

## GLOBALISATION AND CONSUMER PROTECTION LAWS

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### GLOBALISATION

'Globalisation' is a word without any fixed or definite meaning. Originally it was a jargon term, relating to the creation of global rather than national markets. However, it has come to denote the decline of nation-states, and particularly of the barriers to trade and investment erected by national states. It is often accompanied by a belief that national economies, to the extent that any still exist, need to become 'competitive' because if the cost of goods and services, and particularly of labour, is not priced similarly in different places, in theory, imports will replace locally produced goods and services and exported goods and services will not be able to compete with those produced elsewhere at lower cost.

The notion of 'competitiveness' has led many governments to adopt policies commonly described as 'deregulation' and 'privatisation', which are based on the assumptions that attempts by national governments to control standards or business practices will increase costs, and that privately owned businesses that operate on the profit motive, rather than for purposes of service delivery, will always be more efficient than publicly-owned businesses. The evidence to support those assumptions, it is submitted, is incomplete if not questionable, but the policies have been adopted and have led to a decline almost universally in both the number of publicly-owned enterprises and in the number of prescribed standards. The decline is reinforced by reduced taxes and correspondingly fewer resources available to the state to enforce regulatory laws.

This is not the place to discuss the political arguments about why nation-states have exercised political power in particular ways. Suffice it to say that, over several decades in the second half of the twentieth century, many national states chose to enact laws embodying measures designed to protect consumers' health, safety, and

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financial interests. This was a response to the demonstrated failure of markets (because of information and other inequalities of power) to protect consumers against harm resulting from goods or services that did not meet required standards of safety or quality. The need for such laws has been universally recognised and the General Assembly of the United Nations adopted a set of Guidelines for Consumer Protection in 1995.<sup>1</sup>

Globalisation has increased the importance and body of the international movement of goods and services. The effect of deregulation and privatisation of business has been to reduce both the number and extent of regulatory mechanisms within nation-states, and the resources available to enforce them. However, this paper focuses on the legal obstacles to enforcement of regulatory laws designed specifically to protect consumers.

#### NATIONAL CONSUMER PROTECTION LAWS

National consumer protection laws use a number of methods designed to protect consumers.<sup>2</sup> These include provision of consumer education, for both suppliers and consumers, regulation of suppliers and manufacturers by the prescription of standards for goods and services, and the establishment of mechanisms to police those standards. The prescribed standards are usually embodied in law enforced by the power of the state. This is part of an effort to balance the power of the state against that of (probably a small minority of) businesses that are prepared to ignore standards of safety and quality (and long-run reputation) in the pursuit of short-term profit. The methods chosen include both the establishment of administrative bodies with coercive powers, and the creation of remedies enforceable by private citizens through the ordinary courts. Where coercive powers exist, enforcement is generally through the use of public criminal sanctions through the criminal courts. Where the remedy is either a right to a court order preventing behaviour in contravention of the regulation or to an award of compensation for loss or damage suffered, the law depends on a private citizen enforcing the legal remedy through the civil courts at their own expense.

These legal mechanisms were effective so long as there was a legal person physically present within the national state upon whom legal responsibility could be imposed. To some extent they were satisfactory when most goods and services were locally produced. One of the consequences of globalisation is that, to an even greater extent than was hitherto the case, the products and services acquired by consumers or elements of those products and services originate outside the national state. For reasons to be explained, national laws are of little effect beyond the

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<sup>1</sup> David J Harland, 'The United Nations Guidelines for Consumer Protection' (1987) 11 *Journal of Consumer Policy* 245; David J Harland, 'The United Nations Guidelines for Consumer Protection: Their Impact in the First Decade' in Iain Ramsay (ed), *Consumer Law in the Global Economy* (2000).

<sup>2</sup> The consumer protection laws in Australia are the subject of John Goldring et al, *Consumer Protection Law in Australia* (5<sup>th</sup> ed, 1998).

geographical boundaries of the nation-state. It was not uncommon for a person, who was subjected to some liability by national laws, to seek compensation or indemnity from someone outside the nation-state who had supplied some product or services to that person. Often the only possible legal recourse was through the law of contract, and even that depended on the vicissitudes of the rules of conflict of laws or private international law, some of which are discussed below.

This article seeks to discuss some of the obstacles faced by nation-states that seek to protect consumers by the enactment of laws of various types.

#### OBSTACLES TO PROTECTING CONSUMERS IN A GLOBALISED WORLD

##### *'Free Trade' and 'Non-tariff Barriers'*

The strongest current obstacle to the use of national consumer protection law against imported products is probably the prohibition against 'non-tariff barriers' established by international agreements designed to secure free trade. Traditionally, the major obstacles to international free trade were either prohibitions on, or quotas for, imported goods, or the imposition of taxes, mostly in the form of customs duties, under which importers of goods were obliged to pay a percentage of the value of the goods to the state into which the goods were imported. These customs barriers were commonly known as 'tariffs'.

Tariffs were commonly used to protect local industry, and were perhaps the most contentious political issue in nineteenth and early twentieth century Australia. Customs duties were always a useful source of revenue for the state but, during the age of 'mercantilism', in the seventeenth and eighteenth centuries, various nation-states sought to ensure that only their own citizens were able to engage in international trade. Laws not only prohibited or taxed the importing of goods that could be produced locally but they also required that any imports and exports be carried in ships owned and registered within the nation. Such policies lay at the heart of a good deal of the strife in Europe during this period and also friction between the European powers and their American colonies.

Economic thinkers, such as Adam Smith, pointed out that a cost of restricting participation in the supply of a particular commodity was that consumers of that commodity paid higher prices than would be the case if the market were open to competition between all suppliers. A choice, therefore, had to be made between the protection of local vested interests (including both employers and employees of labour) and the interest of consumers in the national market in lower prices for imported goods.

In large agrarian countries, such as Australia, Canada and the United States (US), agricultural interests generally favoured lower, if any, barriers to exports and imports. They feared that the imposition of tariffs on imported products would

encourage nations to which they traditionally exported goods to impose reciprocal tariffs on the import of agricultural goods.

The aftermath of the Great Depression and World War II was to stimulate a movement towards reduction of barriers to international trade. One incentive to this was the need to reconstruct the economies of both the victors and the vanquished, which had been devastated by war and its consequences. At the same time, the European colonial powers began to demolish their empires. Although the outward manifestation of this was national independence, the economic consequences were equally, if not more, significant. Imperial interests continued to dominate the economies of many former colonies and to maintain this domination.

As part of this development towards freer trade, an international agreement known as the General Agreement on Tariffs and Trade (GATT) represented an international move towards the reduction of tariff barriers, at least, on a reciprocal basis. This agreement led to continuing efforts, by the manufacturing nations at least, to reduce the barriers created by other countries (particularly the developing countries of the Third World) against imported manufactured goods.

In the last decades of the twentieth century, GATT, driven by the developed nations, evolved into the World Trade Organisation (WTO). This body is not only committed to the reduction and elimination of barriers to trade, but it also has assumed powers that permit it to impose sanctions on nation-states that create barriers to trade.

The WTO seeks to eliminate not only barriers of the traditional kind, but also what it describes as 'non-tariff barriers'.<sup>3</sup> These are regulations that embody virtually any prescription of standards of quality or manufacturing specifications that may have the effect of discriminating against goods or services of non-local origin. Thus, regulations that require smoked salmon imports to meet certain health standards can arguably be said to constitute non-tariff barriers, because some imported products do not meet the standards. Advocates of free trade often argue that prescription of health or technical standards, established ostensibly for the purpose of ensuring the safety or soundness of the products, in fact have a hidden purpose of creating a monopoly for locally produced products.

