upon foreign relations if the Court exercises jurisdiction and grants relief;
7 If relief is granted, whether a party will be placed in the position of being forced to perform an act illegal in either country or be under conflicting requirements by both countries;
8 Whether the Court can make its order effective;
9 Whether an order for relief would be acceptable [in the United States] if made by the foreign nation under similar circumstances;
10 Whether a treaty with the affected nations has addressed the issue.

This formula was described as "fundamentally unworkable" by the Attorney-General in his second reading speech on the 1981 Bill.[19]

The need for a bilateral agreement on extra-territorial application of United States and Australian antitrust laws is obvious. The major stumbling block, according to the Australian Government, has been the inability of the parties to reach an agreement on a process of advance governmental negotiations which would apply equally to private antitrust suits. Australia's

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[14] *The Conservation Council of Western Australia, Inc* v *Aluminium Company of America (ALCOA) and Reynolds Metals Co* 518 F Supp 270 (WD Pa, 1981).
[15] H Reps Deb 1981, Vol 123, 3306.
[16] 549 F 2d 597 (9th Cir, 1976).
[17] 595 F 2d 1287 (3rd Cir, 1979).
[18] *Ibid* 1297-1298.
[19] Sen Deb 1981, Vol 90, 3073.

negotiating position cannot be seen to have been strengthened by the Government's willingness to sanction the Westinghouse settlement. In mid-1981 President Reagan indicated that he would institute a thorough review of the extra-territoriality of United States antitrust laws.[20]

In August 1981 the Commonwealth Attorney-General told the annual meeting of the American Bar Association that: "While private legal suits, uncontrolled by adequate Government intervention, remain, there will be little chance of solution".[21] The Association passed a resolution at the meeting recommending to the President and Congress:

- that any independent federal regulatory agency shall take a law enforcement or regulatory action which the President considers involves important potential conflicts of law and policy between the United States and foreign nations

(a) involving non-national individuals or enterprises, including foreign subsidiaries of United States parent enterprises, located outside of the United States, or

(b) involving the issue of subpoenas or investigative requests for service outside the United States (or seeking information located outside of) only after notifying and allowing a period of two weeks for consultations with the United States Department of State or whichever other agency the President considers appropriate, except in unusual circumstances;

- that in the light of those consultations, when the President determines it to be appropriate, Foreign Governments involved will be given an opportunity to consult with the United States Government officials during a two week period to allow the views of those Governments to be taken into account before the law enforcement or regulatory action is taken;
- that each agency should nominate an official to consult in the preparation of presidential guidelines about actions which require notification and consultation and to establish and operate internal procedures to ensure that the appropriate notification is given.[22]

The Association also resolved that a bi-partisan commission consisting of twenty members including Senators, Members of the House of Representatives, members of the executive branch and members of the private sector should be appointed to look into the international application of United States antitrust laws. The Commission should report in eighteen months time and, among other aspects, should examine:

- the application of the United States antitrust laws in foreign commerce;
- the effect of the application of the United States antitrust laws on United States relations with other countries;
- the jurisdiction and scope of the application of the United States antitrust laws to foreign conduct and foreign parties; and
- the appropriate mechanisms by which the courts and antitrust enforcement agencies may be informed of and may take into account, the foreign relations implications of antitrust enforcement actions.[23]

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20 The *Age*, 2 July 1981.
21 Press Release by Attorney-General 51/81 of 13 August 1981.
22 *Ibid.*
23 Press Release by Attorney-General 52/81 of 17 August 1981.

It remains to be seen whether the Australia-United States conflict engendered by the Westinghouse case is repeated and whether the diplomatic and other endeavours designed to produce an inter-governmental solution are fruitful.[24] From the United States standpoint there is an indication in the Iran-United States hostage conflict that in matters of high national importance the courts in the United States will yield to the executive Government.[25]

Meanwhile, fall-out from the uranium cartel continues. In July 1981 the Canadian Justice Department brought criminal charges against six Canadian uranium producers who were allegedly involved in the cartel.[26] Echoes from the Westinghouse allegations can be expected to be heard even in the 1980's.

POSTSCRIPT

On 29 June 1982, shortly before this issue went to press, the Governments of Australia and the United States entered into an antitrust co-operation agreement,[27] the main features of which are as follows:

- The Australian Government shall, if practicable, notify the United States Government before the implementation of any official policy that the Australian Government considers may have antitrust implications for the United States.
- The United States Government shall promptly notify the Australian Government of any proposed official antitrust investigation that may have implications for Australian laws, policies or national interests.
- Both Governments are obliged to participate fully in consultations (requested as a result of any notification or otherwise in respect of potential conflicts) designed to identify and avoid possible conflict between their respective laws, policies or national interests.
- In seeking to avoid conflict the United States Department of Justice and Federal Trade Commission are required to give fullest consideration to refraining from, modifying, or discontinuing antitrust investigations or proceedings concerning conduct involved in gaining Australian export control approval, conduct undertaken by an official Australian export authority, conduct concerning exports to countries other than the United States, or conduct involving representations to or discussions with the Australian Government in relation to exports.

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[24] Canada and the United States have had a consultation procedure for more than two decades but it appears not to have been very successful; B Campbell, "The Canada-United States Antitrust Notification and Consultation Procedure—A Study in Bilateral Conflict Resolution" (1978) 56 The Canadian Bar Review 459.

[25] On 2 July 1981 The Supreme Court of the United States in *Dames & More* v *United States* 69 L Ed 2d 918 unanimously upheld the validity of the agreement with Iran that brought the hostage crisis to an end. The agreement authorised the President of the United States to nullify court orders and to suspend private claims in order to honour the agreement. The Supreme Court was careful, however, to stress that its decision was a narrow one.

[26] The Australian *Financial Review*, 25 June 1981; 9 July 1981; 31 July 1981; the *Age*, 9 July 1981.

[27] CCH *Australian Trade Practices Reporter*, 20,741; *Business Week*, 19 July 1982. See also Note, (1981) 55 ALJ 773. Also reproduced in (1982) 21 Int Legal Mat 702.

- Documents and information provided by either Government in the course of notification or consultations under the agreement are confidential.
- Where consultations have occurred pursuant to an Australian notification and the Department of Justice or the Federal Trade Commission concludes that implementation of the Australian policy should not be a basis for action under the United States antitrust laws the Australian Government may request a written memorialization of such conclusion and the basis for it, and the United States Government shall, in the absence of circumstance making it appropriate to decline such a request, provide the memorialization.
- The Governments have agreed to co-operate where a proposed investigation or enforcement action under the antitrust laws of one nation does not adversely affect the laws, policies or national interest of the other.
- The United States Government has agreed to convey the Australian Government's attitude to United States courts in private antitrust suits relating to conduct that has been the subject of notification and consultations under the agreement.
- The agreement is effective from 29 June 1982 and may be terminated by either party upon six months' written notice to the other.