Department of Justice

ADDRESS

BY

THE HONORABLE GRIFFIN B. BELL
ATTORNEY GENERAL OF THE UNITED STATES

BEFORE THE

LAW COUNCIL OF AUSTRALIA
IN CONJUNCTION WITH THE LAW SOCIETY OF NEW SOUTH WALES
AND THE NEW SOUTH WALES BAR ASSOCIATION

12 NOON
TATTERSALLS CLUB

MONDAY, JULY 17, 1978
SYDNEY, AUSTRALIA

I have been learning a great deal about your wonderful country. One of the things I have learned is that you have a new antitrust law, the Trade Practices Act of 1974. While it is different from U.S. law in some respects, I understand you looked at our law and experience before adopting it.

One of our lawyers in the Department tells me that the Australian Law Journal has reprinted excerpts from a speech I made to the American Bar Association on international antitrust enforcement last year. That is a speech which the Economist of London said reflected a "hardheaded" desire to "police world business." That was not my intention at all. It is kind indeed for you to invite such a dangerous fellow as the United States Attorney General to come to talk with you. Maybe when I am done I won't seem so dangerous after all.

I hope, at least, that I will not appear to you as one of your editorial cartoonists sketched me -- my picture in an FBI "Most Wanted" frame, with the statement: "Australian businessmen beware of this man. He wants you."

There are three issues that seem to excite the greatest controversy and concern outside the United States about our

antitrust laws and competition policy. The first of these is why do the Americans place so much emphasis on competition and have so much less regard for public regulation and centralized planning? The second issue is why have we made antitrust violations a crime and why do we try to send business executives to jail when they are caught fixing prices? The third issue is, even if we want to run our society that way, why do we impose these values on the rest of the world which may not be used to doing business under such competitive conditions? I think these are fair questions and they deserve answers.

The American people are quite deeply committed to competition as part of our political heritage. Most of us see it as an extension of the value of political democracy to the marketplace. A free market is the best market for the producer with the best product to sell at the best price. It is also best for the consumer. Free markets are also the most efficient means for allocating a society's resources. In part because of our relative affluence, the abundance of goods and services available, we value consumer choice and economic efficiency highly.

While consumerism in America is stronger than ever before, its historical roots go back to and had a lot to do with the creation of our nation. One of the strongest criticisms our colonial forefathers had against British rule was that the British system of

taxation distorted U.S. markets and denied American manufacturers and consumers the benefits of competition. So our feeling about competition is very close to our feeling about political liberty. We see it as a kind of economic liberty which strengthens our democractic institutions.

If our feeling about competition were only historical we would probably have long since abandoned it. But our experience just seems to prove again and again that at least for us competition works! In times of social and economic crisis it has been necessary for the government to step in to avoid widespread suffering or injustice. Sometimes other values, like helping people find work or improving environmental quality must be served, beyond mere economic efficiency. It is not that competition and the efficiency it yields is a panacea. It is merely a form of economic organization which should be realized as fully as possible, and only departed from where and to the extent that clear benefits will result.

During our Great Depression of the 1930's we thought that the suffering it brought required a significant departure from competitive markets. We raised tariff barriers, we allowed industries to rationalize themselves, and we permitted manufacturers to fix the prices at which their products could be resold to independent merchants. During the course of the last forty years

we have learned that these "reforms" went way too far. We have learned that we paid too heavy a price without getting enough benefit from these forms of government regulation.

I think all of us today appreciate the way we have benefitted from the relatively free trade of the last 30 years since the creation of the General Agreement on Tariffs and Trade, commonly known as the GATT, as compared with the 20-year period between the World Wars. Three years ago, the Congress repealed the resale price maintenance law -- The Miller-Tydings Act of 1937. At the time it was estimated that resale price maintenance cost the U.S. consumer at least $2 billion a year in extra charges.

Our interest in promoting competition is also related to our increasing sense that inflation is one of the most important problems with which we are going to have to come to terms if our nation is to prosper. Departures from competition, we have found, are expensive and inflationary. We are currently seeing the anti-inflationary benefits of removing government regulations which impede competition in such service professions as optometry and pharmaceuticals.

The second issue is why we punish the more serious forms of antitrust violation as a crime. This question can also be answered both historically and practically. I think there is an element of our Puritan heritage embodied in the Sherman Act. The

puritans thought it was wrong, morally wrong, for a few in the community to intentionally inflict hardship on the many. Our puritan forebears tended to express their moral convictions in the laws they adopted.

Moreover, the Sherman Act is historically contemporaneous with the high point of populism in our country -- now being seen again in the consumerism movement.

Most Americans, as I said earlier, are deeply committed to competition. If we feel strongly about something like this we tend to pass a law to punish those who are trying to undo it.

To most Americans, when a group of competitors get together and agree to charge say 3 cents more for a loaf of bread than people would have to pay if they had no special agreement, we see that as a form of thievery, stealing money from our pockets no less effectively than if we were being robbed at gunpoint. We are coming to care quite a lot about what we call "white collar" crime, because we recognize that a lot of the economic harm that can result from illegal white collar activity can have a greater adverse impact on people than street crime. This is especially true if one is concerned about inflation. It is important to us that our laws apply evenhandedly and that white collar criminals be punished when they break the law.