It is certainly true that some standards do have the effect of creating a local monopoly. However, it is also arguable that local authorities are in the best position

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<sup>3</sup> A 'non-tariff barrier' is a control on importation of a commodity other than in the form of a fiscal impost. Regulations that prescribe standards for classes of commodities risk characterization as non-tariff barriers if their effect is to discriminate in favour of domestic products and against foreign-produced products, even though the purpose of the regulation may be to further interests of health, quality or safety. For example, the *New York Times* ('Trade Organization Rules Against U.S.' 18 January 1996, DI) reported that the WTO had found that US laws governing emission controls on gases emitted by oil refineries constituted a non-tariff barrier that discriminated against foreign oil refiners.

to determine what standards are appropriate to protect their own communities from the risk of loss or injury through unsafe, ineffective, or unhealthy products.

The effect of the WTO has been, in effect, to reduce or even eliminate the powers of nation-states, which are part of the organisation, to establish what they considered to be appropriate standards to protect the health or safety of the constituents. In this respect, the effect of the WTO has been significantly to diminish national sovereignty.

#### *Jurisdictional Barriers*

Whether or not markets operate without regard to national boundaries, there are significant difficulties in enforcing national regulatory laws when a 'transnational' element is involved. The traditional rules of international law recognised that the laws of a nation-state operate within its geographical boundaries, but if they are to operate on things or persons outside those geographical boundaries, some additional link with the territory must be demonstrated.<sup>4</sup> The extent to which the courts of any particular nation-state recognise the operation of the laws of another state outside its territorial boundaries (extraterritorial operation) vary. Common law nations (with the possible exception of the United States of America since the beginning of the twentieth century) have traditionally been reluctant to recognise the extraterritorial operation of foreign laws.

At first sight, laws, whether enforced by criminal or civil sanctions, operate only within the territorial boundaries of the enacting state or, in special cases, where the enacting state can show a special connection with the subject matter of the law. That may be where the person on whom the law is intended to operate is domiciled, resident, or a citizen of the enacting state. The converse is not true. All courts traditionally assume that the nation-state has the power to make laws which affect any person or property within its territorial limits.

This is the reason why some consumer protection laws, such as the *Trade Practices Act 1974* (Cth) and some of the consumer protection directives of the European Community (EC), are directed towards the behaviour of a person within the jurisdiction of the enacting state (usually the importer or supplier of the goods or services), even though that person may have no direct moral or practical responsibility for the production, design, quality or state of the goods or services which are provided. That is because there is doubt about whether the laws of one state may operate on a person who is outside the territory of that state. For example, if a pharmaceutical product is manufactured in the US and, because of defective production or design causes loss or damage to a person in Australia, generally speaking Australian courts would have no jurisdiction to enforce a remedy against the US manufacturer if that manufacturer is not located (or if a business has no

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<sup>4</sup> Lawrence Collins (ed), *Dicey and Morris on the Conflict of Laws* (12<sup>th</sup> ed, 1993) 76. The presumption may be rebutted fairly easily, even when the statute in question imposes criminal liability: *Oteri v The Queen* [1976] 1 WLR 1272 (Privy Council).

registered address) in a part of Australia. The laws that create remedies, therefore, are directed to some person within the territorial limits of Australia. Although *Trade Practices Act 1974* Part V, Division 2A is directed to the behaviour of 'manufacturers', the person who imports the product into Australia is deemed for the purposes of that group of provisions to be the manufacturer.

The effect of this is similar to the position, as under the traditional law of sale of goods, where the only remedies available to a buyer of goods are against the seller or supplier of those goods. The seller is legally deemed to be responsible for the condition of the goods, although that seller may have obtained the goods from another person and resold them to the consumer. If the consumer has a legal remedy against the seller, the seller may seek an indemnity for the compensation it has to pay from the person who sold the goods to it, and so on along the 'chain of supply'. This process is uncertain, cumbersome and expensive, particularly where one or more 'links' in the chain are outside the territorial jurisdiction of the place where the remedy is originally sought. The major difference under statutory regimes imposing responsibility on the manufacturer is that it is not possible to exclude or limit liability to a consumer by use of an 'exemption clause' in a contract.

Where a person is deemed by some legislative provision to be the manufacturer of goods and becomes liable to a consumer of the goods, that person will normally insure against liability. If the insurer wishes to enforce any rights of subrogation against a previous supplier and that previous supplier is outside the territorial jurisdiction, it will face a number of problems, just as a person who has bought goods from the person outside the jurisdiction faces problems in enforcing any contractual remedies against the seller. These difficulties are practical as much as they are legal.

Enforcing the legal right against a person outside the jurisdiction will depend on a number of factors. This may depend on the way in which the claim is framed. Different considerations apply to a claim based on breach of contract to those that apply to claim for a civil remedy, such as a claim for damages for negligence.

While most nations' legal systems extend to every legal person within its territorial boundaries, some states (including the Australian States) do not always recognise that a person has a right to enforce a remedy created under a foreign law against a citizen or resident of a foreign state.

#### INTERNATIONAL LAW

The jurisdiction of the courts of any state depends not only on its internal constitutional law, but also on international law. A nation's constitution may give its courts wide powers, but those powers may be illusory unless they are recognised as valid and competent by international law. Two distinct bodies of rules and principles make up 'International Law': public international law and private international law. The terms 'public' and 'private' contain the kernel of an

important practical distinction. Both potentially affect whatever legal and political measures might be taken in respect of activities that extend beyond national borders. Although for many purposes in the globalised world national boundaries may be irrelevant, both public and private international law are predicated on the existence and operation of nation-states. Legal remedies available to individuals presuppose nation-states, for laws that give remedies or impose sanctions are essentially national laws; international law is of a different order.

In both practical and logical senses, all regulation presupposes national legal systems. Public international law itself presupposes national legal systems.

Both public and private international law limit the powers of nation-states to provide legal sanctions and remedies. These limits are the fundamental boundaries within which any contemplation of legal controls of anti-social activities can occur. For the foreseeable future controls on such activities must come from nation-states.

#### INTERNATIONAL LAW AND MUNICIPAL LAW

‘Public’ international law governs the relations between entities, each of which has legal status or personality under its own rules of recognition<sup>5</sup> – usually nation-states. There is no supreme, authoritative ruler of the international community who has *legal* authority to discipline states that do not toe the line. The content of the rules is derived from the practice of states towards each other (usually referred to as ‘custom’, and itself a problematic concept) and from international agreements.

For this reason, much public international law is ‘soft’,<sup>6</sup> in the sense that breach of a ‘soft’ law does not necessarily attract the imposition of a sanction, which is the defining characteristic of the positivists’ ‘law’;<sup>7</sup> legal positivists deny international law the status of ‘law’. Even the most entrenched positivists, however, concede that rules of public international law have significant moral and political force and states that continually offend attract odium which can translate into economic and political consequences, as the insistence by the United States of America on enforcing its antitrust laws outside its territorial limits will show (discussed below).

‘Private’ international law, by contrast, is ‘law’ in the fullest possible sense; it forms part of the system of rules administered and enforced by a state, or ‘municipal’ law. This body of rules determines, most importantly for this discussion, whether the courts of any state are competent to entertain disputes between citizens (or between citizens and governments) (‘judicial jurisdiction’), to enforce any judicial determination of such controversies (‘recognition and

<sup>5</sup> James Crawford, *The Creation of States in International Law* (1979).

<sup>6</sup> Christine M Chinkin, ‘The Challenge of Soft Law: Development and Change in International Law’ (1989) 38 *International and Comparative Law Quarterly* 850.

<sup>7</sup> For example, John Austin, *The Province of Jurisprudence Determined and The Uses of the Study of Jurisprudence* (1954).

enforcement'), and to select which body of rules will be applied to determine any issues that arise ('choice of law').<sup>8</sup>

Public international law itself has only indirect effect on the behaviour of individuals or collectivities and operates through municipal law systems. Infringement of any rights created by rules of public international law, in the ordinary course of events, will only provide to a citizen a legal remedy if the national government of the state of which he or she is a citizen or resident decides to take up the cause.<sup>9</sup>

In contrast, while in the past the rules of private international law may have seemed remote from the lives of ordinary people, today's easier communication means that they affect many individuals every day. Every individual who travels from one country to another (or in a federation from one state or province to another) is immediately exposed to the operation of private international law; and businesses that deal with a business in any place outside their own country or state have the same exposure. Probably everyone who logs onto the Internet immediately becomes exposed to some operations of the rules of private international law in the country where he or she is, physically.

