



# THE EXTRATERRITORIAL APPLICATION OF NATIONAL LAWS: AN UNWARRANTED BURDEN FOR INTERNATIONAL BUSINESS

**T**he extraterritorial application of national laws - that is, when one country imposes its laws on persons operating outside its territory - adds to the cost and uncertainty of doing business and creates conflict between jurisdictions. The Australian Chamber of Commerce and Industry believes that co-operation, rather than coercion, is the best way forward in this complex area.

International trade and commerce is challenging at the best of times – identifying, accessing and holding important export markets, responding to the challenges of competitors and complying with the web of laws in the many different countries with which you trade and/or have in situ investments.

While business readily accepts there are risks and uncertainties in international trade and commerce, the extraterritorial application of national laws is an unwarranted burden and diversion of finite management resources, especially in smaller to medium sized firms.

Key questions for international business arising from the extraterritorial application of national laws include which country's(ies) laws do we have to comply with, are these laws consistent, how do we deal with any inconsistencies and how would we handle a conflict of laws?

The extraterritorial application of national laws imposes a number of potentially substantial, and hidden, costs on international commerce and industry.

These burdens take the form of increased operational costs, greater uncertainty, higher reputational risks and increased distortions to trade and investment, as well as creating tensions amongst sovereign governments with business caught in an invidious predicament between them.

## THE NATURE OF JURISDICTION

International law has produced several general principles for whom municipal (domestic) courts can exercise jurisdiction. These principles are:

- territory;

- nationality;
- passive personality;
- protective or security; and
- universality.

## Territory

The *territorial principle* means the courts of the place where the wrong was committed have jurisdiction over the matter - in effect a geography test. This principle has the advantages of clarity (the situ of the wrong is usually relatively easy to determine), convenience of forum and the involvement of the State where the wrong was committed.

International law has also recognised an *objective territorial principle*, where the wrong was commenced in one State, but completed or consummated in another State (for example, a fraud was planned in Country A, but performed in Country B which is an important issue in the internet age).

## Nationality

The *nationality principle* means municipal courts will have jurisdiction over persons of that nationality (for example, Australian Courts over Australian citizens), regardless of where the allegedly wrongful conduct took place.

This principle can be extended by residence (i.e. persons substantially resident in a country, for example long stay migrants holding permanent residence visas) or some other connection as evidence of allegiance of aliens. Nationality is often used as the basis for the extraterritorial application of national laws.

## Passive Personality

The *passive personality principle* means foreigners may be punished for acts abroad harmful to the nationals of the country in which the case is being heard. For example, an Australian court may seek to impose penalties on a Maltese national for an alleged physical assault on an Australian holidaying in Pakistan.

However, actual application of this principle has been rare and exceptional, and often results in diplomatic tensions between relevant nations.

## Protective or Security

The *protective or security principle* sees States assume jurisdiction over foreign nationals for acts done abroad which affect the security of the State.

The main areas of application in international law for this principle tend to be around currency, economic (e.g. trading or working with the enemy during times of war) and immigration offences (e.g. the movement of illegal immigrants).

## Universality

The *universality principle* allows municipal courts to exercise jurisdiction over the acts of non-nationals where the circumstances, in particular the nature of the crime, justify the repression of such acts as a matter of international public policy. Such situations arise where the State where the offence occurred has refused to prosecute the matter or allow extradition (e.g. homicide, or the hijacking of aircraft or ships at sea).

## EXTRATERRITORIALITY

The United States of America (USA) has been at the forefront of the extraterritorial application of national laws, both as an advocate and user of the practice.

This usage has occurred mainly in the area of competition/antitrust law, but also (and to a lesser extent) its criminal, environmental, financial and securities, and foreign sanctions and trade laws.

