

AUSTRALIA: AN ANTI-TRUST LAW OR A MONOPOLIES AND RESTRICTIVE PRACTICES ACT?†

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If the intentions of the Federal Government are carried into effect, the Commonwealth of Australia will shortly have new legislation designed to strengthen the competitive nature of the economy. Although there have been previous federal Acts,¹ and experiments at the State level,² the possibility of a new Act will bring into issue the basic assumptions involved in legislation intended to stimulate competition.

The earlier federal Acts strongly reflected the influence of the American Sherman Act,³ which is traditionally categorized as *comprehensive* in its provisions since it purported to strike down all contracts in restraint of trade and all attempts at monopolization. Contrasted with this, the most recent legislation in the United Kingdom has been *selective* in its approach. Only in isolated instances has behaviour been forbidden outright, and the problem has been approached primarily through registration of the allegedly anti-competitive practices, coupled with an investigation into their individual desirability.

When the question ultimately arises as to which of these approaches Australia should adopt, it may prove to have no easy answer; but by examining the backgrounds which have given rise to such differing solutions and contrasting the actual legislative provisions involved, it is possible to develop criteria by which the projected legislation may be judged.

I. The Background of the American and English Legislation

'The Sherman and Clayton Acts have become as much a part of the American way of life as the due process clause of the Constitution,' wrote President Franklin Roosevelt.⁴ The belief in competition generally, and in the desirability of prices determined by the functioning of

† The law as stated is intended to reflect the position as of 1 October 1960.

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¹ The Australian Industries Preservation Act 1906; The Australian Industries Preservation Act 1908; The Australian Industries Preservation Act 1909; The Australian Industries Preservation Act 1910. *Attorney-General v. Adelaide Steamship Co. Ltd* [1913] A.C. 781; and note, Stalley 'Federal Control of Monopoly in Australia' (1958)

² *University of Queensland Law Journal* 258; Castles 'Australian Anti-Monopoly Legislation' (1959) 8 *American Journal of Comparative Law* 82.

³ There is legislation in this field in New South Wales, Victoria, Queensland and Western Australia.

⁴ *Attorney-General v. Adelaide Steamship Co. Ltd* [1913] A.C. 781, 801.

⁵ Letter from President Roosevelt to Secretary of State Cordell Hull, 6 September, 1944.

the market specifically, are the outward manifestations of the United States' belief in the private enterprise system. This faith in the power of competition led to the passing of the Sherman⁵ and the Clayton⁶ Acts, and has underlain the reasoning of judges in the cases decided under them.⁷ At the same time, some of the anti-trust legislation stresses a closely related problem, the fear of bigness and a belief in the merits of the small businessman;⁸ and this emphasis too has influenced the judiciary.⁹ A combination of these two strands¹⁰ explains much of the reverence and enthusiasm apparently felt by the American public for this legislation, even though the laws have frequently been proved ineffective in achieving their ends.

The English attitudes to competition have been very different. There has been little in English social history to foster the idea of competition as either the justification for private enterprise or as a vehicle for social democracy. There has been little anti-trust feeling, and when reform movements came in England they tended to discard the radical concept of regulating business in favour of the socialist principle of nationalization.¹¹ Meanwhile the prevailing attitude has been that businessmen are best left to their own devices.¹² Nor have

⁵ Sherman Act 1890, 26 Stat. 209.

⁶ Clayton Act 1914, 38 Stat. 730.

⁷ For instance, Harlan J. in *Northern Securities Co. v. United States* (1903) 193 U.S. 197, 331, finding as a 'plainly deducible . . . proposition . . . that the natural effect of competition is to increase commerce, and an agreement whose direct effect is to prevent this play of competition restrains instead of promoting trade and commerce.'

⁸ This is especially clear in the Robinson-Patman Price Discrimination Chain Store Act 1936, 49 Stat. 1526 and the Fair Trade Act 1937, 50 Stat. 693.

⁹ See especially the views of Brandeis J.; e.g. dissenting in *American Column and Lumber Co. v. United States* (1921) 257 U.S. 377, 413, and *Liggett Co. v. Lee* (1932) 288 U.S. 517, 541. It is possible for this aspect of the problem to foster an anti-competitive attitude from the economic point of view. See the treatment of the Robinson-Patman Act, *infra*, part II (b).

¹⁰ One can see a combination of these two stands, for example, in the judgment of Learned Hand J. in *United States v. Aluminum Co. of America* (1945) 148 F.2d. 416, 427 (2d. Cir.) 'Many people believe that possession of unchallenged economic power deadens initiative, discourages thrift and depresses energy; that immunity from competition is a narcotic, and rivalry is a stimulant, to industrial progress; that the spur of constant stress is necessary to counteract an inevitable disposition to let well enough alone. Such people believe that competitors, versed in the craft as no consumer can be, will be quick to detect . . . new shifts in production, and be eager to profit by them. In any event the mere fact that a producer having command of the domestic market, has not been able to make more than a 'fair' profit, is no evidence that a 'fair' profit could not have been made at lower prices. . . . Congress . . . did not condone 'good trusts' and condemn 'bad' ones; it forbid all. Moreover, in so doing it was not necessarily actuated by economic motives alone. It is possible, because of its indirect social or moral effect, to prefer a system of small producers, each dependent for his success upon his own skill and character, to one in which the great mass of those engaged must accept the direction of a few. These considerations, which we have suggested only as possible purposes of the Act, we think the decisions prove to have been in fact its purposes.'

¹¹ See especially Rostow, 'British and American Experience with Legislation against Restraints of Competition' (1960) 23 *Modern Law Review* 477, 490.

¹² For example, *per* Hill J. in *The President Van Buren* (1924) 16 Asp. R.M.C. 444 (Adm.): 'The English law, in my view, very fortunately regards businessmen as capable of knowing and of making contracts for themselves and is very unwilling to limit the power of capable people to make what bargains they like.'

the judges shown great enthusiasm for maintaining the free working of market as the means of controlling the economy. In upholding a notorious price fixing agreement and at the same time giving a deadly blow to the Australian Industries Preservation Act, the Privy Council declared:

... [I]t was proved that the prices prevailing when negotiations for this agreement commenced were disastrously low owing to the "cut-throat" competition which had prevailed for some years. . . . It can never, in their Lordships' opinion, be of real benefit to the consumers of coal that colliery proprietors should carry on their business at a loss, or that any profit they make should depend on the miners' wages being reduced to a minimum. Where these conditions prevail, the less remunerative collieries will be closed down, there will be great loss of capital, miners will be thrown out of employment, less coal will be produced, and prices will consequently rise until it becomes possible to reopen the closed collieries or open other seams. The consumers of coal will lose in the long run if the colliery proprietors do not make fair profits or the miners do not receive fair wages. There is in this respect a solidarity of interest between all members of the public.¹³

It was not surprising that when the Monopolies and Restrictive Practices Act was passed in England in 1948,¹⁴ it proved to be, by American standards, a timid affair. It was so mild that it evoked little political controversy, being introduced by a Labour government, supported by a Conservative opposition, and based on a White Paper published by the Coalition government in 1944.¹⁵ The Restrictive Trade Practices Act of 1956¹⁶ was, admittedly, a much bolder measure, but again it was primarily aimed at flagrant abuses of an anti-competitive nature, rather than inspired by any generalized concept of the desirability of competition. The work of a few enthusiasts in both parties,¹⁷ it was probably in advance of the sentiments of the country.¹⁸

Not only have the English and American public shown a different attitude to competition, but the attitude of the business communities in the two countries is equally different. The American businessman working in a mobile society regards the duty to compete as the correlative of his right to have the minimum amount of other govern-

¹³ *Per* Lord Parker in *Attorney-General v. Adelaide Steamship Co. Ltd* [1913] A.C. 781, 809. In keeping with this view the judiciary also found such things as market sharing: *Collins v. Locke* (1879) 4 App. Cas. 674 (P.C.), bid rigging: *Pallant v. Morgan* [1953] 1 Ch. 43, and private courts to enforce collective resale price maintenance: *Thorne v. M.T.A.* [1937] A.C. 797, to be in the public interest.

¹⁴ Monopolies and Restrictive Practices (Inquiry and Control) Act 1948, 11 & 12 Geo. 6, c. 66.

¹⁵ Employment Policy, Cmd. 6527 (1944), especially para. 41.

¹⁶ Restrictive Trade Practices Act 1956, 4 & 5 Eliz. 2 c. 68.

¹⁷ 'Against Restrictive Practices' (1956) 178 *The Economist* 501; 'A Bouquet for Mr Thorneycroft' (1956) 179 *The Economist* 248.