Much of the commercial law of the Western/Mediterranean world has a common origin in the body of rules developed among traders and applied by them to their own transactions – the *lex mercatoria* or law of merchants.<sup>10</sup> This body of rules developed because traders wanted to avoid the complications associated with multiple, differing, sets of rules and procedures. The law of merchants was incorporated into most of the legal systems of Europe, with only minor differences, and was thus appropriated by states.

#### PUBLIC INTERNATIONAL LAW

Public international law does not affect the internal workings of any state directly, but it does influence attitudes to the recognition and enforcement of what other states do. The principles of 'comity', which are applied by municipal courts in conflict of laws cases, embrace some of the broad principles of public international law, especially the principle of territoriality.

#### *The Territoriality Principle*

The general rule is that [public] international law limits the right of states to legislate extraterritorially or to enforce their laws outside their own boundaries.<sup>11</sup>

<sup>8</sup> Specifically see Vaughan Black, 'Consumer Protection in the Conflict of Laws: Canada, the United States and Europe' in Iain Ramsay (ed), *Consumer Law in the Global Economy* (2000).

<sup>9</sup> As the Turkish and French Governments did in the seminal *Lotus Case* (*France v Turkey*) [1927] PCIJ (ser A) No 10.

<sup>10</sup> Leon E Trakman, *The Law Merchant: The Evolution of Commercial Law* (1983).

<sup>11</sup> Lea Brilmeyer, *An Introduction to Jurisdiction in the American Federal System* (1986); Rosalyn Higgins, 'The Legal Basis of Jurisdiction' in Cecil J Olmstead (ed), *Extraterritorial*

This rule applies whether the consequences of the legislation are to penalise certain behaviour (criminal law), or to create enforceable rights as between legal persons (civil law). The distinction between civil and criminal law is not always clear and some regulatory laws are a mixture of ‘civil’ and ‘criminal’ laws; they may create both civil and criminal consequences.<sup>12</sup> However, the rules that permit extraterritorial operation of laws applying to criminal jurisdiction are different from, and simpler than, those relating to civil claims.

### *Territoriality and Criminal Law*

Criminal law is dealt with relatively briefly. The rules of private international law are far more concerned with the rules of civil law, and those rules are far more detailed. Because, traditionally, criminal law is not classified as ‘private law’ it is not considered in works dealing with private international law or conflict of laws. The basic principle is that ‘[t]he criminal courts of a state apply only the law of that state. That is not the case with civil law.’<sup>13</sup> Over a century ago, Hall wrote:

No country can insist as against another that acts performed in a manner demanded by itself shall be recognized in the country where they are accomplished, still less can it there exercise the jurisdiction over the persons of its subjects without the express or implied consent of the territorial sovereign.<sup>14</sup>

There is an argument that a state may, by statute, prohibit specified behaviour outside its geographical boundaries and impose penal sanctions, provided that it only enforces those laws when the accused persons are physically within its territory or control.<sup>15</sup> In Commonwealth countries, it is generally accepted that unless the legislation specifically and expressly applies it to acts or omissions

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*Application of Laws and Responses Thereto* 1984) 7–13; (as to criminal law) American Law Institute, *Restatement of the Law (Third): Foreign Relations Law of the United States* (1986) §422; A V Lowe, ‘The Problems of Extraterritorial Jurisdiction: Economic Sovereignty and the Search for a Solution’ (1985) 34 *International and Comparative Law Quarterly* 724; Jean G Castel, *Extraterritoriality in International Trade: Canada and the United States of America Practices Compared* (1988); Ivan Shearer, ‘Jurisdiction’ in Sam Blay, Ryszard Piotrowicz and Martin Tsamenyi (eds), *Public International Law: An Australian Perspective* (2<sup>nd</sup> ed, 2005); David Lanham, *Cross-Border Criminal Law* (1997).

<sup>12</sup> In both the USA and Australia, since the *Sherman Anti-trust Act 1890* (US), the tendency has been to include both civil and criminal sanctions for contravention of provisions of the legislation, as this avoids some consequences of bureaucratic ‘capture’ and expense for the state. *Trade Practices Act 1974* includes both civil and criminal sanctions.

<sup>13</sup> Glanville Williams, ‘Venue and the Ambit of Criminal Law – Part I’ (1965) 81 *Law Quarterly Review* 275, 277; *Attorney-General (New Zealand) v Ortiz* [1984] AC 1, 21; *Attorney General (United Kingdom) v Heinemann Publishers Australia Pty Ltd* (1988) 165 CLR 30. The US position with respect to criminal law is similar: American Law Institute, *Restatement (Third): Foreign Relations*, above n 11, §422.

<sup>14</sup> William E Hall, *A Treatise on the Foreign Powers and Jurisdiction of the British Crown* (1894) 3.

<sup>15</sup> A recent Australian example is Commonwealth laws penalising Australians who engage in ‘sex tourism’; see *XYZ v Commonwealth* [2006] HCA 25; (2006) 227 ALR 495; (2006) 80 ALJR 1036. Enforcement by way of confiscation of assets may be permissible if the assets are within the jurisdiction: *Banco Nacional de Cuba v Sabbatino* 376 US 398 (1964).

taking place beyond the territorial limits of the state, it will be construed as applying only to conduct within the jurisdiction<sup>16</sup> and, in general terms, this principle is accepted elsewhere.<sup>17</sup> The principle does not mean that every element of every offence and its prosecution must take place within the territory of a single state.<sup>18</sup> The Commonwealth Criminal Code, Divisions 15 and 16, applies these concepts by applying the operation of the commonwealth criminal laws to circumstances that have a distinct territorial or personal connection with Australia. In some cases there is a requirement that the place where the act was done penalise that act in similar ways, and in many cases, the consent of the Attorney-General is required to commence prosecutions.<sup>19</sup>

<sup>16</sup> *Cox v Army Council* [1963] AC 48 (HL); *Air-India v Wiggins* [1980] 1 WLR 815; 2 All ER 593. See Shearer, 'Jurisdiction', above n 11; Lanham, *Cross-Border Criminal Law*, above n 11.

<sup>17</sup> Law Reform Commission of Canada, 'Extraterritorial Jurisdiction' (Working Paper No 37, Law Reform Commission of Canada, Ottawa, 1984) especially 1-3; Sharon A Williams and Jean G Castel, *Canadian Criminal Law, International and Transnational Aspects* (1981) ch 2; Edward M Morgan, *International Law and the Canadian Courts*, Carswell (1990) ch 2; R Y Jennings, 'Extraterritorial Jurisdiction and the United States Anti-trust Laws' (1957) *British Yearbook of International Law* 146; Michael Akehurst, 'Jurisdiction in International Law' (1972-3) 46 *British Year Book of International Law* 146; Robin S O'Regan, 'Extraterritoriality' in *New Essays on the Australian Criminal Codes* (1988); Christopher L Blakesley, 'United States Jurisdiction over Extraterritorial Crime' (1982) 73 *Journal of Criminal Law and Criminology* 1109.

<sup>18</sup> Blakesley, 'United States Jurisdiction over Extraterritorial Crime', above n 17, probably gives the fullest account of the then current position in the USA; see also Thomas A Behney Jr, 'Bibliography' (1987) 50 *Law and Contemporary Problems* 3, 303; in the UK see Akehurst, 'Jurisdiction in International Law', above n 17; Great Britain, Law Commission, *Territorial and Extraterritorial Extent of the Criminal Law*, (WP 29 1970); in Canada, G V La Forest, 'The Ambit of Criminal Law' (Working Paper, Law Reform Commission of Canada, Ottawa, 1970); Law Reform Commission of Canada, 'Extraterritorial Jurisdiction' above n 17.

