

## RECOGNITION AND ENFORCEMENT OF JUDGMENTS AND ORDERS AND THE SERVICE OF PROCESS WITHIN THE COMMONWEALTH — MULTIPLE DAMAGES JUDGMENTS

Memorandum prepared by the Government of Australia

This paper raises an important issue for consideration in relation to the rules of law in Commonwealth countries (whether at common law or under legislation) as to the recognition and enforcement of certain foreign judgments in civil proceedings.

2. That issue is whether judgments for multiple damages in private proceedings should be treated as penal or civil for the purpose of recognition and enforcement. A judgement for multiple damages is a judgment arrived at by doubling, trebling or otherwise multiplying a sum assessed as compensation for the loss or damage sustained by the person in whose favour the judgment is given (See s.5(3) of the United Kingdom Protection of Trading Interests Act).

3. The significance of the issue arises chiefly in the field of United States Antitrust Laws. Under those laws criminal proceedings in the strict sense may be taken by the United States Government in respect of their violation. In addition, however, private proceedings may be instituted for the recovery of treble damages in respect of any injury to business or property sustained as a result of anything forbidden in the antitrust laws (s.4 of the Clayton Act).

4. The overall purpose of the provision conferring the right to treble damages upon private plaintiffs is to enable United States antitrust laws to be enforced more effectively. Plaintiffs exercising that right are referred to in the United States literature on the subject of antitrust enforcement as "private Attorneys-General" (see Antitrust Law Developments 1975 p. 254). The right conferred is thus penal in purpose and effect.

5. The problem concerning the international recognition of such judgments cannot be dissociated from the extremely wide extraterritorial jurisdiction assumed by United States courts in antitrust proceedings. As stated in the "Antitrust Guide for International Operation" issued by the United States Department of Justice on 26 January 1977, "Where foreign transactions have a substantial and foreseeable effect on U.S. commerce, they are subject to U.S. law regardless of where they take place." (page 6). This doctrine of jurisdiction—the "effects doctrine"—has been objected to by other countries as being contrary to the rules of international law.

6. The position is that companies incorporated and carrying on business in the international market outside the United States may find themselves the subject of treble damages suits in that country. Judgments may be given in those suits notwithstanding that the conduct of the defendants is extraterritorial and that the companies concerned have

been carrying out the legitimate trade policies of their governments.

7. The Australian Government has recently been concerned with proceedings of that character brought by Westinghouse Electric Corporation in Illinois against 29 United States and foreign uranium producers in respect of uranium marketing arrangements entered into outside the United States. Four of the defendants are Australian companies.

8. As a result of such proceedings—

- (a) Australian defendants are facing a potential judgment of hundreds of millions of dollars;
- (b) Such a judgment against the companies concerned would have a considerable impact upon Australia's national interest;
- (c) The alleged uranium marketing arrangement by non-United States producers was consequential upon an embargo imposed by the United States Government prohibiting the importation of uranium into the United States for enrichment for domestic use there so as to protect U.S. producers. The United States at that time constituted 70 percent of the world's market.

Details of the Westinghouse proceedings are attached.

9. Faced with this situation the Australian Parliament enacted the Foreign Antitrust Judgments (Restriction of Enforcement) Act 1979 in March of last year. The Act provides that where the Attorney-General is satisfied that a foreign court has exercised jurisdiction or powers in a manner inconsistent with international law of comity or where he is satisfied that it is desirable in the national interest that judgment should not be enforced in Australia he may by order in writing declare that that judgment should not be recognised or enforced in Australia or that it should be enforced to the extent only in such amount as indicated in the order. On 6 June 1979 the Attorney-General made an order that the judgment entered in the Westinghouse suit should not be recognised or enforceable in Australia.

10. The experience of Australia in the Westinghouse suit is mentioned in order to indicate the difficulties with which exporting countries within the Commonwealth may be faced when confronted with a request for recognition or enforcement of a treble damages antitrust judgment in a foreign court against their exporters.

11. So far as Australia is concerned, the Foreign Antitrust Judgment (Restriction of Enforcement) Act would preclude enforcement of the

Westinghouse judgment in Australia but the companies concerned have assets in other countries including those within the Commonwealth. Accordingly the need could arise in other Commonwealth countries to determine whether a judgment in the Westinghouse suit is to be treated as penal or civil for enforcement purposes.