¹⁸ 'Bolder than They Think' (1955) 176 *The Economist* 204.

mental interference.¹⁹ To such a dynamic community the existence of anti-trust laws appears as the norm. By contrast, the executive class in the British industry has become more obviously absorbed into the Establishment,²⁰ a fate which cannot be said to have stimulated a dynamic attitude to competition. The result has been that British industry has not only become accustomed to working very closely with government departments,²¹ but also to working in co-operation with potential rivals in the same industry. As an American Congressional Committee put it, 'a typical British director probably still feels that there is something ungentlemanly and vulgar about too much competition'.²² In line with this the Federation of British Industries was able to claim in 1945 that at least 75 per cent of all industrial production was controlled by Trade Associations.²³ It is scarcely surprising that when the Monopolies and Restrictive Practices Commission began investigating individual industries, the companies concerned were not a little displeased with the suggestion that a new attitude to competition might be desirable.²⁴

Moreover, when contrasting the English and American solutions for the legal control of competition, the different concept of the role of the judiciary must be borne in mind. The American judges in the nineteenth century had always taken an active interest in restraint of trade in the field of business activities.²⁵ They were already familiar with political and economic problems brought within their province by the interpretation of the Constitution; and they were conscious of their creative role.²⁶ So without much difficulty they adapted their thinking to deal with the economic, social and political considerations required in deciding cases under the generalized pro-

¹⁹ Sutton, Harris, Kaysen and Tobin, *The American Business Creed* (1956), especially at pp. 46-47, and pp. 163-165. See also popular works such as Randall, *A Creed for Free Enterprise* (1952) 19 ff. Mr Randall is President of the Inland Steel Corporation.

²⁰ Sanderson, 'The Confidence Trick' *The Establishment* (ed. Thomas) (1959); Erickson, *British Industrialists* (1959) ch. 2; Neale, *The Anti-Trust Laws of the U.S.A.* (1960) 475.

²¹ For an excellent description of this relationship, see Crosland, 'The Private and Public Corporation in Great Britain' *The Corporation in Modern Society* (ed. Mason) (1959) 260, 263.

²² Foreign Trade Conferences, Staff Memorandum of the Subcommittee on Anti-trust and Monopoly of the Senate Committee on the Judiciary, pursuant to Senate Resolution 61, 84th Congress, 1st Session (1955).

²³ See generally Leyland, 'Trade Associations' *The British Economy 1945-1950* (ed. Wosdick and Ady) (1952) 87.

²⁴ E.g. The cable industry's reaction to the Monopolies and Restrictive Practices Commission, *Report of the Supply of Insulated Electric Wires and Cables* (1952). 'A Cable Maker's Reply' (1954) 171 *The Economist* 1000; 'Implementing Monopoly Reports' (1954) 171 *The Economist* 734.

²⁵ Per Taft J. in *United States v. Addyston Pipe & Steel Co.* (1898) 85 Fed. 271 (6th Cir.), affirmed (1899) 175 U.S. 211, cf. House of Lords in *Northwestern Salt Co. v. Electrolytic Alkali Co.* [1914] A.C. 461.

²⁶ The most famous exposition of this view was the remark of Hughes C.J. that 'the constitution is what the Supreme Court says it is,' cited by Corwin, *The Twilight of the Supreme Court* (1934) 1.

visions of the early anti-trust statutes;²⁷ and today it can be said that 'Although we are accustomed to think of anti-trust law as part of our statutory law, all of its doctrines, both before and since 1890, are the creation of the Judges'.²⁸ The English legal tradition is very different. Judges are reluctant to admit any creative function on their part, and are especially reluctant to become embroiled in conflicts involving conflicting interpretations of the public interest.²⁹ In keeping with this attitude they have repeatedly re-affirmed their view that the courts are not equipped to deal with economic questions,³⁰ and the great apologist of the common law, Sir Frederick Pollock, was forced to admit that '. . . our lady the common law is not a professed economist'.³¹

It was therefore natural that the 1948 legislation left the investigation of alleged monopolies and restrictive practices to a commission which bore little resemblance to a court of law. Indeed it came as a surprise when the Conservative Government announced in their 1956

²⁷ For instance, the reasoning of Learned Hand J. when deciding whether certain restraints were unreasonable under section 1 of the Sherman Act: 'Certainly such a function is ordinarily "legislative"; for in a legislature the conflicting interests find their respective representation or in any event can make their political power felt, as they cannot upon a court. The resulting compromises so arrived at are likely to achieve stability, and to be acquiesced in: which is justice. But it is a mistake to suppose that courts are never called upon to make similar choices: i.e. to appraise and balance the value of opposed interests and to enforce their preference. The law of torts is for the most part the result of exactly that process, and the law of torts has been judge-made, especially in this very branch. Besides, even though we had more scruples than we do, we have here a legislative warrant, because Congress has incorporated into the Anti-Trust Act the changing standards of the common law, and by so doing has delegated to the Courts the duty of fixing the standard for each case.' *United States v. Associated Press* (1943) 52 F. Supp. 362, 370 (S.D.N.Y.).

²⁸ Handler, *Antitrust in Perspective* (1957) 3.

²⁹ 'You know there was a time when the earth was void and without form, but after these hundreds of years the law of England, the common law, has at any rate got some measure of form in it. We are really no longer in the position of Lord Mansfield who used to consider a problem and expound it *aequa et bona*—what the law ought to be—and it is a long time since Lord Hardwicke's time . . . the problem is not to consider what social and political conditions of today require; that is to confuse the task of the lawyer with the task of the legislator. It is quite possible that the law has produced a result which does not accord with the requirements of today. If so, put it right by legislation, but do not expect every lawyer, in addition to all his other problems, to act as Lord Mansfield did, and decide what the law ought to be. He is far better employed if he puts himself to the much simpler task of deciding what the law is . . . please do not get yourself into the frame of mind of entrusting to the judges the working out of a whole new set of principles which does accord with the requirements of modern conditions. Leave that to the legislature, and leave us to confine ourselves to trying to find out what the law is.' *per* Viscount Jowitt, (1951) 25 *Australian Law Journal* 296.

The Australian judiciary is normally regarded as English rather than American in its approach. McWhinney, *Judicial Review in the English Speaking World* (1956) ch. 5.

³⁰ E.g. ' . . . The evil, if it exists, may be capable of cure by legislation or by competition, but . . . not by litigation' *per* Lord Atkinson in *United Shoe Machinery Co. of Canada v. Brunet* [1909] A.C. 330, 344 (P.C. Can.). See also *per* Fry L.J.: 'I know no limits to the right of competition in the defendants—I mean, no limits in law. I am not speaking of morals or good manners. To draw a line between fair and unfair competition, between what is reasonable and unreasonable, passes the power of the Courts.' *Mogul Steamship Co. v. McGregor, Gow & Co.* (1889) 23 Q.B.D. 598, 625 (C.A.).

³¹ Pollock, *The Genius of the Common Law* (1912) 94.

Restrictive Trade Practices Bill, that the final decision as to whether restrictions were in the public interest was to be left to a court, which, whilst it had lay members, was nevertheless to be presided over by a High Court judge. Although the projected Act was much more detailed and tightly drawn than the American statutes in the field, many responsible authorities were sceptical of the arrangement;³² and the Labour Party centred its opposition to the Bill on this point.³³ Whilst conceding that the new legislation did require the Court to make novel decisions containing elements of policy, the government spokesmen, Mr Thorneycroft and Viscount Kilmuir, came out strongly in favour of the judicial solution.³⁴ The rather different nature of the judicial process required in deciding such cases was recognized even by some members of the judiciary;³⁵ and *The Times* predicted that the judges on the court would be compelled to reveal their predispositions.³⁶ This prediction has proved partially true,³⁷ but the experiment has been generally hailed as a success.³⁸ There is no doubt, how-

³² 'Rings and the Lawyers' (1955) 177 *The Economist* 640.

³³ See speech of Jay, 549 H.C. Deb. 1951 (1956); Speech of Castle, *ibid.* 2000; Speech of Darling, *ibid.* 1991. See especially the former Labour Solicitor-General, Sir Lynn Ungood-Thomas, *ibid.* 2029: 'The function of a court is not that which is mentioned in the Bill; it is entirely different, namely, to interpret and administer law, and not to make it. The Bill hands over to this court governmental and parliamentary power. All judgments are founded upon law or upon facts, but in this case the decision which really matters will be a decision founded neither upon law nor upon fact. It will be a political and economic decision. . . . The true place of public interest in law is as the foundation and reason for a general rule, which the law then applies. It is not for a judge to conceive what, in all the circumstances, he considers the public interest to be. That is not law; it is the negation of law.'

³⁴ Speech of Thorneycroft, 549 H.C. Deb. 1934 (1956); Speech of Kilmuir, 198 H.L. Deb. 18 (1956); Speech of Kilmuir, 199 H.L. Deb. 350 (1956). Also Speech of Kilmuir to Juridical Society of Glasgow, reported, 'Straight from the Woolsack' (1956) 178 *The Economist* 609; and Kilmuir, 'The State, The Citizen and the Law' (1957) 73 *Law Quarterly Review* 172, 173.

³⁵ E.g. per Lord Evershed, First Maccabean Lecture, reported *The Times*, (London) 8 November 1956, p. 15, Col. 5.