<sup>19</sup> Division 15 -- Extended geographical jurisdiction 15.1. If a law of the Commonwealth provides that this section applies to a particular offence, a person does not commit the offence unless,

(a) the conduct constituting the alleged offence occurs:

(i) wholly or partly in Australia; or

(ii) wholly or partly on board an Australian aircraft or an Australian ship;

(b) the conduct constituting the alleged offence occurs wholly outside Australia and a result of the conduct occurs:

(i) wholly or partly in Australia; or

(ii) wholly or partly on board an Australian aircraft or an Australian ship;

(c) the conduct constituting the alleged offence occurs wholly outside Australia and:

(i) at the time of the alleged offence, the person is an Australian citizen; or

(ii) at the time of the alleged offence, the person is a body corporate incorporated by or under a law of the Commonwealth or of a State or Territory; or

(d) all of the following conditions are satisfied:

(i) the alleged offence is an ancillary offence;

(ii) the conduct constituting the alleged offence occurs wholly outside Australia;

(iii) the conduct constituting the primary offence to which the ancillary offence relates, or a result of that conduct, occurs, or is intended by the person to occur, wholly or partly in Australia or wholly or partly on board an Australian aircraft or an Australian ship.

Note: The expression *offence* is given an extended meaning by subsection 11.2(1), section 11.3, subsection 11.6(1).

A question also arises where an offence has several constituent elements, which may occur in more than one national state, and with ‘inchoate’ offences, attempts and abetting, counselling or procuring the commission of offences outside the prosecuting jurisdiction. The Criminal Code, s 15, covers this situation for Commonwealth offences. In Canada it is enough that a significant proportion of the events constituting the offence took place in the territory.<sup>20</sup> In New Zealand, the *Crimes Act 1961*, s 7, provides that if ‘any act or omission forming part of any offence, or any event necessary to the completion of the offence’ occurs in New Zealand then the offence is deemed to have been committed in New Zealand, even if the person concerned was not in New Zealand at the time. The law reform agencies of Canada and England and Wales found that such a provision had some merit, but should be confined to situations where the offence was also prohibited under the law of the place where the other acts or omissions occurred.<sup>21</sup> The Criminal Codes of Queensland and Western Australia, ss 12–14, provide that if a person does acts or makes omissions outside the jurisdiction which, if committed within the jurisdiction and in conjunction with other acts or omissions within the jurisdiction, would be an offence under the Code, that person on entering the jurisdiction is deemed to have committed an offence.<sup>22</sup>

Although the ‘territorial principle’ may be interpreted as being ‘objective’ or ‘subjective’, with one exception, the offence or its perpetrators must have a significant connection with the state in whose courts the prosecution takes place (the ‘forum’). The exception is for ‘universal’ crimes, or ‘crimes against humanity’, of which the earliest was piracy. It is now joined by other universal crimes such as genocide.<sup>23</sup> The US has argued that under the ‘objective’ version of the principle, if an act or omission has significant effects within a state, that state may treat it as criminal.<sup>24</sup> A leading international lawyer has treated this view with the deepest scepticism.<sup>25</sup> Some states take the view that their laws may properly apply if an act

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Similar provisions may be found in the *USAPATRIOT Act* USC Title 18, s 2331(2); the *Terrorism Act 2000* (UK). As to the constitutional validity of the section, see *Polyukhovich v The Commonwealth* (1991) 172 CLR 501 (High Court of Australia); *XYZ v Commonwealth* [2006] HCA 25; (2006) 227 ALR 495; (2006) 80 ALJR 1036.

<sup>20</sup> *Libman v The Queen* [1985] 2 SCR 178; 21 DLR (4th) 174.

<sup>21</sup> Great Britain, Law Commission, *Territorial and Extraterritorial Extent of the Criminal Law*, above n 18, 47.

<sup>22</sup> O'Regan, ‘Extraterritoriality’, above n 17.

<sup>23</sup> For example, *Polyukhovich v The Commonwealth* (1991) 172 CLR 501 (High Court of Australia); *XYZ v Commonwealth* [2006] HCA 25; (2006) 227 ALR 495; (2006) 80 ALJR 1036. The trial of Adolf Eichmann in Jerusalem is also often cited to support this principle, and there is little doubt that Israel, or any other State, could have tried Eichmann for these crimes. What was questioned (and is questioned in other cases) is the use of illegal means to bring defendants to such cases before the courts.

<sup>24</sup> John H Shenefeld, ‘The Perspective of the US Department of Justice’ in Joseph P Griffin (ed), *Perspectives on the Extraterritorial Application of US Antitrust and Other Laws* (1979) 15–17; cf Blakesley, ‘United States Jurisdiction over Extraterritorial Crime’, above n 17, 1111 citing ‘Harvard Research in International Law, Jurisdiction With Respect to Crime’ (1935) 29 *American Journal of International Law* 474.

<sup>25</sup> Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (1994).

is committed against their citizens<sup>26</sup> but common law jurisdictions have generally taken the opposite view.<sup>27</sup> In any event, validity of the external operation of laws of this type seems confined only to specific offences created by statute.

A justification for the US view has been expressed by a former US prosecutor:

Extraterritorial jurisdiction provides the authority by which the United States may enforce its criminal laws against those who conduct their criminal acts from the sanctuaries of foreign jurisdictions. In a world made smaller by supersonic jet travel, cellular telephones, telefax machines, international bank transactions by wire transfer and the use of computers, the need to protect the nation's citizen and the lawful order of our society requires the enactment of legislation with the authority to prosecute those who commit crimes beyond the border.<sup>28</sup>

These are very understandable sentiments. The problem occurs because not all states agree on the kinds of behaviour that should attract criminal penalties. The room to differ on such matters is an essential attribute of national sovereignty, provided that the manner of exercise of sovereignty is not itself contrary to international law or commonly accepted morality. Anti-competitive behaviour by business may in fact be the overt and consciously chosen policy of national governments, especially in the face of predatory competition by foreign businesses. This may worry the US government, and incur its disapproval,<sup>29</sup> but it is nevertheless an exercise of sovereign power that must, as a matter of public international law, be respected. The criminalisation of certain activities, for example, abortion, advertising and production of alcohol and drugs (including tobacco) for recreational use, pornography, advertising and certain economic and political activities, may be regarded as abhorrent and criminal in some nations but accepted and even constitutionally protected in others. Political controversy over such matters must be given free reign, for what nation has the right to tell others what is or is not criminal?

There are, however, some commonly accepted extraterritorial applications of criminal laws. Most states claim the right to exercise power over contiguous waters and often within their maritime zones, even though these may technically lie beyond recognised territorial boundaries.<sup>30</sup> Ships (probably including drilling rigs)

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<sup>26</sup> Such circumstances gave rise to the leading case of the *Lotus*.

<sup>27</sup> *R v Keyn* (1876) 2 Ex D 63 (Court for Crown Cases Reserved); *Croft v Dunphy* [1933] AC 156; 59 CCC 141 (Privy Council).

<sup>28</sup> Richard D Gregorie, 'Extraterritorial Jurisdiction: Its Use, Its Roots and Its Validity' (1991) 15 *Nova Law Review* 625, (referring to General Noriega, the former president of Panama.)

<sup>29</sup> Shenefeld, 'The Perspective of the US Department of Justice' above n 24, 13.