We try to send price fixers to jail because even a short jail sentence can have a profound deterrent effect. Most Americans are law abiding most of the time; and that fact reinforced by the threat of serious punishment, we find, has a lot of practical value in promoting just those competitive market conditions that are so important to us.

That brings me to the third issue which causes particular concern. Why does the United States enforce its law against foreign enterprises, often finding a violation arising from actions taken outside our territory? Isn't the effect of this to impose United States values on the rest of the world?

The United States is a very good market for imported goods and services. Back in 1890 when the Sherman Act was passed, the Congress recognized that if we did not seek to apply our laws also to those foreign persons conducting substantial business in our markets, United States consumers and United States producers could be victimized by anticompetitive restraints. In the early years of our antitrust laws, before World War I, a few European cartels were seen to be causing just this kind of predatory market disruption.

Thus, right from the beginning, our government concluded that if you never applied the antitrust laws to persons or actions located outside your territory, the result will be that the values

of others, alien to our own values, will be forced upon us in our territory. We do not assert antitrust jurisdiction in United States foreign commerce to meddle in matters which do not affect us. We do assert it where necessary and appropriate to promote the significant United States interest in maintaining competition in United States markets.

Jurisdiction based exclusively on the principle of territory is a concept developed in the 19th century when there was much less worldwide interdependence. We in the United States think that in today's world, where what happens in one nation may have profound effects in market places thousands of miles away, nations should have a right to assert jurisdiction based on the principle of substantial effects, so long as that principle is not applied unilaterally and inflexibly. Increasingly, international business transactions seem to be matters as to which two or more states may have legitimate law enforcement concerns and claims. When we assert antitrust jurisdiction in United States foreign commerce we are not saying that no other nation may have legitimate interests, nor would we deny that sometimes those interests may conflict with our own. What we do say is that we have seen too often situations in international trade where failure to enforce our law against private antitrust conspiracies formed outside our jurisdiction to affect our markets, would have created gaping immunities from compliance

with our law. By applying our antitrust laws to foreign persons who seek to do business in our markets, we are merely saying you are welcome in our markets if you abide by our rules of competition.

This is the historical answer to the question. There is also a practical answer. With the relatively recent rise to prominence of the multinational corporation it becomes possible for United States citizens to control actions through foreign subsidiaries which could have a direct and adverse effect on United States consumers and on United States domestic competitors. If we were to limit our antitrust jurisdiction to the water's edge we would be permitting those United States multinationals so inclined largely to evade our antitrust laws.

I think you can appreciate why we want to do our utmost to see that our laws apply evenhandedly among different classes of our citizens, and between our citizens and foreign persons who do business in our country. You should bear in mind that in virtually all of the major international cartel cases we have brought in the past 30 years against foreign firms, United States enterprises were also parties and were prosecuted.

Some nations which subscribe to the principle of territory try to maintain control over their domestic markets by direct intervention into the terms and conditions of particular import transactions. For example, in some states, each significant

technology transfer agreement between a foreign licensor and domestic licensee must be explicitly approved by the government before it goes into effect. We in the United States disfavor this approach to regulation of our own markets. It goes against our traditional desire to limit rather than expand the power of bureaucrats. As I indicated at the beginning, too often in our experience bureaucratic control excessively limits competition and promotes economic waste.

As an aside, I might mention here that skepticism of bureaucracy is deep in the American grain, no matter what the field of activity may be. The Declaration of Independence, in one of its critical references to the King, had this to say: "He has erected a Multitude of new Offices, and sent hither Swarms of Officers to harrass our People, and eat out their Substance."

Our views of England have, of course, changed over the years. Our wariness of bureaucracy -- any bureaucracy -- lives on.

Enforcement of the antitrust laws permits a measure of control without the bureaucratic structure. Since our antitrust laws provide a private right of action, law enforcers are frequently those who can prove in a court of law that they have been injured by illegal anticompetitive conduct.

I have tried to explain how we apply our antitrust laws in foreign commerce. I have conceded that from time to time our attempts to enforce our law will conflict with the laws and policies of other states which do not share our view.

What do we do in these situations? I think the answer is relatively simple to state, but difficult to implement. It is to seek mutual accommodation, a rational and equitable resolution of the conflict by compromise and by the recognition and acknowledgement of the validity of significant national interests of others. I spoke at some length about the principles of comity in the speech now excerpted in your legal publication. For our part, we would hope to find a greater appreciation by our friends abroad of the absolutely vital interest in competitive market conditions which is expressed in United States law and policy. Where there is a willingness by others to seek to accommodate this national interest of ours, I think you will find considerable willingness by United States law enforcement officials and United States courts to seek to accommodate the significant conflicting interests of others.

I hope I have been able to increase your understanding of the way we approach these problems. Especially between allies with strong ties and strong mutual needs, it ought to be possible to find comity in dealing with restrictive business practices. We are prepared to do just that.

Thank you.