³⁶ *The Times*, (London), 11 April 1956, cited in Speech of Fletcher, 551, H.C. Deb. 423 (1956).

³⁷ Cf. The attitude of Devlin J. that 'we cannot think that as a general rule (price stabilization) is a benefit; if we were to hold that, we would be going contrary to the general presumption embodied in the Act that price restrictions are contrary to the public interest', *In re Yarn Spinners' Agreement* (1959) L.R. 1 R.P. 118, 189; and the view of Diplock J. *In re Black Bolt and Nut Association's Agreement* [1960] 1 W.L.R. 884, 904, that price stabilization which made it unnecessary for the purchasers to 'go shopping' was in the public interest. Note also the same learned Judge's willingness to construe 'public' narrowly, thereby making the benefit gateway easier to prove. *Ibid.* 903.

³⁸ The judges have, however, continued to talk in traditional terms. See especially per Devlin J. *In re Chemists' Federation Agreement (No. 2)* (1958) L.R. 1 R.P. 76, 103; ' . . . [W]e have to consider the fundamental question of whether it is contrary to the public interest that sales of medicines should be effected only through chemists. . . . We are not, in our view, in any way required to answer this question as a question of policy. We are not to consider whether competition in the sale of medicines is desirable or undesirable, whether drug stores are a suitable outlet for them or whether chemists should have a monopoly, or whether the Chemists' Federation is a good or bad thing. Such questions of general policy are settled by the Act. . . . Our task is the ordinary task of a court of law to take the words of the Act according to their proper construction and see if, upon the facts proved, the case falls within them.'

It is not easy to reconcile this statement with some of the decisions of the Court.

ever, that even today the English judges would be hostile to being called upon to decide cases with the strong public interest element, which characterizes so much of the American litigation.

It may be deduced from the Anglo-American experience that the feelings of the country as a whole towards competition will decide the strength of future Australian legislation in the field, but the form the legislation takes will be strongly influenced by the attitude of the business community and the judiciary.

II. The Provisions of the English and American Legislation

Vital as the discussions of the background of the anti-trust laws and the Monopolies and Restrictive Practices Act will be, the main emphasis must centre around the actual provisions in the statutes of the United States and the United Kingdom, and the litigation arising under them.³⁹ Furthermore, even with the obvious social and political differences, there is much in the laws of the two countries which represents a fumbling towards the same ends.⁴⁰

(a) *The Collusive Behaviour of Competitors*

Although the common law was traditionally reluctant to become embroiled in the control of competition, there have been times, even in England,⁴¹ when some effort has been made to curb the activities

See especially the choice the court made between making 20,000 workmen unemployed, and having excess capacity reduced in the cotton industry. *In re Yarn Spinners' Agreement* (1959) L.R. 1 R.P. 118, 196.

³⁹ For a general comparison of the laws of all the nations on this point, see *Anti-Trust Laws* (ed. Friedmann) Part III. For the most recent view of the English and American laws, as seen by an American, see Rostow, 'British and American Experience with legislation Against Restraints of Competition' (1960) 23 *Modern Law Review* 477. For an allegation that any contrast between the English and American law is worthless, see Morrison, 'Restrictive Trade Practices' (1959) *Journal of Business Law* 285, 288.

On the two countries individually see:

United States: The best systematic treatment of the law as it is, appears in the *Report of the Attorney-General's National Committee To Study the Antitrust Laws* (1955) (hereinafter cited as the *Attorney-General's Report*); and Neale, *The Antitrust Laws of the U.S.A.* (1960). Among recent books which are illuminating should be numbered, Rostow, *Planning for Freedom* (1959) Ch. 11; Kaysen and Turner, *Antitrust Policy* (1960); Dewey, *Monopoly in Economics and Law* (1959).

United Kingdom: The standard treatise on the Acts is now established as Wilberforce, Campbell and Elles, *The Law of Restrictive Trade Practices and Monopolies* (1957). Also Heathcote-Williams, Bernstein and Roberts, *The Law of Restrictive Trade Practices and Monopolies* (1956); Albery and Fletcher-Cooke, *Monopolies and Restrictive Trade Practices* (1956); Martin, *Restrictive Trade Practices and Monopolies* (1957); Johnson-Davies and Harrington, *Restrictive Trade Practices* (1957). On the operation of the 1956 Act, the two best articles are Dennison, 'The Restrictive Trade Practices Act of 1956' (1959) 2 *Journal of Law and Economics* 64; and Rhineland, 'The British Restrictive Trade Practices Act' (1960) 46 *Virginia Law Review* 1.

⁴⁰ Most obvious is the acceptance in both countries of the idea of 'workable competition' as opposed to classical competition which is now assumed to be unobtainable. The most famous exposition of workable competition is Clark, 'Toward a Concept of Workable Competition' (1940) 30 *American Economic Review* 241. The theory has been subject to numerous interpretations, see Sosnick, 'A Critique of Concepts of Workable Competition' (1958) 72 *Quarterly Journal of Economics* 380.

⁴¹ E.g. as late as *Hilton v. Eckersley* (1855) 6 El. & Bl. 47.

of competitors who chose to combine overtly to stifle competition. It is therefore natural that, relying on this earlier tradition, the most important statutes in both the United Kingdom and the United States should have concentrated their efforts on curbing the more obvious examples of collusion between individual members of an industry who might be expected to show some competitive urges.

The Sherman Act sought to achieve its goal by declaring illegal 'every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce'.⁴² Both English Acts were less direct than this. The Monopolies and Restrictive Practices Act of 1948 set up a commission of that name to which industries where one-third of the supply, processing, or export of goods was in the hands of one company, a group of companies, or a trade association might be referred for investigation. In fact, the majority of the twenty industry reports made between 1948 and 1956 were concerned with collusive arrangements between potential competitors to put an end to competition in some way or other, and in almost every case the Commission found the activities contrary to the public interest.⁴³ Although the government only once acted to make such activities illegal,⁴⁴ there was considerable pressure put on the industries to reform themselves, and the surrounding publicity ultimately encouraged the passing of the Restrictive Trade Practices Act 1956.⁴⁵

This Act requires registration of all 'agreements' or 'arrangements' concerning the production, supply or processing of any goods, when at least two parties accept restrictions relating to the price, terms or conditions, quantities or descriptions, or processing of the goods concerned, or with respect to the persons, classes of persons, to whom, or the areas in which they may be sold.⁴⁶ Registration raises only the

⁴² Sherman Act, s. 2. Although the Act talks in absolute terms, White C.J. is traditionally said to have added the requirement of 'reasonableness' to the Act. *Standard Oil Co. of New Jersey v. United States* (1911) 221 U.S. 1. In the sense that this led to the exemption of many ancillary restraints from the purview of the anti-trust laws this is true, but the change, if it in fact were such, had little impact on the behaviour under discussion in this section.

⁴³ The leading literature on the 1948 Act includes Grunfield and Yamey, 'United Kingdom' *Anti-Trust Laws* (ed. Friedmann 1956); Jewkes, 'British Monopoly Policy 1944-1956' (1958) 1 *Journal of Law and Economics* 1; Cairns, 'Monopolies and Restrictive Practices', in *Law and Public Opinion in 20th Century England* (ed. Ginsberg 1959); Wilberforce, Campbell and Elles, *Restrictive Trade Practices and Monopolies*, (1957) chs. 3, 4 and 8; and Guenault and Jackson, *The Control of Monopoly in the United Kingdom* (1960).

⁴⁴ Under the Monopolies and Restrictive Practices (Inquiry and Control) Act 1948, the Commission made recommendations to the Government which might be accepted or not, and, if accepted, might be implemented by persuasion or made illegal by statutory instrument. *Infra*. Part II, n. 40.

⁴⁵ Note, e.g., the reaction to the Monopolies and Restrictive Practices Commission, *Collective Discrimination Report*. 'Trade with the Brakes Off' *News Chronicle*, 30 June 1955, p. 4; 'The Six Deadly Sins of Monopoly' *ibid.*; 'Price Fixing must be abolished by law' *ibid.*, p. 6; 'Treat High Prices as Criminal' *Daily Worker*, 30 June 1955, p. 1; 'Legislature Urged to Curb Restrictive Practices' *The Times* (London), 30 June 1955, p. 10; 'Ban on the Boycott?' *ibid.*, p. 11.