<sup>30</sup> See Michael Hirst, 'Jurisdiction Over Cross-frontier Offenses' (1981) 97 *Law Quarterly Review* 80. See also Law Reform Commission of Canada, 'Extraterritorial Jurisdiction', above n 17, especially 1-3; Williams and Castel, *Canadian Criminal Law, International and Transnational Aspects*, above n 17; Morgan, *International Law and the Canadian Courts*, above n 17; Jennings, 'Extraterritorial Jurisdiction and the United States Anti-trust Laws' above n 17; Akehurst, 'Jurisdiction in International Law', above n 17; O'Regan,

and aircraft are traditionally regarded as an extension of the territory of the state in which they are registered. States have a right to protect their diplomatic and consular staff serving in other countries, and the physical premises occupied by embassies and consulates is regarded for many purposes as the territory of the state they represent. Similar principles may apply with the consent, in peacetime, of the state where the missions are located, to naval and military forces stationed outside their home territory, for example, US forces stationed in Okinawa.

States also have a right to protect themselves against activities carried on outside their territory with a view to overthrowing or destabilising their institutional structures. Treason and similar offences may, under the rules of most legal systems, be punishable even though the offences were committed in the territory of another state.<sup>31</sup>

The literature seems to allow at least argument that a state may claim the power to deal with criminal acts committed *by* its nationals wherever they may be. Less clear is the power to deal with crimes committed *against* a state's own nationals outside their country. There was some comment on this when US relatives of US citizens killed in the Lockerbie air disaster (involving a US-registered aircraft in Scotland) sought criminal sanctions against persons who had committed criminal acts some distance from the aircraft itself, allegedly in Germany, Britain, or other places outside the US. Even if the perpetrators could be identified, it is difficult to envisage that in the circumstances they could be extradited under the law of any country, except the US, to any place other than England or Germany (where a bomb was loaded onto the aircraft), unless what they did were found analogous to piracy.

The claim to criminal jurisdiction that has excited the most comment, however, is the claim to jurisdiction where behaviour, wherever and by whomever it may be committed, has *effects* on or in the territory of the prosecuting state. This is the basis of the controversy surrounding attempts by the US to enforce its antitrust laws extraterritorially. However, the rationale for such law may be easier to comprehend when the activity complained of is not commercial behaviour, which is regarded as normal in most countries, but rather, say, the production of heroin for non-medicinal use. Suppose A, B and C, who are all residents and citizens of Illyria, produce heroin in Illyria and send it to a contact in, say, Arcadia. Arcadian law penalizes the production, as well as sale and possession of heroin for non-medicinal use. If A ceased to produce heroin in 2002 and visited Arcadia as a tourist in 2005, would Arcadia have jurisdiction to try him for a crime based on events that

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'Extraterritoriality', above n 17; Blakesley, 'United States Jurisdiction over Extraterritorial Crime', above n 17.

<sup>31</sup> For example, *Joyce v DPP* [1946] AC 347; the House of Lords found that English courts had jurisdiction to try Joyce (also known as 'Lord Haw-haw') who was a citizen of the Republic of Ireland, and whose acts, (broadcasting Nazi propaganda in English) amounting to treason, had been committed in Germany.

happened in Illyria in 2002?<sup>32</sup> Or what should the approach be to other cases? Some examples include:

- *Director of Public Prosecutions v Stonehouse*<sup>33</sup> the well-known case where a former British Cabinet minister faked his death in Florida, intending to defraud an English insurance company;
- *Treacey v Director of Public Prosecutions*<sup>34</sup> where the accused wrote and posted in England a blackmailing letter demanding money, the letter being delivered to the addressee in Germany;
- *R v Blythe*<sup>35</sup> where a man in British Columbia wrote letters to a girl in Washington State which constituted an attempt to seduce her while she was under age;
- *Ward v The Queen*<sup>36</sup> where D and V were both residents of Victoria. D was standing at the top of a steep bank of a river, which forms the border between Victoria and NSW. D shot V, who was standing on a sandbank in the river, intending to kill him, and succeeded. When the matter came to trial it was established that the boundary of Victoria is the bank of the river on the Victorian shore, so that the sandbank on which V was standing is in the territory of NSW. The courts of Victoria had no jurisdiction to entertain the case in the circumstances.

These cases show why people find it difficult to see why there should be objections to the courts of a country exercising jurisdiction in cases where behaviour outside the country has effects within its boundaries.

The contrary arguments are familiar from the extraterritorial antitrust debate.

It does seem acceptable for a country to assert jurisdiction if at least one vital element occurs within its territory and that element is also an essential element of a crime in the state where the other elements of the offence took place. To go beyond this seems to risk treading on the national interests and jealousies of the other states that form the international community. The views of the US government are easy to appreciate, but it is suggested they ignore the national interests and sovereignty of other states.

### *Extradition and Enforcement*

Few if any countries ever enforce penal sentences or orders of foreign governments.<sup>37</sup> Even within federal systems, special legislation or constitutional

<sup>32</sup> Cf *DPP v Doot* [1973] AC 807.

<sup>33</sup> [1978] AC 55.

<sup>34</sup> [1971] AC 527; cf *Re Chapman* [1970] 5 CCC 46 (Ontario CA.)

<sup>35</sup> 1895 1 CCC 263 (BC SC).

<sup>36</sup> (1980) 142 CLR 308 (High Court of Australia) The NSW Courts assumed jurisdiction and dealt with the matter. See O'Regan, 'Extraterritoriality', above n 17, 14.

<sup>37</sup> Williams, 'Venue and the Ambit of Criminal Law', above n 13; Collins, above n 4, 97 says that '[t]here is a well-established and almost universal principle that the courts of one country

provisions are used to enforce minor penal sanctions, such as ‘on-the-spot’ fines for traffic and parking offences. The reason for this lies in the assumption in international law and practice that no state will attempt to exercise its power or public authority within the territory of another state, without the express agreement of the other state. Even when the US offends international law and the feelings of other states by arresting and abducting persons in the territory of other states,<sup>38</sup> it does not attempt to carry out sentences of its courts in other countries.

The power to tax is regarded, like the power to punish, as an exercise of sovereign power. In the absence of agreement or treaty arrangements, neither the civil nor criminal courts of any country will recognise or enforce the penal or revenue judgements or orders made by courts (or other aspects of the implementation of public policy) of those countries.<sup>39</sup>

The solution seems to lie in *extradition*,<sup>40</sup> under which one state requests another to apprehend and surrender to it a person accused of committing a crime against its

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will not enforce the penal and revenue laws of another country.’ American Law Institute, *Restatement of the Law (Second): Conflict of Laws* §§89, 120 (1971); American Law Institute, *Restatement (Third) Foreign Relations*, above n 11, §422.

<sup>38</sup> As the United States did in the *Escamilla* case, referred to in La Forest, ‘The Ambit of Criminal Law’, above n 18. In that case and subsequently in the case of General Noriega and other cases, US law enforcement officers have arrested foreign nationals in foreign countries with the purpose of removing them physically, and regardless of the wishes of the State where the persons are found, for trial in the United States. See Ethan A Nadelmann, *Cops Across Borders: The Internationalization of USA Criminal Law Enforcement* (1993). The legality of acts of this type was upheld by the US Supreme Court: *Ker v Illinois* 119 US 436 (1886). In the cases of Eichmann and some other cases, Israel has also abducted persons accused of crime under its laws in the territory of other states.