12. In the United Kingdom, the Protection of Trading Interests Act has recently been enacted. Under that legislation no recovery is allowed in respect of a foreign judgment for multiple damages (s.5(2)(a)). In certain circumstances a United Kingdom defendant to a foreign multiple damages judgment may recover back the amount awarded against him not attributable to compensation (s. 6(2)). In introducing that legislation on 15 November 1979 the Secretary of State for Trade (Mr. Nott) said—

“We regard this civil sanction—I refer here to triple damages—as being penal rather than compensatory, and consequently consider that in international dealings at least these proceedings should be subject to the legislation that we would regard as appropriate to criminal proceedings. In fact, they are subject to no such limitations. The plaintiff is given what appears to us to be an unfair advantage.”  
(Hansard p. 1536).

#### *The general legal position*

13. The common law conflict of laws rule is that enforceability is denied to a foreign “penal” judgment. That principle is reflected in the United Kingdom Judgments (Reciprocal Enforcement) Act 1933 which provides for registration of foreign judgments and the various statutes applying in Commonwealth countries based upon that Act.

14. The question is whether multiple damages judgments are to be regarded as penal. In *Huntington v. Attrill* (1893) A.C. 150 the Privy Council approved the following statement by the Supreme Court of the United States in *Winsconsin v. The Pelican Insurance Company* (1888) 127 U.S. 265:

“The rule that the courts of no country executes the penal laws of another applies not only to sentences for crimes and misdemeanours but to all suits in favour of the State for the recovery of pecuniary penalties for any violation of statutes for the protection of its revenue or other municipal laws, and to all judgments for such penalties.”

The Privy Council considered that that would apply whether the proceedings were instituted by the state or by an official authorised by the State, or by a common informer, who it saw as acting in the interest of the whole community.

15. A multiple damages suit would not in terms fall within this description of penal judgments. It is perhaps arguable that a multiple damages suit would be construed as bearing more similarity to the situation of a common informer because of its enforcement element.

16. Nevertheless the position is at least doubtful and under a strict application of *Huntington v. Attrill* a multiple damages judgment would not be regarded as penal. In S.A. *Consortium General Textiles v. Sun & Sand Agencies Ltd.* [1978] 2 A.E.R. 339 at 354-5 Lord Denning commented that a “penalty” under the United Kingdom Foreign Judgments (Reciprocal Enforcement) Act 1933 referred to “a sum payable to the State (sic) by way of punishment and not a sum payable by way of exemplary damages”.

17. In the United States some authorities tend to support the view that two thirds of a judgment for treble damages under the antitrust laws would be held to constitute a penalty— see *Kline v. Caldwell, Banker & Co.* 508 F.2d. 226 (9th Cir. 1974), *Lyons v. Westinghouse Electric Corp.* 222 F.2d. 184 (2nd Cir. 1955) and *Rogers v. Douglas Tobacco Board of Trade Inc.* (1957) Trade CAS. 68, 706 (5th Cir. 1957).

18. In the draft Bill for a Foreign Judgments (Reciprocal Enforcement) Bill in respect of money judgments prepared by Professors McLean and Patchett, s.3(3)(b) provides that the Act does not apply to—

“any judgment to *the extent to which* it provides for the payment of a sum of money by way of exemplary or punitive or multiple damages”.

#### *Conclusion*

19. In the Australian view it would be preferable if there were a clear exclusion from the proposed Bill of Professors McLean and Patchett of judgments for multiple damages or any portion of such judgments. The most common case in which multiple damages judgments are given is under United States antitrust laws which, as mentioned, may be applied extraterritorially in conflict with national economic policies of other countries. If a plaintiff chooses to exercise the right to multiple damages and in effect act as a “private Attorney-General” he should not, under the guise of civil proceedings, be entitled to reciprocal enforcement of the judgment obtained. If he wishes to have that advantage he should be obliged to limit his action to a claim for loss actually sustained.

## ATTACHMENT

### THE WESTINGHOUSE PROCEEDINGS

1. The genesis of the Westinghouse uranium litigation lies in a 1964 decision of the United States to prohibit the enrichment of foreign uranium for use in U.S. domestic reactors. This had the effect of closing the United States market to foreign uranium producers. This embargo, the continuation of which was announced by the United States Government on 13 October 1971, forced the burden of adjustment of supply and demand to be carried by non-United States uranium producing countries.