⁴⁶ Restrictive Trade Practices Act 1956, s. 6.

presumption of illegality, and the final decision on illegality lies with the Restrictive Practices Court—a new court composed of High Court judges and a majority of ‘other members’ being persons qualified by virtue of their ‘knowledge of or experience in industry, commerce or public affairs’.⁴⁷ This Court is called upon to determine whether the registered agreements are able to pass a twofold test which would rebut the presumption that they are contrary to the public interest. The first part of this test requires the advocates of the registered agreement to prove that it is reasonably necessary to protect the public against injury, or that its removal would deny a specific or substantial benefit to the public, or that it is justified to counteract the restrictive activities of other members of the industry, or is needed in dealing with a monopoly or monopsony, or that its removal would have a serious and persistent effect on unemployment in any area, or cause a substantial reduction in the volume of exports in the industry. If the restrictionists are able to bring themselves within one of these so-called ‘gateways’, they then have to contend with the second part of the test. This requires the Court to be satisfied that, balancing on the one hand the advantages embodied in the satisfaction of the requirements of some gateway, and on the other any detriment the public as a whole might suffer, nevertheless the restriction is in the public interest.⁴⁸

The most obvious of all restrictive agreements between competitors is that of fixing prices. Soon after the passing of the Sherman Act, Taft J., sitting as a circuit judge, held that price-fixing was always an unreasonable restraint of trade, and that it invariably violated the Sherman Act.⁴⁹ From that day price-fixing has always been regarded as a *per se* violation, and reasonableness of the price is no defence.⁵⁰ So strong has been the hostility to the practice that the courts have found that an individual manufacturer’s scheme of resale price maintenance amounted to an implied agreement between its dealers to fix prices,⁵¹ and even exchange of information between competitors on prices and production has been held a violation of the Act, although there was no express agreement to fix prices.⁵²

The English law is slightly weaker. Although all agreements relating to price are required to be registered, at the moment agreements for the exchange of information relating to prices are not regarded as

⁴⁷ *Ibid.* s. 4.

⁴⁸ *Ibid.* s. 21.

⁴⁹ *United States v. Addyston Pipe & Steel Co.* (1898) 85 Fed. 271 (6th Cir.) affirmed (1899) 175 U.S. 211.

⁵⁰ *United States v. Trenton Potteries Co.* (1927) 273 U.S. 392. ‘The reasonable price fixed today may through economic and business change become the unreasonable price of tomorrow’, *per* Stone J., 397. The most recent Supreme Court confirmation of this stern attitude to price-fixing appears in *United States v. Socony-Vacuum Oil Co.* (1940) 310 U.S. 150.

⁵¹ *Dr Miles Medical Co. v. John D. Park & Sons Co.* (1911) 220 U.S. 373.

⁵² *E.g. American Column & Lumber Co. v. United States* (1921) 257 U.S. 377.

registrable even if they have the effect of stabilizing prices.⁵³ Individual resale price maintenance is specifically sanctioned,⁵⁴ so that there could be no question of dealers being held guilty of price-fixing. But those agreements relating to price which have had to be registered, have met with firm opposition from the Restrictive Practices Court. Both Devlin J., the first President of the Court, and Lord Cameron, have said that to uphold price stabilization as an alternative to the free market would be to fly in the face of the presumption in favour of competition, embodied in the Act.⁵⁵ On the other hand the Court recently held that the reasonableness of the prices charged could justify the restriction, particularly where the public at large had to pay no more for the end product.⁵⁶

The more rigid approach of the American legislation when contrasted with the British is similarly illustrated by the attitude to market sharing. Again relying on the *Addyston Pipe* doctrine, any market sharing agreement between competitors, whether it relates to areas or quantities must always be unreasonable, because it is bound to affect competition, and it will therefore be treated as a *per se* violation of the Sherman Act.⁵⁷ English law once again would find such an agreement registrable, and would presume it to be against the public interest. But in making a final decision on its legality it is also entitled to take other factors into consideration. No doubt a straightforward market sharing agreement would be struck down, but the Court has upheld a market sharing agreement where it found that its removal would do substantial harm to the export trade of the industry.⁵⁸

The Sherman Act naturally regards collective boycott and exclusive dealing agreements as unlawful.⁵⁹ Moreover, it is firmly established that even the highest motives for the behaviour will not justify it.⁶⁰

⁵³ Korah, 'Open Price Agreements' (1960) 27 *The Solicitor* 202; Heath, 'Symposium on Restrictive Practices Legislation: Some Economic Consequences' (1960) 70 *Economic Journal* 474.

⁵⁴ Restrictive Trade Practices Act 1956, s. 25. Agreements to enforce resale price maintenance collectively have been outlawed by s. 25, but agreements to have a collective system of resale price maintenance are subject only to registration.

⁵⁵ *Per* Devlin J., *In re Yarn Spinners' Agreement* (1959) L.R. 1 R.P. 118, 189; *per* Lord Cameron in *In re Wholesale and Retail Bakers of Scotland Association's Agreement* (1959) L.R. 1 R.P. 347, 376.

⁵⁶ *In re Black Bolt and Nut Association's Agreement* [1960] 1 W.L.R. 884 (R.P.C.). Perhaps even American law must at some point apply the *de minimis* rule. *Board of Trade of the City of Chicago v. United States* (1918) 246 U.S. 231.

⁵⁷ Most efficiently illustrated by *United States v. Trenton Potteries Co.* (1927) 273 U.S. 392.

⁵⁸ *In re Water-Tube Boilermakers' Agreement* (1959) L.R. 1 R.P. 285.

⁵⁹ Collective Boycott: *Eastern States Retail Lumber Dealers Association v. United States* (1914) 234 U.S. 600. Collective Exclusive Dealing: *Standard Sanitary Manufacturing Company v. United States* (1912) 226 U.S. 20.

⁶⁰ *Fashion Originators' Guild of America Inc. v. Federal Trade Commission* (1941) 312 U.S. 457, finding that the effort of fashion designers to ensure collectively that their fashions were not pirated violated both the Sherman Act and the Federal Trade Commission Act.

In the United Kingdom, a collective boycott or exclusive dealing agreement is illegal if it is used to enforce resale price maintenance,⁶¹ but in other cases it is only registrable. Of registered agreements of this type that have come before the court, an agreement between the manufacturers of carpets that no sales should be made directly to the public was held not justified under the public benefit gateway,⁶² and the manufacturers of proprietary medicines were held to be acting unlawfully in refusing to sell to anyone but chemists, despite the public benefit and protection of the public arguments.⁶³ So it would seem that there is no more chance of justifying such arrangements than there would be in the case of pure price-fixing or market sharing.

There is therefore much in common between the English and American approach to agreements between members of an industry to stifle competition. As has been seen the United States law frequently provides for a *per se* violation in contrast to the English presumption of unlawfulness, and there are other differences. The American approach is more thorough. A contract or conspiracy is assumed in cases where so far English courts would probably not find a registrable arrangement.⁶⁴ Section eight of the Clayton Act has gone so far as to forbid persons to hold directorates in competing companies, a device which no one has yet suggested for England. American firms that choose to do business by using different corporations, are required to make their corporations behave in a semi-competitive manner towards one another,⁶⁵ a requirement specifically avoided by the English legislation.⁶⁶ But even with these additional differences, there is a hard core of American law which is being matched by growing English precedents.

(b) *The Behaviour of Individual Companies*

The reason for the similarity between English and American law in the treatment of the collusive behaviour of competitors is that the comprehensive attitude underlying the anti-trust legislation and the more selective aims of the Monopolies and Restrictive Practices legislation both require the discouragement of such activities. But when it comes to cases where the emphasis is on the behaviour of a single company or corporation, the reaction of the two systems is very different. English law, which was willing to discourage competitors

⁶¹ Restrictive Trade Practices Act 1956, s. 24. The first successful prosecution under this section is reported in (1958) 175 *Board of Trade Journal* 217.

⁶² *In re Federation of British Carpet Manufacturers' Agreement* (1959) L.R. 1 R.P. 472.

⁶³ *In re Chemists' Federation Agreement (No. 2)* (1958) L.R. 1 R.P. 76.

⁶⁴ See especially the concept of 'conscious parallelism'. *Interstate Circuit Inc. v. United States* (1939) 306 U.S. 208; *Federal Trade Commission v. Cement Institute* (1948) 333 U.S. 683. Note also the 'open price' agreement, n. 53 *supra*.

⁶⁵ *Kiefer Stewart Co. v. Joseph E. Seagram & Sons, Inc.* (1951) 340 U.S. 211.

⁶⁶ Restrictive Trade Practices Act 1956, s. 8 (9).

from agreements not to compete, nevertheless assumes that no one man can be forced to compete, or even made to compete fairly. The American courts, on the other hand, have been asked by Congress to perform various feats in this field, some apparently intended to protect competition, others to protect competitors.