Supporters of extraterritorial application of national laws have put forward a number of arguments in favour of their case, including:

- in an increasingly globalised marketplace, national borders are becoming of lesser importance, with illegal/improper commercial conduct in one market often having adverse effects in another market. These

spillover effects are especially important in globally integrated sectors such as banking, finance, insurance and securities, and in closely linked markets relying on competition and environmental laws; and

- by developed countries adopting vigorous policing of breaches of key economic laws (most notably competition, and financial and securities), other nations, in particular developing and transitional economies, will be encouraged to enact and/or raise the standards of their own laws in these areas.

By contrast, critics and opponents of the extraterritorial application of national laws argue it:

- undermines the fundamental principle of international law, namely the respect between nations of the existence and integrity of national sovereignty, by allowing one State to interfere in the affairs of another State;
- breaches the spirit of international comity, that is of co-operation between nations, resulting in conflicts between (and the sovereignty of) nations. The blocking statutes and conduct by the affected country can compound the detriment to comity from the initial extraterritorial application of national laws; and
- for business, it can result in unnecessarily complex and costly systems of overlapping and even inconsistent (and potentially unworkable) legal obligations especially for those operating across national borders.

## INDUSTRY-WIDE PROBLEMS

A number of industries and firms operating across national borders experience tangible problems with the extra-territorial application of national law, most notably those in aviation, energy and mining, financial services and telecommunications.

In the international aviation industry, US aviation law prohibits gambling and smoking on all flights to and from that country even when the aircraft is outside US airspace and such practices are permitted under the national laws of non-US carriers.

European Union rules requiring carriers to notify passengers of relevant national liability regimes create problems preventing carriers from issuing a common notice.

In energy and mining, the USA and a number of other countries require companies in these sectors to report their reserves based on different rules, whilst inconsistent

### A Real Problem

In March 1997, a Canadian subsidiary of Wal-Mart Stores faced an increasingly common dilemma. United States authorities demanded it comply with US sanctions by ending sales in Canada of clothing manufactured in Cuba.

At the same time, Canadian authorities insisted Wal-Mart Canada continue to carry the Cuban-origin products or face fines of up to C\$ 1.5 million for non-compliance with counter-measures designed to neutralise the impact of US sanctions.

The company's first response was to remove the items from its stores, but it reversed its decision within two weeks. After apparently deciding the risk of liability was more severe under Canadian law, Wal-Mart Canada announced it was restocking its shelves with Cuban-origin clothing.

A US government spokesman later stated that US officials are considering whether or not to take action against Wal-Mart. The US Government subsequently backed down.

environmental regulations and reporting requirements impose substantial costs on such companies.

In financial services, banks in particular endure US extraterritorial reach imposing intrusive discovery, disregard for the corporate veil and conflicting laws on confidentiality and data protection.

At the same time, the USA and the EU require global financial services firms to comply with different international accounting rules (the US under its own Generally Accepted Accounting Principles and the EU under the International Accounting Standards).

US law also grants that country's courts jurisdiction over foreign financial institutions in anti-money laundering enforcement proceedings, even where the alleged conduct took place outside US territory – i.e. the financial institution only needs to have a bank account at a US financial institution to establish jurisdiction.

The telecommunications industry, and in particular the electronic commerce stream, is impacted by issues ranging across the extraterritorial reach of national laws dealing with antitrust/competition law, protection of intellectual property and data confidentiality and jurisdiction and applicable law in on-line business transactions.

## THE AUSTRALIAN GOVERNMENT RESPONSE

A number of nations, most notably Australia, Britain and Canada, have responded resolutely against progressive efforts during the twentieth century by the US Government and its judiciary to extend extraterritorial reach of American law.

This action has primarily taken the form of legislative processes, most notably the enactment of 'blocking statutes'.

Such statutes are intended to at very least disrupt, if

not ultimately defeat, the extraterritorial application of another nation's laws - that is to effectively defend the integrity of the State's own national sovereignty.

The modus operandi of these blocking statutes range across refusal to co-operate with foreign courts and tribunals, denying foreign litigants access to information, allowing an own-national defendant to escape adverse foreign judgements and/or 'clawing back' of foreign awards.

