FOREIGN ANTITRUST JUDGEMENTS (RESTRICTION OF ENFORCEMENT) AMENDMENT BILL 1981

Date Introduced: 11 June 1981
House: Senate
Presented by: Senator the Hon. A.J. Messner, Minister for Veterans' Affairs for Senator the Hon. P.D. Durack, Q.C. Attorney-General

Purpose

To amend the Foreign Antitrust Judgements (Restriction of Enforcement) Act 1979 to enable Australian defendants against whom a foreign antitrust judgement has been enforced in a foreign country to take proceedings in Australian courts to recover from the foreign plaintiff any amount which has been recovered under the judgement in the foreign country.

Background

In 1976 the Westinghouse Electric Corporation commenced proceedings in United States courts against 29 domestic and foreign uranium producers, including 4 Australian corporations. The action alleged price-fixing agreements contrary to the US antitrust laws. Parliament enacted the Foreign Proceedings (Prohibition of Certain Evidence) Act 1976 in November of that year. The Act prevented Australian-based evidence from being used in foreign legal proceedings to which there was objection on the basis of protecting the national interest. That Act proved to be inadequate to protect the Australian companies from the US legislation and in 1979, after Westinghouse had obtained a judgement in default of appearance by the Australian Defendants in the US courts, Parliament enacted the Foreign Antitrust Judgements (Restriction of Enforcement) Act 1979 which prohibited the enforcement of that and similar judgements in Australia.

The Westinghouse action has been settled but a potential problem remains in respect of private suits for treble damages under US antitrust laws. The decision of the United States Court of Appeals in the Timberlane case in 1977 requires that before jurisdiction is assumed or exercised in any suit where foreign government policies on
interests are involved, there should be a weighing of the respective governmental interests of the United States and the foreign country. However, the United States courts in subsequent cases have professed a lack of the necessary expertise to weigh foreign governmental interests, while at the same time the US Government has refused to intervene upon the ground that it is a matter for the courts to decide. Whilst this problem is currently the subject of consultation between the Governments of the United States and Australia there are a number of private antitrust suits involving Australian defendants pending before the US courts.

This Bill which is similar to the United Kingdom's Protection of Trading Interests Act is aimed at deterring foreign corporations or individuals from bringing antitrust actions against Australian defendants in foreign countries by allowing the defendants to recoup the amount of any judgement from the Australian assets of the foreign plaintiff.

Main Provisions

Clause 3 inserts a new section 2B which restates the definition of "antitrust law" as including any law having 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. Section 2B(2) provides a new test of whether corporate bodies are related by reference to the Companies Ordinance 1962 of the Australian Capital Territory.

Clause 4 amends section 3 and provides in new subsection (2A) that the Attorney-General shall not prohibit the enforcement of a foreign judgement in Australia if the conduct of the defendant took place in the country in which the judgement was obtained.

A new section 4, inserted by clause 5, provides the "recovery back" remedy for Australian defendants to overseas antitrust suits. The period in which such proceedings may be instituted is limited to three years from the date of the overseas enforcement. Jurisdiction is vested in the Federal Court by section 4(9).

Section 4(7) has the effect that in cases where the Attorney-General certifies that portion only of a foreign judgement shall be recognized in Australian any amount paid by the defendant in excess of the sum certified shall be recoverable under the Act.
Also inserted by clause 5 is a new section 5 which provides for enforcement under the Act of a judgement obtained in a foreign country where a reciprocity agreement has been entered into between Australia and that other country. However, any order made by the Attorney-General enabling the enforcement of such a judgement must be laid before each House of the Parliament and may be disapproved by either House.

For further information, if required, contact:

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