2. Also in October 1971 the United States Government announced its policy to approve the release of 50,000 tons of  $U_3O_8$  from the United States stock pile onto domestic markets which further depressed the price obtainable. By 1972, there was a gross oversupply of uranium in terms of demand and prices had dropped to as low as \$4.50 per pound.

3. The exportation of uranium from Australia has been subject to control, through the Customs Act 1901, by the Australian Government since 1961. From 10 April 1967 the control has formed an integral part of a wider uranium market policy. In the light of the U.S. embargo, that policy was that its uranium producers should engage in discussions with uranium producers of other countries, outside the United States, to achieve the stabilization of prices in the world market which, as a result of the United States Government decisions, excluded the United States market.

4. In the late 1960's and early 1970's the Westinghouse Electric Corporation (Westinghouse) entered contractual arrangements for the supply of nuclear power plants. As an inducement for these contracts they included provision of fuel supply at low prices. By 1974 Westinghouse had a commitment for the supply of 60 million lbs of  $U_3O_8$  at low prices. Westinghouse, however, had not entered purchase or supply arrangements for the uranium supply commitments it had entered into and thus had sold "short" this very large quantity of  $U_3O_8$ . Following a steep rise in uranium prices in 1974, Westinghouse notified its customers in 1975 that it was unable to fulfill the uranium contracts under the "commercially impracticable" clause of the U.S. Uniform Commercial Code. Subsequently, proceedings were instituted against Westinghouse by sixteen U.S. and three Swedish electric power utilities for breach of supply contracts. United States Courts have however ruled that Westinghouse had not sustained its burden of proving that it was excused from performing its contractual obligations by commercial impracticability or force majeure. As a consequence Westinghouse has now settled thirteen of these suits out of court. It is estimated that the total cost of settlement of the nineteen suits will reach well over one billion dollars.

5. In July 1976, a Grand Jury was empanelled by the U.S. Government to examine whether a case existed for criminal prosecution of parties alleged to have been involved in the uranium marketing cartel. The Grand Jury did not return any indictments. However, the Antitrust Division of the Department of Justice, after a full study of the matter, filed only a misdemeanour charge against one United States company. Indeed, on 24 January 1980, in the course of discussing the alleged cartel and the Justice Department investigation, U.S. Assistant Attorney-General Shenefield said, "It is an undoubted fact.... that the cartel had its genesis in a major anti-competitive action by our own Government in walling off a major portion of the world's market to businessmen who had therefore sold into our market", and "I think it is also fair to point out that the governments of certainly Canada and South Africa and Australia see uranium as being one of their major national resources and took steps following our own governments's anticompetitive acts to try and save an important national industry".

6. On 15 October 1976, Westinghouse commenced antitrust civil proceedings, claiming treble damages, in the U.S. District Court for the Northern District of Illinois against 29 defendants 20 from the United States and nine foreign defendants. In that action Westinghouse sought treble damages under the Sherman Antitrust Act of 1890, in relation to alleged uranium marketing arrangements which had been entered into by the defendants in 1972 outside the United States and which were alleged to have damaged Westinghouse.

7. Four Australian companies were among the nine non-United States defendant corporations which declined to enter any appearance. As the Australian Government understands it, the defendants have been advised that there are serious jurisdictional objections to the proceedings against them and that by appearing, they might be regarded, under the law of countries where they have assets against which enforcement might be sought, as having voluntarily submitted to the jurisdiction and thereby waiving those objections for the purposes of any enforcement proceedings. In particular, it appeared that upon the basis of judicial authority in the United Kingdom, even an appearance merely to contest jurisdiction could produce the same result as an unrestricted appearance for the purposes of enforcement proceedings in those Commonwealth countries where United Kingdom legal precedents are regarded as relevant. Faced with claims involving hundreds of millions of dollars (an amount referred to in relation to defaulting defendants by Judge Prentice Marshall hearing the case) they were advised, notwithstanding the strength of their case on the merits, not to appear.

8. On 3 January 1979, Westinghouse was granted a default judgment against the nine non-appearing defendants, for an amount to be determined, on the grounds of their non-appearance in the proceedings. Assessment of damages against the non-appearing defendants was originally set down for 10 December 1979 but was stayed pending appeal by the contesting defendants to the United States Court of Appeals on

the grounds that such assessment would prejudice their fair trial on the merits.

9. On 15 February 1980 the Court of Appeals ruled that the question of damages should await the resolution of the issue of liability as to all parties. (The trial on the merits is currently scheduled to commence in September 1981).