<sup>39</sup> In the UK, Australia, Canada and most Commonwealth Countries the decisions by the Privy Council in *Sirdar Gurdyal Singh v Rajah of Faridkote* [1894] AC 679; *Attorney-General (New Zealand) v Ortiz* [1984] AC 1; the House of Lords in *Government of India v Taylor* [1955] AC 491 still represent the law. See *Attorney-General (UK) v Heinemann Publishers Australia Pty Ltd* (‘*Spycatcher*’) (1988) 165 CLR 30, especially 43; *Morgeaud Investments Ltd v De Savoie* [1990] 3 SCR 1074, 76 DLR (4th) 256; *Hunt v T & N plc* [1993] 4 SCR 289; Collins, above n 4, 97; Peter E Nygh, *Conflict of Laws in Australia*, (5<sup>th</sup> ed 1991) 242–5; Jean G Castel, *Canadian Conflict of Laws*, (3<sup>rd</sup> ed, 1994) 161–3. For the US position, see American Law Institute, *Restatement (Second): Conflict of Laws*, above n 37, §§89, 98–102; *Hilton v Guyot* 159 US 113 (1895); *H.M. The Queen in Right of British Columbia v Gilbertson* 597 F 2d 1161 (9th Cir, 1979). It is interesting that US Courts (1) appear to be able, even in the absence of reciprocal legislation, to enforce foreign revenue or tax laws: American Law Institute, *Restatement (Second): Conflict of Laws*, above n 37, §89, note (b); (2), have refused to give extraterritorial operation to US legislation dealing with employment conditions (see *Benz v Compania Naviera Hidalgo* 353 US 138 (1957); *McCulloch v Sociedad Nacional* 372 US 10 (1963); *Windward Shipping (London) Ltd v American Radio Association* 415 US 104 (1974); (cf *International Longshoremen's Association v Ariadne Shipping Co* 397 US 195 (1920); *Marine Cooks v Panama SS Co* 362 US 365 (1960)), discussed in NOTE (Bruce Alan Rosenfeld) ‘Extraterritorial Applications of United States Laws – A Conflict of Laws Approach’ (1976) 28 *Stanford Law Review* 1005. They appear to have not enforced anti-discrimination laws outside the US.

<sup>40</sup> See Ivan Shearer, *Extradition in International Law* (1971); American Law Institute, *Restatement (Third): Foreign Relations*, above n 11, §§475–478.

laws. Extradition involves both the executive and judicial branches of government. Generally extradition takes place under a treaty between the two states, although ad hoc extraditions are possible. The treaties generally set out conditions for granting of extradition orders. Each state also usually has general extradition legislation, setting out general procedures for, and conditions of, extradition orders. After initial contact between governments, leading to police action, such as the issue and execution of an arrest warrant, the accused person must be brought before the courts where he or she is. In general, those courts must be satisfied of matters set out in the legislation, and the accused has the opportunity to contend that extradition is improper – for example, that the crime of which he or she is accused is not an ‘extradition’ crime” within the meaning of any relevant treaties or legislation. The most salient characteristic of an extradition crime is that the behaviour complained of must constitute activity prohibited by the criminal law of both countries and must not be of a political or ideological character. If the prosecution succeeds, the court orders that the accused be taken in custody and surrendered to the authorities of the prosecuting state. That state then disposes of the matter under its own laws, generally by a criminal trial in its own courts.

The procedure may be complex and time-consuming, and the authorities of the prosecuting state may decide that the time and expense are not justified relative to the returns. However, apart from the general requirement of treaty relationships, the requirement for court procedures in both countries is a reflection of procedures that must be followed when the civil judgments and orders of one country are enforced in the courts of another.

A preferable solution seems to be bilateral or multilateral international agreements under which governments agree that each will make criminal, under its domestic laws, the conduct which all desire to prohibit. If any activities in cyberspace are to be made criminal, even though this process seems cumbersome, it may be the only acceptable means.

*Learning from Mistakes: The Example of United States Antitrust Law*<sup>41</sup>

The problem created where a nation-state wishes to proscribe activities outside its geographical boundaries, by persons who are not its residents or citizens, is illustrated by the way in which the US sought to apply its competition laws to activity by foreigners in their own countries. Attempts by any single nation to proscribe activities beyond its physical boundaries by people who are neither residents nor citizens are likely to create similar problems. The reality is that when

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<sup>41</sup> Still the best, and most thoughtful account of the subject (at least in terms of appreciating the position of people outside the United States, is Kingman Brewster Jr, *Antitrust and American Business Abroad* (1958) but see also Brilmeyer, above n 11, ch 10; for a non-US view; Castel, *Extraterritoriality in International Trade*, above n 11, ch 2 is useful. Most self-respecting law reviews have carried at least one article each year on this subject. I will not attempt to refer to all of them. There is an excellent select bibliography by Behney Jr, above n 18, 303.

this happens, a state may enforce its laws within its own boundaries, but other states will steadfastly block any attempt to enforce those laws within *their* own territory.

In 1909, an attempt was made to invoke the provisions of the United States *Sherman Anti-trust Act* to compensate a company whose attempt to enter the market for producing bananas in Costa Rica and exporting them to the United States was allegedly frustrated by activities, including violence, and conduct by, among others, Costa Rican citizens, corporations and its government, all of which would have been contrary to the Act if done in the US or by US citizens. The Supreme Court, in a judgment delivered by Holmes J, refused to give the legislation any extraterritorial operation whatever,<sup>42</sup> relying on the presumption that legislation has no extraterritorial effect. The *Clayton Anti-trust Act 1914* enacted subsequently, expressly provides for its own operation outside the United States.<sup>43</sup> In *United States v Aluminum Corporation of America*,<sup>44</sup> Judge Learned Hand, influenced by the effects of a breach of the antitrust laws on business within the United States, indicated that those laws might apply to a *US company* outside the US, and there was support for this view in the Supreme Court,<sup>45</sup> but *United Fruit* has never been expressly overruled.<sup>46</sup>

The suggestion was enough, however, for a number of US lawyers to assume that US antitrust laws affected *foreign* businesses operating outside the US. In 1978, the then US Attorney-General told the Law Council of Australia that if the US did not assert its own values, others would assert their values on the US; competition was valued highly in America, and the US would continue to assert its sovereignty over activities that had their effects on business in the US.<sup>47</sup>

As a senior US Justice Department official put it:

There are two primary objectives of US policy in the application of our anti-trust laws to foreign jurisdictions. First is to prevent national boundaries from providing a haven from which Americans may flout laws designed to protect our domestic competition; and second, to prevent arrangements made abroad from depriving U.S. consumers of the benefits of competition among importers and between domestic and foreign sources of supply.<sup>48</sup>

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<sup>42</sup> *American Banana Co v United Fruit Co* 213 US 347 (1909).

<sup>43</sup> 15 USC §22.

<sup>44</sup> 148 F 2d 416 (2d Cir, 1945).

<sup>45</sup> *Continental Ore Co v Union Carbide and Carbon Corp* 370 US 690 (1962).

<sup>46</sup> See Joseph P Griffin, 'Antitrust and Act of State' in John R Lacey (ed), *Act of State and Extraterritorial Reach: Problems of Law and Policy* (1983). The American Law Institute, *Restatement of the Law (Third): The Foreign Relations Law of the United States* (1986), above n 11, §421 (j) does accord jurisdiction to United States courts over persons where 'the persons ... had carried on outside the state an activity having a substantial, direct and foreseeable effect within the state, but only in respect of such activity'. Even this circumscribed statement is, in terms of public international law, controversial, at least everywhere outside the US.

<sup>47</sup> Griffen Bell Jr, in A V Lowe, *Extraterritorial Jurisdiction: An Annotated Collection of Legal Materials* (1983) 4–5.

<sup>48</sup> Shenefeld, 'The Perspective of the US Department of Justice', above n 24, 13.

Most of the world's uranium is produced outside the US; when Westinghouse, a US manufacturer of uranium-powered electrical generators, claimed to have been affected adversely by what it alleged to be a producers' cartel, it commenced actions in the US courts against the members of the alleged cartel and then sought discovery of documents in a number of foreign countries, including the United Kingdom, Australia and Canada. These countries objected to the discovery proceedings in their own courts on the grounds that US laws had no application to acts outside the US by persons or corporations, which could not be said in any sense to be residents or citizens of the US.<sup>49</sup> These three countries, among others, enacted 'blocking' legislation to prevent their respective courts granting interlocutory orders (in the unlikely event that they may have done so, for the common law seemed clearly to preclude this) and, although there were some moves to reconciliation,<sup>50</sup> the situation remains a stand off, with the US alone asserting its right to apply criminal laws to activities beyond its boundaries and all other nations denying this.<sup>51</sup>

The problem is obvious. Because of the cultural and political significance of the antitrust laws (which are essentially penal laws), US politicians and others in the US do not wish to concede that their laws, embodying political values which, at least until recently, commanded wide support, can be thwarted simply because the acts that contravene the laws happen outside the US and the actors are not American – often not even subsidiaries or associates of American businesses. The effects are identical to those that would follow from similar acts or omissions within the territory of the US.

