Die Konzentration in der Wirtschaft

On Economic Concentration

Herausgegeben von Helmut Arndt

Schriften des Vereins für Socialpolitik

Gesellschaft für Wirtschafts- und Sozialwissenschaften

Neue Folge Band 20/II

Zweite, völlig neu bearbeitete Auflage

SCHRIFTEN DES VEREINS FÜR SOCIALPOLITIK
Gesellschaft für Wirtschafts- und Sozialwissenschaften
Neue Folge Band 20/II

Die Konzentration in der Wirtschaft
On Economic Concentration

Zweiter Band

Konzentrationstendenzen und Konzentrationspolitik
— Spezielle Probleme der Konzentration —
Konzentration als politisches und gesellschaftliches Problem

Tendencies of Concentration and Concentration Policy
— Spezial Problems of Concentration — Concentration as a
Problem in Politics and Society

DUNCKER & HUMBLOT / BERLIN 1971

Die Konzentration in der Wirtschaft

On Economic Concentration

Zweite, völlig neu bearbeitete Auflage

Herausgegeben

von

Helmut Arndt

unter redaktioneller Mitarbeit von Hans-Jürgen Scheler

Zweiter Band

DUNCKER & HUMBLOT/BERLIN 1971

Gedruckt 1971 bei Berliner Buchdruckerei Union GmbH., Berlin 61
Printed in Germany
ISBN 3 428 02380 3

Inhalt des 2. Bandes

Contents of Volume II

IV. Konzentrationstendenzen und Konzentrationspolitik in ausgewählten Ländern* und in der EWG
Tendencies of Concentration and Concentration Policy in Selected Countries and in the E.E.C.

* Alphabetisch nach Ländern geordnet.

V. Spezielle Probleme der Konzentration unter besonderer Berücksichtigung der BRD
Special Problems of Concentration with Regard to the Federal Republic of Germany

VI. Konzentration als politisches und gesellschaftliches Problem
Concentration as a Problem in Politics and Society

IV.

Konzentrationstendenzen und Konzentrationspolitik in ausgewählten Ländern und in der EWG

Tendencies of Concentration and Concentration Policy in Selected Countries and in the E. E. C.

Economic Concentration and Concentration Policy in Australia

By *V. G. Venturini*, Brisbane

I.

Mergers are often regarded as the major vehicle of economic concentration. Probably more important than any other single factor in the trend towards economic concentration in Australia are the mergers and take-overs that have taken place in recent years, for they have been carried out—with a comfortable sense of impunity—in the awareness that at the present time any merger is legal.

Under the influence of the United States example[1] an antimonopoly law was enacted in the early days of the Commonwealth.[2] However, the Act did not contain provisions for the regulation of mergers.[3]

It is impossible even to attempt, in a 'catalogue raisonné' of this size, to describe the misfortunes of the *Australian Industries Preservation Act*. Its constitutionality was first—and successfully—challenged in the case of *Huddart Parker & Co. Pty. Ltd.* v. *Moorehead*,[4] where it was held in conflict with s. 51 (xx) of the Federal Constitution,[5] "a paragraph [which] has been the subject of so much difference of judicial opinion that, beyond saying that it has a narrow meaning, it is quite uncertain what power it confers [on the Federal Parliament]. It is probable that the Commonwealth Parliament is not authorized to legislate generally with respect to the range of matters which are normally included in the

---

[1] See: *Sherman Antitrust Act*, 26 Stat. 209 (1890); 15 U.S.C. Sec. 1—7.

[2] See: Commonwealth of Australia, *Australian Industries Preservation Act*, [No. 9 of] 1906.

[3] Even in the United States these came later with the *Clayton Act*, 38 Stat. 730 (1914); 15 U.S.C. Sec. 12—27 and were subsequently strengthened by the *Celler-Kefauver Antimerger Act*, 64 Stat. 1125 (1950); 15 U.S.C. Sec. 18.

[4] See: C.L.R., vol. 8 (1909), p. 330.

[5] "The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:

(xx.) Foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth." The Commonwealth of Australia, Constitution Act, 63 & 64 Vic., c. 12 (hereinafter cited as Constitution).