A company and particularly a manufacturer, in organizing its affairs frequently seeks to sell its products through a system of territorial dealerships, or through long-term requirements contracts. Such arrangements are regarded as *prima facie* lawful by American law.⁶⁷ But such arrangements will be regarded as unreasonable and therefore unlawful if they go beyond the ancillary stage and either interfere with the public policy of maintaining competition, or show signs of being part of a policy of monopolization.⁶⁸ As the degree of exclusiveness increases, it is matched by a growing hostility on the part of the law. A system of exclusive dealing contracts not based on the territorial principle, is looked at more closely. They may be held to amount to an unreasonable restraint of trade under section one of the Sherman Act, but they may also run foul of section three of the Clayton Act, which specifically prohibits exclusive dealing arrangements where the effect of them 'may be to substantially lessen competition or tend to create a monopoly in any line of commerce'. At one point it looked very much as if the Supreme Court had laid down a test that if any party, having a substantial part of the market, used such contracts it would be presumed to have violated the Act.⁶⁹ But recent decisions show that the courts and the Federal Trade Commission still require proof that competition has in fact been harmed.⁷⁰ There is no doubt, however, that where a court is faced with a series of tying contracts, whereby the purchaser of item A is required also to purchase item B, or the supplies for item A, the law requires the court to apply a *per se* test, and will assume damage to competition if the vendor holds any appreciable part of the market.⁷¹

The English common law found nothing undesirable in any of these devices, and happily lent its services to ensure that even tying clauses were faithfully enforced.⁷² The evidence of such behaviour in British

⁶⁷ E.g. *Pearsall Butter Co. v. Federal Trade Commission* (1923) 292 Fed. 720 (7th Cir.). ⁶⁸ *United States v. Columbia Steel Co.* (1948) 334 U.S. 495.

⁶⁹ *Standard Oil Co. of California v. United States* (1949) 337 U.S. 293. *Richfield Oil Corp. v. United States* (1952) 343 U.S. 922.

⁷⁰ *Federal Trade Commission v. Motion Picture Advertising Service Co.* (1953) 344 U.S. 392, (actually a case where the Federal Trade Commission Act, s. 5 was used to deal with exclusive dealing contracts). See also *Dictograph Products, Inc. v. Federal Trade Commission* (1954) 217 F. 2d 821 (2d Cir.).

⁷¹ *United Shoe Machinery Corp. v. United States* (1922) 258 U.S. 451; *International Business Machines Corp. v. United States* (1936) 298 U.S. 131. There may also be a violation of s. 1 of the Sherman Act. *International Salt Co. v. United States* (1947) 332 U.S. 392.

⁷² *British United Shoe Machinery Co. Ltd v. Somervell Bros.* (1907) 95 L.T. 711 (Ch.); *United Shoe Machinery Co. of Canada v. Brunet* [1909] A.C. 330 (P.C.).

industry went largely undiscussed by the Monopolies and Restrictive Practices Commission since it was primarily concerned with industries influenced by trade associations. The 1956 legislation was drafted in such a way that ordinary contracts of supply were excluded,⁷³ and registration was only required when at least two parties had accepted restrictions. Nevertheless, Part III of that Act did keep in being the emaciated remains of the Monopolies and Restrictive Practices Commission to deal with monopoly situations; and it is possible for the new Monopolies Commission to entertain complaints about exclusive dealing arrangements providing they are perpetrated by companies or groups controlling a third or more of their respective markets.⁷⁴

Whereas the attack on these exclusive arrangements may be said to be economically justifiable, there is less economic justification for the abundance of law which has grown up around price discrimination in the United States. Discrimination may be anti-competitive, but in many situations it is a spur to competition.⁷⁵ The legislation which first attacked it as a general principle was the Robinson-Patman Act. That Act was primarily a political one, aimed at the growing number of retail chain stores which appeared in the 1930's.⁷⁶ It purported to make illegal all discrimination by sellers which led to the injury, destruction, prevention or substantial lessening of competition. The only justification for sellers discriminating was in order to meet the lower prices of a competitor, or to reflect the saving of expenses represented by a bulk order. Even in that latter case the Federal Trade Commission was allowed to limit to some extent the size of the discrimination. Such legislation represented more an attempt to satisfy the claims of the independent grocers' lobby in Washington than to ensure the most efficient form of competition and the wisest uses of resources. Not surprisingly, the Supreme Court has conceded the difficulty of reconciling the Act with the underlying competitive assumptions of the

⁷³ Restrictive Trade Practices Act 1956, ss. 7 (2), 8 (3). Also Speech of Thorneycroft, (1956) 551 H.C. Deb. 2012.

⁷⁴ Thus on 27 September 1960, The President of the Board of Trade referred the question of tied garages to the Monopolies Commission. See *The Times* (London), 28 September 1960. The position bears a striking resemblance to the *Standard Stations Case*, *supra* n. 69.

The Monopolies and Restrictive Practices Commission, *Report on the Supply of Certain Industrial and Medical Cases* (1956), concluded that certain aspects of the exclusive dealing and tying contracts on the part of the monopolist in the industry were contrary to the public interest. Para. 252.

⁷⁵ Price discrimination by a dominant company in an industry may lead to monopoly. Phillips, 'Price Discrimination in the Large Firm' (1957) 43 *Virginia Law Review* 685. But price discrimination in an industry with an oligopolistic structure may be an important method of stimulating competition. McGee, 'Price Discrimination and Competitive Effects: The Standard Oil of Indiana Case' (1953) 23 *University of Chicago Law Review* 398.

⁷⁶ Robinson-Patman Price Discrimination Chain Store Act 1936, amending s. 2 of the Clayton Act. It represents the 'curse of bigness' strand in the anti-trust laws, as opposed to the 'universal belief in competition' strand.

Sherman Act;⁷⁷ and the courts have been forced to give many decisions which have been anti-competitive in effect.⁷⁸

The English law again allows little room to emulate such attitudes. Any action before the Restrictive Practices Court must be ruled out since, as has been seen, two parties accepting restrictions are required to register before the provisions of the 1956 Act becomes operative. On the other hand, it is open to the Monopolies Commission to find discriminatory behaviour on the part of one firm to be against the public interest, as was done in *The Oxygen Report*.⁷⁹

When it comes to individual resale price maintenance, then English and United States Federal law are diametrically opposed. By the 1956 Act all resale prices are specifically enforceable even if there is no privity of contract.⁸⁰ The Supreme Court, however, decided as early as 1911 that even individual resale price maintenance represented a conspiracy in restraint of trade between the dealers and the retailers, and held that it was unenforceable at common law and in violation of the Sherman Act.⁸¹ Moreover the Court later decided that in certain circumstances even an individual refusal to deal used to enforce a system of 'fair trade' would be regarded as unlawful.⁸²

In fact the operative law in the United States is much more favourable to resale price maintenance. Once again the political pressure to protect the smaller shopkeeper resulted in amending legislation, first of all permitting the states to pass statutes to legalize fair trade agreements,⁸³ and more recently to allow legislation to bind even non-signing retailers who have notice of the fair trade prices.⁸⁴ Although a few states did not take advantage of the right to legislate, and several state courts held unconstitutional their local statutes particularly when they contained non-signer provisions, over half the jurisdictions enforce resale price maintenance today.

The balance of economic opinion on both sides of the Atlantic is that resale price maintenance hinders competition.⁸⁵ In keeping with

⁷⁷ *Standard Oil Co. (Indiana) v. Federal Trade Commission* (1951) 340 U.S. 231, 249; *Automatic Canteen Co. of America v. Federal Trade Commission* (1953) 346 U.S. 61.

⁷⁸ E.g. In *Federal Trade Commission v. Morton Salt Company* (1948) 334 U.S. 37, the Supreme Court appeared willing to presume that injury to competition must flow from price discrimination. (In fact the Federal Trade Commission has not relied on this ruling). The cost justification has also been narrowly construed, *Automatic Canteen Co. of America v. Federal Trade Commission* (1953) 346 U.S. 61.

⁷⁹ See Report cited *supra* n. 74, at para. 251.

⁸⁰ S. 25. English common law had of course given its full blessing to resale price maintenance. *Elliman Sons & Co. v. Carrington & Son* [1901] 2 Ch. 275.

⁸¹ *Dr. Miles Medical Co. v. John D. Park & Sons Co.* (1911) 220 U.S. 373.

⁸² *Federal Trade Commission v. Beech-Nut Packing Co.* (1922) 257 U.S. 441; and see now *United States v. Parke, Davis & Co.* (1960) 362 U.S. 29.

⁸³ Miller-Tydings Resale Price Maintenance Act 1937.

⁸⁴ McGuire Amendment 1952. See s. 1 for *supra* n. 80.

⁸⁵ E.g. Bowman, 'Resale Price Maintenance—A Monopoly Problem' (1952) 25 *Journal of Business of the University of Chicago* 141; Yamey, *Economics of Resale Price Maintenance* (1954) *passim*; *The Attorney-General's Report* (1955) 149 ff. Cf. Andrews and Friday, *Fair Trade* (1960).

its more selective approach to these problems it is probable that the practice will ultimately be outlawed in the United Kingdom. The Labour Party is officially committed to the repeal of section twenty-five,⁸⁶ the Committee on Prices, Productivity and Income has registered its disapproval,⁸⁷ and the President of the Board of Trade has recently set up a committee to investigate the desirability of repealing the section.⁸⁸ It is too early yet to say what will happen in the United States. The strong hostility of most advocates of the anti-trust laws is balanced by many lobbies in Washington seeking to push through a federal 'fair trade' statute.