On the other hand, the view of virtually every other country is that the operation of laws such as the US antitrust law – like all other penal laws – should be confined to the territory of the legislating state and to individuals and other legal persons over

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<sup>49</sup> For British reactions see S Silkin, in Joseph P Griffin (ed), *Perspectives on the Extraterritorial Application of US Antitrust and Other Laws* (1979) 30–2; for Canadian reactions, D Gordon Blair, 'The Canadian Experience, in Perspective on the Extraterritorial Applications of U.S. Antitrust and Other Laws' in Joseph P. Griffen (ed), *Perspectives on the Extraterritorial Application of US Antitrust and Other Laws* (1979) 65–7; for Australian reactions, see Laurence W Maher, 'Anti-Trust Fall-out: Tensions in the Australian-American Relationship' (1982) 13 *Federal Law Review* 103; Warren Pengilly 'Extraterritorial Effects of United States Commercial and Antitrust Legislation: A View from "Down Under"' (1983) 16 *Vanderbilt Journal of Transnational Law* 833.

<sup>50</sup> The 1982 agreement between Australia and the US is 'Appendix' in John R Lacey (ed), *Act of State and Extraterritorial Reach: Problems of Law and Policy* (1983).

<sup>51</sup> For example, Jennings, 'Extraterritorial Jurisdiction and the United States Anti-trust Laws', above n 17, 146; Brewster, above n 41; cf H P de Vries and A Loewenfeld, 'Jurisdiction in Personal Actions – A Comparison of Civil Law Views' (1959) 44 *Iowa Law Review* 306; Kurt H Nadelmann, 'Jurisdictionally Improper Forum' in *XXth Century Comparative and Conflicts Law – Legal Essays in Honor of Hessel E Yntema*, (1961); L I de Winter, 'Excessive Jurisdiction in Private International Law' (1968) 17 *International & Comparative Law Quarterly* 706; Hans Smit, 'Common and Civil Law Rules of *In personam* Adjudicatory Authority: An Analysis of Underlying Policy' (1972) 21 *International and Comparative Law Quarterly* 335.

whom that state has some control. Any attempt to apply such laws to non-citizens of that state outside its territorial boundaries is regarded as an arrogant encroachment on national sovereignty and contrary to public international law. The government of any state that wishes to enforce laws that are possibly 'penal' outside its boundaries is caught in the dilemma of satisfying the demands of voters and pressure groups internally, and the demands of diplomacy and good relations with other states externally. While it may be easy for governments to explain the impact of political pressures to other governments, it is often difficult for governments – especially the US government, it might be said, in a national culture that has strong historical tendencies to isolationism – to justify actions dictated by international pressure.

This example is worth considering, given the amount of commercial activity crossing national barriers that is generated in the US and affects the people of the US. The arguments about antitrust law might apply equally to other transnational activities. Many countries would consider the consequences of some transnational activities (fraud, pornography etc.) injurious to their citizens, and like the US government in respect to enforcement of its antitrust laws, might seek to legislate to penalize activities carried out beyond territorial limits but with effects within those limits, and also to enforce that legislation.<sup>52</sup> Any state which attempts to exercise legislative or law-enforcing power outside its physical boundaries runs the risk of, at worst, accusations that what it does is contrary to public international law and, at best, disapproving attitudes from the governments of other countries.

#### *Private International Law*<sup>53</sup>

The general rule in almost all countries is that only the judgments and orders of the local courts are recognised and enforced without considerable formalities.<sup>54</sup> Penal and revenue judgments are generally never enforced outside the place where they apply directly. Other judgments or orders that are repugnant to the 'public policy'

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<sup>52</sup> In the December 1995, Senate Select Committee on Community Standards Relevant to the Supply of Services Utilising Electronic Technologies, Parliament of Australia, Report on Regulation of Computer On-Line Services Part 2, the committee has recommended a series of measures, including criminal sanctions, to proscribe the communication of pornographic material. Australian law penalises 'sex tourism' by Australian citizens or residents in other countries [http://www.apf.gov.au/Senate/committee/comstand\\_ctte/online2/index.htm](http://www.apf.gov.au/Senate/committee/comstand_ctte/online2/index.htm) at November 2008.

<sup>53</sup> The following account is based on the situation in common law countries: I have drawn on available literature of Australia, Canada, the UK and the US. The basic principles governing recognition and enforcement of foreign judgments in each of these countries is the same, though the federations may differ in their treatment of internal conflict of laws, and the 'due process' clause of the US Constitution has affected judicial attitudes in that country. The 'long-arm' statutes of some states are considered below. Reference may be made to Nygh, above n 39; Castel, *Canadian Conflict of Laws*, above n 39; Collins, above n 4; *Restatement of the Law (Second): Conflict of Laws*, above n 37, ch 3; Gary B Born with David Westin, *International Civil Litigation in United States Courts* (2<sup>nd</sup> ed, 1992) ch 2.

<sup>54</sup> American Law Institute, *Restatement (Third): Foreign Relations*, above n 11, §§481–482. Like most of the principles set forth in the Restatement, these principles are always subject to a requirement of 'reasonableness'.

of the forum (as determined by the courts of that forum) also may not be recognised and enforced.<sup>55</sup> However, courts will normally recognise and enforce other judgments and orders of courts in other countries, especially those that provide for the payment of money.<sup>56</sup>

Recognition and enforcement is not automatic in the absence of local legislation that provides for registration of foreign judgments. The normal procedure for enforcing a civil judgment awarded by a foreign court is that the person seeking to enforce that judgment must commence the appropriate claim in a forum court seeking payment of the debt created by the judgment. The judgment debtor may, as a defence to the civil claim, deny that the foreign court had jurisdiction to make the judgment or that there was a procedural irregularity (such as a failure to afford the judgment debtor a fair hearing); but normally the forum court will not question the substantive finding of the foreign court and re-litigate the issue.

The forum court may refuse to recognise and enforce a foreign judgment if it finds that the court giving the original judgment lacked jurisdiction. That question, like the question of jurisdiction in criminal cases, flows from the territoriality principle. The basic ground of jurisdiction is that the forum court would itself exercise jurisdiction on similar bases. The main requirement for jurisdiction is physical presence of the defendant personally in the jurisdiction, even if that presence is fleeting.<sup>57</sup> The question is more difficult if the defendant is an artificial legal person, typically a corporation, which has no personal physical presence anywhere. Generally courts recognise jurisdiction of foreign courts over corporations based on the corporation being registered, doing business or having significant assets in the jurisdiction. Defendants may submit to the jurisdiction of the foreign court by defending the action. Defendants who are not physically present in a country may nevertheless be subject to the jurisdiction of its courts if they are residents of or domiciled in that country, and in some cases if they are nationals of that country. In the US the Supreme Court has placed a constitutional gloss over the area by holding

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<sup>55</sup> American Law Institute, *Restatement (Second): Conflict of Laws*, above n 37, §98, which states that a 'valid judgment rendered in a foreign nation after a contested proceeding will be recognized in the United States so far as the immediate parties and the underlying cause of action are concerned'; American Law Institute, *Restatement (Third): Foreign Relations*, above n 11, §482(2)(d); *Attorney-General (UK) v Heinemann Publishers Australia Pty Ltd* ('*Spycatcher*') (1988) 165 CLR 30 involved an attempt by the UK government to prevent publication in Australia of information which it alleged to contravene provisions of its official secrets legislation. The High Court of Australia drew an analogy between that type of legislation and penal and revenue laws: see especially at 43.