Australian governments, of both political persuasions, have enacted blocking statutes:

- the Fraser (Coalition) Government, in the form of the *Foreign Proceedings (Prohibition of Certain Evidence) Act 1976* and the *Foreign Antitrust Judgments (Restriction of Enforcement) Act 1979*; and
- the Hawke (Labor) Government, in the form of the *Foreign Proceedings (Excess of Jurisdiction) Act 1984*, which superseded, consolidated and reinforced the two preceding laws.<sup>1</sup>

The latter Act empowers the Australian Federal Attorney General to make orders prohibiting compliance with foreign judgements,<sup>2</sup> the giving of certain evidence<sup>3</sup> and the production of documents<sup>4</sup> in foreign antitrust proceedings where doing so would be in Australia's national interests.<sup>5</sup>

It also contains provisions dealing with refusal to enforce foreign judicial orders or reducing the quantum of any damages awarded,<sup>6</sup> allowing the defendant in an antitrust proceeding to recover awards of damages enforced against them in a foreign jurisdiction<sup>7</sup> and to recover costs and expenses<sup>8</sup> (also known as the 'clawback' provisions).

ACCI strongly supports blocking statutes, such as the *Australian Foreign Proceedings (Excess of Jurisdiction) Act 1984*, which are designed to preserve the integrity of the

national sovereignty of States and at least impair, if not defeat, the extraterritorial application by other States of their national laws.

## POSITIVE COMITY

In reality, the extraterritorial application of national laws may not be capable of addressing all of the issues of concern to the home government, reflecting the nature of international law and the laws, policies and practices of foreign governments (particularly through the use of 'blocking statutes').

A constructive approach to overcome the creation of tensions, if not antagonism, in international relations, and to provide greater certainty for commerce and industry on the jurisdiction and the application of laws, is what has become known as 'positive comity'.

Comity has been judicially defined as "*the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.*"<sup>9</sup>

Positive comity is a situation where a country is expected to give full and sympathetic consideration to another country's request that it open or expand a law enforcement proceeding in competition cases in order to remedy conduct in its territory that is substantially and adversely affecting another country's interests.

Australia has embraced the principle of positive comity as a State Party to the OECD Recommendation Concerning Co-operation Between Member Countries on Anticompetitive Practices Affecting International Trade, made in 1995.

The Recommendation deals mainly with the notification, exchange of information and co-ordination of action, confidentiality and consultation and conciliation where investigations or proceedings create tensions between State Parties.

Positive comity is also the central thrust of the treaty level agreement between the Australian and the US governments on Mutual Antitrust Enforcement Assistance, made in 1999.

## CONCLUSION

The extraterritorial application of national laws by some countries, notably the USA, has created uncertainty and added cost to the operation of businesses involved in

international trade and commerce.

Beyond the standard commercial risks of international trade and commerce, businesses operating across national borders are confronted with the added burden of potential uncertainty in legal jurisdiction.

The most effective approach is to eliminate the extraterritorial application of national laws, with territory being the sole basis for jurisdiction. If this were to occur, then the various national 'blocking statutes' could be repealed.

However, while ACCI recognises that this is a laudable longer term objective, in the near to medium term greater effort should be put into progressively winding back the extraterritorial application of national laws and commensurately expanding the use of positive comity.

## END NOTES

- <sup>1</sup> The two former statutes were enacted fairly quickly in response to certain circumstances; the latter statute consolidated them and ostensibly tidied up some legislative loose ends.
- <sup>2</sup> Section 14
- <sup>3</sup> Section 6
- <sup>4</sup> Section 7
- <sup>5</sup> Section 6 (3)
- <sup>6</sup> Section 9
- <sup>7</sup> Section 10
- <sup>8</sup> Section 11
- <sup>9</sup> *Allstate Life Insurance Company vs Linter Group Limited* 994 F 2nd 996, at 998-999