It is therefore legitimate to generalize and say that where the behaviour of a single company is concerned the English and American legal systems have chosen different approaches. In order to preserve workable competition or at least to preserve competitors, American acts have invaded the province of the individual firm and imposed striking prohibitions on certain activities. English legislation, limiting its interest to economically proven advantages of competition rather than embodying any generalized belief in its desirability, and harbouring a *laissez-faire* reluctance to invade the privacy of any one company's policy, has for the most part left the individual company in peace.

(c) *General Control of the Structure of Industries*

The American anti-trust law, based on the premise that competition is a desirable end, has taken upon itself the obligation to provide participants to indulge in this competition, and to control their size and number; and although effective control of the structure of industry may yet be in the future, the trend of legislation and litigation is towards placing restraints on existing monopolies and on attempts to expand by merger.

The battle to control the structure of industries began with section two of the Sherman Act, which made illegal all monopolization, attempts to monopolize, or combinations or conspiracies to monopolize. This was intended as, and has in fact become, the chief weapon⁸⁹ in the efforts by the government to discipline monopolies or near monopolies. Admittedly in the earliest cases the Supreme Court was able to find that combinations between competitors which would lead to a monopoly would in fact violate both sections one and two of the Sherman Act.⁹⁰ But where the behaviour of only one monopolist or giant in an industry was at stake the courts were compelled to rely solely on the more radical provisions of section two.

⁸⁶ See Gaitskell, *The Director*, April 1959.

⁸⁷ First Report, p. 48 (1958).

⁸⁸ Statement by President of Board of Trade, 17 March 1960.

⁸⁹ To some extent, the Sherman Act, s. 1 and the Clayton Act, ss. 3, 7 are also used.

⁹⁰ *E.g. Northern Securities Co. v. United States* (1904) 193 U.S. 197.

The wording of the section left the judiciary in a powerful position to interpret it. Beginning with the Standard Oil litigation in 1911,⁹¹ the judges insisted on an 'intent to monopolize' as an additional requirement for all offences contained in the section. For some while after this the Government was successful in its attempts to prove this requirement,⁹² but as is understandable in political litigation based on political legislation, the judges of the inter-war years, faced first with a decade of big business and then a decade of depression, were reluctant to find monopolization,⁹³ which might force them to order dissolution of large industries.

Equally understandably the tide began to turn again in the forties. In his famous judgment in the *Alcoa Case*,⁹⁴ Learned Hand J. apparently cut down the required intent to anything beyond the 'normal methods of industrial development'. Today arguments rage with great vigour as to the present state of the law of monopolizing, how far size itself is an offence, and what room there is for an innocent monopolist.⁹⁵ But it at least seems clear that the law is much stricter with respect to both intent and market power than it was in the twenties. The courts have in effect struck down as monopolization the policy of leasing rather than selling machines used by the United Shoe Machinery Company,⁹⁶ which was found not to violate section two in 1918.⁹⁷ Moreover it now seems that the courts by the joint use of both major sections of the Sherman Act are endeavouring to stir up some competition in oligopoly situations, by talking in terms of conspiracy to monopolize.⁹⁸

Section two is indeed an excellent example of the working of the general test of 'reasonableness', which is traditionally alleged to have been imported into the Sherman Act by Chief Justice White in 1911.⁹⁹ In fact many restraints of trade under section one are today presumed to be unreasonable and hence *per se* illegal, but the reasonableness doctrine comes into full play in section two, whether it is a

⁹¹ *Standard Oil Co. of New Jersey v. United States* (1911) 221 U.S. 1.

⁹² E.g. *United States v. American Tobacco Co.* (1911) 221 U.S. 106.

⁹³ E.g. *United States v. United Shoe Machinery Co. of New Jersey* (1918) 247 U.S. 32; *United States v. United States Steel Corporation* (1920) 251 U.S. 417.

⁹⁴ *United States v. Aluminum Co. of America* (1945) 148 F. 2d 416 (2d Cir.). The Second Circuit was sitting as the final court of appeal as the Supreme Court had no quorum eligible to decide the appeal.

⁹⁵ E.g. Rostow, 'Monopoly under the Sherman Act: Power or Purpose?' (1949) 43 *Illinois Law Review* 745; Levi, 'A Two Level Anti-Monopoly Law' (1952) 47 *Northwestern University Law Review* 567.

⁹⁶ *United States v. United Shoe Machinery Co.* (1953) 110 F. Supp. 295 (D.C. Mass.).

⁹⁷ The courts, however, have considerable discretion in that by defining the market broadly, and introducing the economic concept of cross-elasticity, the defendant no longer appears as a monopolist. See *United States v. E. I. du Pont de Nemours & Co.* (1956) 351 U.S. 377.

⁹⁸ E.g. *American Tobacco Co. v. United States* (1946) 328 U.S. 781, where the government sought to rely on concurrent price changes by the 'big three' tobacco manufacturers to prove a conspiracy to monopolise.

⁹⁹ *Supra* n. 42.

general or specific monopoly at stake. In the latter type of case, it has been used where large firms have attempted to expand by the use of price discrimination,¹ by the exploitation of a local monopoly,² by exclusive dealing and tying contracts,³ and by vertical and horizontal integration.⁴ In all these cases the courts have found that the possibility of a monopolization offence exists, if the proved behaviour is found to be unreasonable.

Section two, although useful in cases of one monopolist or quasi-monopolist and his personal activities, had limited value in horizontal mergers between different concerns, because of the difficulty of proving intent to monopolize. But it was realized that in the long run mergers harm the competitive process as much as monopolies. It was to remedy this that section seven of the Clayton Act was passed in 1914, prohibiting stock purchases which substantially lessened competition between the acquiring and the acquired companies or tended to create a monopoly in any line of commerce. The section came to be interpreted in the era of decisions favouring big business, with the result that the courts demanded a clear injury to competition before the section would be applied and refused to apply it at all to cases involving the acquisition of assets.⁵ In the post World War II trust-busting era, section seven was amended⁶ to cover the acquisition of assets and to strengthen the test of injury to competition.⁷ The courts this time have accepted the obligation imposed on them, and by 1960, of the sixty anti-merger cases instituted under the new section, all but one of those decided was in favour of the government. Many planned mergers had been halted,⁸ and, for the first time, the remedy

¹ *United States v. New York Great A & P Tea Co.* (1949) 173 F. 2d 79 (7th Cir.).

² *E.g. Lorain Journal Co. v. United States* (1951) 342 U.S. 143.

³ *Supra* Part II b. But s. 2 may be used in addition to or in conjunction with s. 3 of the Clayton Act. *E.g. United States v. American Can Co.* (1949) 87 F. Supp. 18 (D.C. Cal.) Tying clauses would however still be treated as a *per se* violation.

⁴ The possibility that vertical integration might be a violation of the Sherman Act was canvassed in two leading post-war cases, *United States v. Yellow Cab. Co.* (1947) 332 U.S. 218, and *United States v. Columbia Steel Co.* (1948) 334 U.S. 495. The application of s. 2 to horizontal mergers has already been seen, *supra* n. 90. The normal method of attacking such mergers, however, would be under s. 7 of the Clayton Act. *Infra*.

⁵ *International Shoe Co. v. Federal Trade Commission* (1930) 280 U.S. 291. After the section had been amended in 1950, a further interpretation of the old s. 7 gave it a much stronger appearance. *United States v. E. I. du Pont de Nemours & Co.* (1957) 353 U.S. 586.

⁶ By the Kefauver-Celler Amendment 1950.

⁷ The relevant part of the section now reads: 'That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly'.

⁸ See especially *Pillsbury Mills, Inc.*, Dkt. 6000, (1953) 50 Federal Trade Commission 555. The most notable attempted merger which has been prevented by the new s. 7 is that between Bethlehem and Youngstown, the second and fifth largest steel companies in the United States. *United States v. Bethlehem Steel Co.* (1956) 168 F. Supp. 576 (S.D.N.Y.) 1958.

of divestiture has become a regular remedy to undo mergers recently completed.

Since public opinion in the United Kingdom is not deeply committed to a belief in competition, the problem of market structure has caused little concern.⁹ The Monopolies and Restrictive Practices Commission concentrated its attentions on restrictions imposed by trade associations. It came face to face with the problem of oligopoly only in *The Tyre Report*,¹⁰ and that of monopoly only in *The Oxygen Report*.¹¹ In the latter case it actually found that the monopoly position had been achieved by predatory practices and had been maintained in the same manner,¹² but it disagreed strongly over the way the monopoly should be dealt with. Some members felt it should be nationalized, others that its divisions should be made more independent, and the majority that the Board of Trade should exercise general supervision over the company's prices and profits.¹³ No one thought of suggesting that the monopoly should be dissolved, and competition restored in the industry. Moreover, in acting on this particular report, the government seemed reluctant to exert control over a single company even if it were a monopolist.¹⁴

The 1956 Act, likewise, did nothing to aid the control of monopolies;¹⁵ and neither of the major pieces of legislation were in any way concerned with mergers. Thus the United Kingdom has begun the task of controlling competition without considering the correlative need to control the structure of industry. The general assumption has been that amalgamations only take place in England because of economies of scale,¹⁶ though it is certainly not easy to put all mergers into that category.¹⁷ It is now clear that the requirement of registration in the 1956 Act has led to an increase in the pace of mergers.¹⁸ The government, far from considering that these amalgamations pose anything of a problem, has in some cases, specifically

⁹ Indeed, until recently, it was largely ignored by English economists, but see now, Burn, *The Structure of British Industry* (1958); Cook, *Effects of Mergers* (1958); Evely and Little, *Concentration in British Industry* (1960); Hart, 'Business Concentration in the United Kingdom' (1960) 123 *Journal of the Royal Statistical Society* 50.