<sup>56</sup> Orders affecting status of persons, such as orders for the custody of children of marriages that have ended, create different problems.

<sup>57</sup> American Law Institute, *Restatement (Third): Foreign Relations*, above n 11, §482(b); American Law Institute, *Restatement (Second): Conflict of Laws*, above n 37, §28; *Laurie v Carroll* (1958) 98 CLR 310; *Amusement Equipment Inc v Mordelt* 779 F 2d 264 (5th Cir, 1985).

that the ‘due process’ clause of the constitution requires at least minimal contacts with the jurisdiction.<sup>58</sup>

Most jurisdictions have provisions allowing the joinder of a defendant, who is neither domiciled nor physically present in the jurisdiction where the circumstances giving rise to the claim, have a connection with that jurisdiction. In the US these are called ‘long-arm’ statutes. However, most other common law jurisdictions have provisions based on the former Order 11 of the Rules of the High Court in England. In NSW these are now contained in the *Uniform Civil Procedure Rules*, Part 10 and Schedule 6. For example, Courts will usually have jurisdiction in an action for breach of contract if that contract was made in the forum state, no matter where the breach occurs.<sup>59</sup> Similarly if the claim is founded on a tort and the damage was sustained, or resulted from an act committed within the jurisdiction, the courts will entertain the action.<sup>60</sup> Judgments under such provisions are usually recognised.

Once the courts of a state take jurisdiction over a civil claim, the next task is to determine which legal system will determine the substantive outcome of the case. By definition, more than one legal system is potentially involved and in common law systems the courts resort to a series of complex rules, known as ‘choice-of-law’ rules to determine this issue. Generally, in contract law cases, the parties are free to choose a governing law, and if they fail to do so the court will apply the system of law that has the closest or most significant connections with the transaction.<sup>61</sup> In tort claims, courts in the US generally make an assessment of which legal system has the greatest interest in the proceeding and apply the law of that state,<sup>62</sup> while common law courts within the Commonwealth tend to apply the law of the place where the unlawful act was committed, and give a remedy if the act gives rise to a tort claim under the law of that place, provided that the act is also unlawful in the

<sup>58</sup> *International Shoe Co v Washington* 326 US 310 (1945); *Helicopteros Nacionales de Colombia v Hall* 466 US 408 (1984); Brilmeyer, above n 11.

<sup>59</sup> English Rules of Court O 11, r 1(1)(d); for example, where a contract is made by fax or telex, the English courts have ruled that the contract is made in the place where the acceptance is communicated to the offeror, that is, the place where it is received. So if the acceptance of an offer is received in England by telex, fax or e-mail, the contract is made there, and English Courts will entertain an action wherever the breach may have occurred: See Collins, above n 4, 329; Nygh, above n 39, 39–41.

<sup>60</sup> English Rules of Court, O 11, r 1(1)(f); Collins, above n 4, 340; Nygh, above n 39, 42–52. See *Distillers Co (Biochemicals) Ltd v Thompson* [1971] AC 458; *Moran v Pyle National (Canada) Ltd* (1973) 43 DLR (3d) 239; *Hunt v T & N plc* [1973] 4 SCR 289; John Goldring, ‘Product Liability and the Conflict of Laws in Australia’ (1978) 6 *Adelaide Law Review* 151; Peter Kaye, *Private International Law of Tort and Product Liability* (1991).

<sup>61</sup> *Bonython v The Commonwealth* [1951] AC 201; *Amin Rasheed Shipping Corp v Kuwait Insurance Co* [1984] AC 50; American Law Institute, *Restatement (Second): Conflict of Laws*, above n 37, §188.

<sup>62</sup> *Babcock v Jackson* 191 NE 2d 279 (1963); American Law Institute, *Restatement (Second): Conflict of Laws*, above n 37, §145.

forum (the proviso may no longer apply).<sup>63</sup> There are weaknesses in both the US and Commonwealth positions.<sup>64</sup> The complexity of law is a deterrent to litigation.

### *Enforcement of Laws?*

The discussion of the limitations and difficulties of enforcing consumer protection laws suggests that legal means of consumer protection will not be completely effective. The recent scandal involving contaminated milk products manufactured in China demonstrated the inability of Australian laws (and the laws of many nations outside China) to prevent harm, or even to provide compensation for the victims of that harm. Some of the difficulties may be overcome, and for that reason the difficulties should not deter nation-states from exercising their national sovereignty by enacting the legal measures they consider necessary in the national interest.

Can these obstacles be overcome? Does the national interest require that they be overcome?

If a national interest requires measures of consumer protection, the means of overcoming the obstacles that exist to the maximum effectiveness of consumer protection measures should, so far as possible, be overcome. Because of the legal problems discussed here, methods that depend on the enforcement of local legal sanctions, criminal or civil, may not be entirely or maximally effective where the product is designed or manufactured outside Australia.

Where a legal sanction is necessary, to some extent the simplest way, as in a number of Australian consumer protection statutes since the early 1970s, is to deem some specific link in the chain of supply as the person who must assume liability for any loss or damage resulting from a defect in goods or services. Such a person may be in a better position to spread the loss by insuring against liability, so that there is an incentive to pay attention to quality and safety.

However, prevention is usually better than cure, and advance prescription of safety and information standards, with which goods must comply, is often a more effective way of achieving the aims of protecting consumers. Breach of such prescriptions usually attracts a criminal penalty, and these are very difficult to enforce against, for example, designers and manufacturers of goods outside the territorial jurisdiction of the enacting state. The attraction of such standards is not the sanction for breach but rather the assumption that most citizens wish to obey the law and will therefore strive to meet the standards.

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<sup>63</sup> *Phillips v Eyre* (1870) 6 LR QB 1; but cf *Breavington v Godleman* (1988) 80 ALR 362; *John Pfeiffer Pty Ltd v Rogerson* [2000] HCA 36; *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503; 172 ALR 625; 74 ALJR 1109.

<sup>64</sup> Great Britain, Law Commission, *Private International Law: Choice of Law in Tort and Delict*, LRC 193, (1990); Australian Law Reform Commission, *Choice of Law*, Report No 58, (1992).

Compliance with different standards in different places is difficult and increases costs. For this reason the European Community seeks, where prescription of standards is necessary, to ensure that standards are uniform. From time to time it issues Directives to achieve this end.<sup>165</sup>

In a small market such as Australia, where trade agreements tend to be bi-, rather than multi-lateral, uniform standards, unless prescribed on a global or universal basis, are unlikely to be effective. Given that Australia has been unable to adopt a standard electrical power plug, uniformity is unlikely to provide practical standards for many types of goods. Uniform standards may be appropriate in some cases, but in other cases may result in products that are unsuitable for Australia.

Uniform legal rules, unless expressed in terms so general as to be practically useless, may meet the same fate. However, in some cases, following a widely adopted overseas model may have benefits. To some extent, the *Trade Practices Act 1974* Part VA, follows the Directive of the European Communities on manufacturers' liability for defective products, and must be regarded as beneficial, if not optimal. Manufacturers and importers can be assured that, if the product meets the requirements of EC law, it will most likely meet the requirements of Australian law. This reduces compliance and other production costs, and assures Australian consumers of a reasonable standard of quality for goods. To this extent a local standard that mirrors and enacts an international standard is desirable.

In the last resort, however, the national interest of any state may require that it enact standards of safety and quality of goods that may in effect discriminate against goods produced outside the boundaries of that state, unless special measures are taken to ensure compliance.

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<sup>65</sup> For a general survey of the work of international organisations, see David Harland 'The Consumer in the Globalized Information Society – The Impact of the International Organizations' in Thomas Wilhelmsson, Salla Tuominen and Heli Tuomola (eds), *Consumer Law in the Information Society* (2000).