¹⁰ Monopolies and Restrictive Practices Commission, *Report on the Supply and Export of Pneumatic Tyres* (1955).

¹¹ Monopolies and Restrictive Practices Commission, *Report on the Supply of Certain Industrial and Medical Cases* (1956).

¹² *Ibid.* para. 246.

¹³ *Ibid.* paras. 278-311.

¹⁴ 'The Commission meets a Monopoly' (1957) 182 *The Economist* 59; 'British Oxygen Replies', *ibid.* 116; 'Agreement over Oxygen' (1958) 186 *The Economist* 1168.

¹⁵ Although Part III of the Act left in being the Monopolies and Restrictive Practices Commission (renamed the Monopolies Commission) limiting its powers to investigating monopolies and certain special agreements.

¹⁶ E.g. Kilroy, 'Tasks and Methods of the Monopolies Commission' (1953) 22 *Manchester School* 37.

¹⁷ E.g. the merger between Austin and Nuffield in 1952 gave the British Motor Corporation control of more than half the motor car industry.

¹⁸ 'Court Report' (1959) 191 *The Economist* 355; 'Mergers Take Over' (1959) 192 *The Economist* 41; 'Impact of the Restrictive Practices Court' *The Times* (London) 30 August 1960; Moon, *Business Mergers and Take-over Bids* (1959) 20.

blessed them.¹⁹ The United Kingdom therefore has now reached the stage of development which the United States reached after 1890, when it strongly opposed agreements between individual concerns to stifle competition, but looked with no disfavour on the existence of monopoly or the total disappearance of competition by way of merger. Such examples from both the United Kingdom and the United States should be sufficient to put the Australian government on notice as to the danger of legislation dealing with only half the problem.

(d) *Exceptions*

The contrast between the thorough American policy and the more narrow English attitude is carried through into the peripheral areas of the economy. When in doubt as to whether some particular behaviour should be brought within the ambit of the law, the American solution is normally to include, the British to exempt.

The American attitude to the international ramifications of anti-trust problems provides an excellent example of this. Particularly in the period of ardent enforcement of these laws which has gone on since World War II, the American courts have frequently taken cognizance of the behaviour of defendants in foreign countries.²⁰ Although an effect on the United States' economy must be proved, a miniscule effect is enough to satisfy the average court. Such judicial enthusiasm has not always been viewed with pleasure by foreign governments,²¹ but from the American businessman's point of view it is now clearly established that the Department of Justice will not allow him to use foreign territory to perform the anti-competitive acts which he knows are forbidden at home. On the other hand, the United Kingdom legislation of both 1948 and 1956 has gone to considerable lengths not only to exempt activities outside the country,²² but also to give a large

¹⁹ The government 'arranged' the mergers in the aircraft industry early in 1960. 'The Aircraft Mergers' (1960) 194 *The Economist* 221.

²⁰ E.g. *United States v. Aluminum Co. of America* (1945) 148 F. 2d 416 (2d Cir.). *United States v. National Lead Co.* (1946) 332 U.S. 319; *Timken Roller Bearing Co. v. United States* (1950) 341 U.S. 593. The leading works in this field are Brewster, *Anti-Trust and American Business Abroad* (1958), and Fugate, *Foreign Commerce and the Anti-Trust Laws* (1958).

²¹ E.g. the disapproval of the British government when the United States federal courts began an investigation of the Anglo-Iranian Oil Company. *New York Times*, 10 December 1952, p. 57, col. 4; *ibid.* 12 December 1952, p. 1, col. 5; *ibid.* 16 December 1952, p. 6, col. 3. Note also *British Nylon Spinners v. Imperial Chemical Industries Ltd* [1953] Ch. 19.

²² The Monopolies and Restrictive Practices (Inquiry and Control) Act was interested only in the supply of goods in the United Kingdom. It was of course possible that one of the suppliers might be out of the United Kingdom (*Report on the Supply and Export of Matches and the Supply of Match-Making Machinery*), but there was no attempt to control the behaviour of the foreign firms, as there was in recent American litigation.

To be a registrable agreement under the Restrictive Trade Practices Act 1956, the parties must be carrying on business in the United Kingdom. If they are joined in the agreement by foreign firms, the foreign firms will presumably be required to register. *Sed quaere*. But, in any event, there is again no attempt to control behaviour abroad. See s. 8 (8).

measure of exemption to restrictive agreements made in England if their effect is felt for the most part abroad.²³

In the same way, the American law has been more active in the supervision of patents than is the new British legislation. Although a patent may be legitimately exploited,²⁴ this right must be taken no further than is necessary for the protection of the lawful monopoly.²⁵ Moreover, when firms come together to share, pool or cross-license their patents, they then become subject to the full force of the Sherman Act.²⁶ Misuse of patents may justify a charge of monopolization,²⁷ and the use of patents to effect tying arrangements will be held a violation of the Clayton Act.²⁸ The 1948 United Kingdom legislation provided that no reference to the Monopolies and Restrictive Practices Commission would be made if the prevailing conditions in any industry were the result of patents,²⁹ and the 1956 Act exempted from registration agreements licensing or assigning patents.³⁰ But in fact the Monopolies Commission did feel free to make recommendations on specific licensing problems where it found misuse of patents,³¹ and the 1956 Act refused to allow the exemption of non-registration where the restrictions relating to patented goods were extended to apply to any non-patented articles.³²

As with international cartels and patents, so over the whole field of exemptions from the coverage of the relevant legislation, the American law has paved a more thorough path than the English. Both systems have obviously had to exclude the operation of nationalized industries. American law grants a *prima facie* exemption to regulated industries, but they are still kept as far as possible in line with the general philosophy of the anti-trust laws.³³ The exemptions from the English 1956 Act, however, are not easy to understand, for the government is left with a wide power to dispense with the Act by making an order allowing rationalization in an industry;³⁴ and in the case of the vital steel industry, the Act approves the Iron and Steel Board as the price-fixing agency for the industry.³⁵ The Restrictive Trade Practices Act also excludes services entirely from its purview, whereas the

²³ The Restrictive Trade Practices Act 1956 exempts agreements relating to exports from registration. S. 8 (8).

²⁴ *United States v. General Electric Co.* (1926) 272 U.S. 476 (Price maintenance of patented goods).

²⁵ *E.g. United States v. Line Material Co.* (1947) 333 U.S. 287.

²⁶ *E.g. Standard Sanitary Manufacturing Co. v. United States* (1912) 226 U.S. 20.

²⁷ *E.g. Hartford-Empire Co. v. United States* (1945) 323 U.S. 386.

²⁸ *E.g. International Salt Co. v. United States* (1947) 332 U.S. 392.

²⁹ Monopolies and Restrictive Practices (Inquiry and Control) Act 1948, s. 2 (1).

³⁰ Restrictive Trade Practices Act 1956, s. 8 (4).

³¹ *E.g. Monopolies and Restrictive Practices Commission, Report on the Supply of Electric Lamps*, paras. 270-272.

³² S. 8 (4).

³³ *E.g.* the right of the Maritime Commission to disapprove agreements filed which are 'unjustly discriminatory or unfair'. 46 U.S.C. s. 814 (1952). See also *Federal Maritime Board v. Isbrandtsen Co.* (1958) 356 U.S. 481.

³⁴ Restrictive Trade Practices Act 1956, s. 8 (2).

³⁵ *Ibid.* s. 7 (1).

American law has pursued its policies as much against industries providing services, as it has against those producing goods.³⁶

(c) *Enforcement*

The remedies provided to ensure the enforcement of American anti-trust laws have, if for no other reason than the antiquity of the laws concerned, been more numerous and more effective. The Sherman and Clayton Acts both allow the government to bring a civil or criminal suit. The normal penalty in a criminal suit is a fine, the present maximum being \$50,000, although occasionally a prison sentence will be imposed. In practice, the civil suit is much more important, since the injunction issued at the end of such an action can be made to control the behaviour of an industry over a long period. The so-called 'equity decree' may contain instructions for the general behaviour of companies concerned in the litigation, but it may also cover the intricate details of behaviour required to ensure more competition in the industry. To a foreigner, the most startling possibility of such decrees is their ability to order dissolution of a company or divestiture of some of its assets. Whilst courts have been reluctant to enforce such remedies, the knowledge that they have such power has no doubt had a serious effect on the business community.³⁷

The 1948 legislation in England gave the Monopolies and Restrictive Practices Commission power only to make recommendations to the government, which might then proscribe the behaviour condemned by delegated legislation. In fact such power was used only on one occasion³⁸ in the early years, and the government has contented itself with a policy of negotiating with the industry concerned, and thereby avoided the making of an order. This approach has met with varying success.³⁹ At no time has the government contemplated

³⁶ E.g. Banking: *Transamerica Corporation v. Board of Governors of Federal Reserve System* (1953) 206 F. 2d 163 (3rd Cir.); Investment Banking, *United States v. Morgan* (1953) 118 F. Supp. 621 (S.D.N.Y.); News: *Associated Press v. United States* (1944) 326 U.S. 1; Advertising: *Times-Picayune Publishing Co. v. United States* (1952) 345 U.S. 594; Railway Services: *United States v. Joint Traffic Association* (1898) 171 U.S. 505; Professional Football: *Radovich v. National Football League* (1956) 352 U.S. 445.

³⁷ By 1955, dissolution, divorcement or divestiture had only been ordered in twenty-four litigated cases; it is more than common in consent decrees entered in cases settled out of court. These remedies have achieved far greater prominence since the amendment of s. 7 of the Clayton Act in 1950.

³⁸ The Monopolies and Restrictive Practices (Dental Goods) Order 1951 s. 1. 1951 No. 1200, enforcing the recommendations of the Monopolies and Restrictive Practices Commission, *Report on the Supply of Dental Goods* (1951).

³⁹ Sometimes such negotiations have apparently been successful. E.g. the government's handling of the British Oxygen Company: 'The Commission Meets a Monopoly' (1957) 182 *The Economist* 59; 'British Oxygen Replies' (1957) 182 *The Economist* 1116; 'Agreement over Oxygen' (1958) 186 *The Economist* 1186. But cf. Monopolies Commission, *Imported Timber: Report on whether and to what extent the Recommendations of the Commission had been complied with* (1958). This report

measures of the degree of seriousness of dissolution or divestiture, even if they are legally entitled to exercise such powers.⁴⁰ As for the 1956 legislation, since it is aimed primarily at agreements between competitors, the types of remedies provided are limited to those needed in such a situation. Although the Act appears to assume that an injunction should be the normal remedy to cope with an agreement found to be against the public interest, the Restrictive Practices Court has laid down a basic rule that it will accept an undertaking to reform from a trade association whose activities are found to be against the public interest, rather than grant an injunction as of right.⁴¹ But presumably, if phrased in the correct form, such undertakings will perform the functions of the injunction in American litigation. Neither the 1948 nor the 1956 Act make primary use of criminal remedy, although the latter does contain criminal provisions for failure to disclose information.⁴²

A further interesting distinction between the two systems with regard to remedies, concerns the use of actions by private parties. In the legislation which is probably of an anti-competitive nature, such as resale price maintenance, both systems leave enforcement to private parties. But both the Sherman and the Clayton Acts have extended such a procedure into pro-competitive situations, and have encouraged such private initiative by awarding treble damages to plaintiffs who prove that they have been injured by the defendant's actions.⁴³ The 1956 Act has kept enforcement in the hands of the government, although it may be open to a private party to bring an action to prevent the collective enforcement of resale price maintenance.⁴⁴

Both the United Kingdom and the United States have allowed the enforcement of their respective legislation to be conducted by a series of government organs. The Sherman Act provided⁴⁵ that enforcement should be by the Attorney-General and from this grew the Anti-Trust Division of the Department of Justice, which today still has primary

showed that the undertakings given by the trade associations after the Report by the Monopolies and Restrictive Practices Commission on the Supply of Imported Timber (1953) had had practically no effect on the industry.

⁴⁰ The powers vested in the 'competent authority' seem to fall short of such drastic measures. See Monopolies and Restrictive Practices (Inquiry and Control) Act 1948, s. 10. A former Chairman of the Commission, however, has assumed that such powers do exist. Cairns, 'Monopolies and Restrictive Practices' *Law and Opinion in England in the 20th Century* (ed. Ginsberg 1959) 173, 183.

⁴¹ *In re Chemists' Federation Agreement* (No. 2) (1958) L.R. 1 R.P. 75, 112.

⁴² Restrictive Trade Practices Act 1956, ss. 14-16. The breach of an injunction under s. 20, or an action alleging collective enforcement contrary to s. 24, is in effect criminal; and a violation of an order made under s. 10 of the 1948 Act would presumably be a crime. It would of course never be easy to design criminal sanctions for an Act which prescribes no *per se* violations.

⁴³ Sherman Act 1890, s. 7; Clayton Act 1914, s. 4.

⁴⁴ S. 24 of the Restrictive Trade Practices Act is ambiguously worded.

⁴⁵ Sherman Act 1890, s. 4.

jurisdiction over Sherman Act violations. The appearance of the Clayton Act in 1914 coincided with the creation of the Federal Trade Commission, and responsibility for ensuring enforcement of the Clayton Act was made the joint task of the Commission and the Department.⁴⁶ In time too, the Commission interpreted section five of the Federal Trade Commission Act in such a way that it achieved power to deal with violations normally dealt with under the Sherman Act.⁴⁷ Although it is conceivable that such overlapping functions could have led to chaos, particularly in ensuring compliance with decrees, in fact the combined effect has been to strengthen enforcement policy.

The British enforcement agencies are more diverse. The Board of Trade is responsible for making references to the Monopolies Commission, for negotiating with industry after the publication of a report and if necessary for making an order enforcing the recommendations, and for seeing that section twenty-four of the 1956 Act outlawing certain collective discriminatory practices is complied with. The Monopolies Commission not only has the power of investigating a specific industry, but also of discovering how far an industry has been affected by an undertaking to reform; in both cases not until it has received instructions to do so from the Board of Trade. Finally, the office of the Registrar of Restrictive Trading Agreements is responsible for supervising registration, preparing cases for the court, and also for ensuring that decisions of the court are complied with. Contrasted with the American example it may well be that the British enforcement arrangements lack cohesion, and the time may come when a more centralized system of dealing with the whole area of monopolies and restrictive practices will be required. For a country about to embark on such legislation, however, it should be possible to provide a comprehensive government agency to tackle the whole problem from the beginning.

III. Conclusions

If the Australian government is serious in its intentions to introduce some new form of legal control of the competitive aspects of the economy, then there is no doubt that the United Kingdom and the United States will be much quoted examples. This is desirable, but many things must be borne in mind before this exercise in comparative law becomes meaningful.

The fundamental distinction which permeates every aspect of the

⁴⁶ Clayton Act 1914, ss. 11, 15. Under certain circumstances, various governmental regulatory agencies are entitled to bring actions under the anti-trust laws. *E.g.* Clayton Act, s. 11. Also nn. 14 and 17, *supra*.

⁴⁷ Federal Trade Commission Act 1914, s. 5 provides 'That unfair methods of competition in commerce are hereby declared unlawful.' See *Federal Trade Commission v. Cement Institute* (1947) 333 U.S. 683.

discussion, is the different ethos which pervades the two countries. In the political and sociological sphere, there have developed different attitudes towards the radical dream, traditionally manifested in the United States in the belief in competition and the market as promoters of progress and freedom, and in the United Kingdom in the trend towards socialization. It is therefore not surprising to find the American business community and general public wedded to a belief in the merits of competition which makes little appeal to their British counterparts, with the result that the first major legislation came from Westminster some sixty years or more after the Sherman Act had emerged from Washington. Moreover, the acceptance of the idea of the dynamic force of law and the creative role of the judiciary, has made the judicial control of competition a more feasible project in America than it could ever be in Britain.

But if these fundamental differences are appreciated, the contrast of the law in the two countries produces innumerable lessons for any country about to indulge in such legislation. The attack on overt anti-competitive agreements between potential competitors has met with general approval, but at that point general agreement stops. The United States is still only fumbling with ideas as to what should be done to curb monopolies in their incipiency, although in recent years a serious effort has been made to ensure that merger does not achieve what is declared legally impossible by collusion. The logic of such an attitude is clear, and it may be that in the not too distant future, Parliament will be forced to enact more comprehensive legislation, not only to cover such remarkable loopholes as these, but even to curb behaviour which affects the economy through the use of patents or international cartels.

The Commonwealth of Australia has its strong and obvious connection with the legal tradition of England. It may well be that when examined, its economic needs and social traditions are also more attuned to the English view of competition than they are to the American. But at the same time, there was a feeling in 1906 that the monopoly problems of Australia were nearer to those of the United States. It is also true that there the legal control of labour and the politico-legal problems caused by constitutional questions have, in some ways, brought Australian lawyers nearer to their American colleagues. Seen in this perspective, Canberra's choice of its type of legislation may well provide an interesting combination of the Anglo-American.

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