Companies Acts of the States."[6] The judgement in that case made it clear that the Commonwealth could not rest its power on the 'corporations' power and would thus have to rest it on a restricted 'commerce' power and—by so doing—much of the effectiveness of the statute would be removed. It was an unnecessarily restrictive construction of the law and one which attracted much criticism.[7] This is not the only constitutional problem; serious difficulties derive from the interpretation given to section 92 which provides that "on the imposition of uniform duties of customs, trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free..."[8]

Legislation to prohibit restrictive trade practices was regarded as "consistent with the freedom of trade which Section 92 postulate" by the 1959 Report from the Joint Committee on Constitutional Review.[9] The Committee also recommended the reconstitution of the Inter-State Commission, inoperative for many years.[10] But the suggestion fell on deaf ears!

By 1913, with the decision in *Attorney-General for the Commonwealth of Australia* v. *Associated Northern Collieries*,[11] the willingness of the common law courts to assume that an agreement reasonable in the interests of the parties is also reasonable in the interest of the public had virtually sanctified the right of every individual to trade by means of his own choice.[12] The unwillingness of the government effectively to use the available legislation—particularly as amended[13]—was blatant.[14]

---

[6] See: Appendix C to Commonwealth of Australia, Report from the Joint Committee on Constitutional Review—1959, Canberra 1959, para. 133.

[7] See for all: *G. Sawer,* Australian federalism in the courts, Melbourne 1967, p. 206, and *G. Sawer,* Cases on the Constitution of the Commonwealth of Australia, Sydney 1964, p. 430.

[8] See also: section 99 which provides that: "The Commonwealth shall not, by any law or regulation of trade, commerce, or revenue, give preference to one State or any part thereof over another State or any part thereof", section 100 by which the Commonwealth is prevented from abridging the right of a State or of the residents therein to use waters of rivers for conservation or irrigation, and section 98 by which Parliament's power to make laws with respect to trade and commerce is extended to navigation and shipping, and to state railways.

[9] See: Report supra note 6, para. 871.

[10] On the fate of the Commission see: Report, supra note 6 para. 867, and *G. Sawer,* Australian federal politics and law 1901—1929, Melbourne 1956, at pp. 92, 152—153 and 204.

[11] C.L.R., vol. 14 (1911), p. 387. On appeal to the full High Court of Australia *sub nomine: Adelaide Steamship Co. Ltd.* v. *The King and the Attorney-General for the Commonwealth of Australia* C.L.R. vol. 15 (1912), p. 65, and to the Privy Council: *Attorney-General of the Commonwealth* v. *Adelaide Steamship Co. Ltd.,* C.L.R., vol. 18 (1913), p. 30.

[12] C.L.R., vol. 18 (1913), pp. 30 at 38, 39, 51 and 51—52.

[13] See: *Australian Industries Preservation Act,* [No 29 of] 1910.

[14] See: *G. de Q. Walker,* Australian monopoly law, Melbourne 1967, at p. 31.

Defeated in the courts, successive federal governments resorted to constitutional amendment[15] in 1911,[16] 1913[17] and 1919[18] to gain additional powers over monopolies. They all failed—although very narrowly in 1919.[19] In 1926 the *Bruce-Page* Government made a further effort to extend the 'corporations' power and to convince the federal electors that the Commonwealth should have a power over combinations, trusts and monopolies in restraint of trade. The electors decisively repudiated these proposals.[20] In 1929, the Royal Commission on the Constitution recommended an appropriate amendment;[21] but there were also dissenting voices.[22] A 1944 referendum was equally unsuccessful. As *Sawer* concluded: "Constitutionally speaking, Australia is the frozen continent."[23]

Five Australian states have some form of anti-monopoly legislation;[24] yet none has antimerger provisions, and every one is a pale reflection of the Sherman Act type prohibitions.[25]

In 1964 the result of *Redfern* v. *Dunlop Rubber Australia Ltd.*,[26] the only other case since 1913, seemed to have extended the reach of the law, though it is hard to appreciate how far in view of previous decisions.[27]

---

[15] See for all: *C. Joyner,* The Commonwealth and monopolies, Melbourne 1963.

[16] Ibid., at p. 13.

[17] Id., at p. 43.

[18] Id., at p. 62.

[19] An amendment of the Constitution would require a referendum of the people which would have to be won in a majority of states and with an overall majority throughout the Commonwealth. 26 amendments have been put by this procedure. Only 5 have passed. See: Constitution, s. 128.

[20] See: *G. Sawer,* Australian federal politics and law 1901—1929, Melbourne 1956, at pp. 280—281.

[21] See: Commonwealth of Australia, Report of the Royal Commission on the Constitution, Canberra 1929, pp. 273—274, as cited in Report, supra note 6 para. 795.

[22] Id., at pp. 298—299.

[23] See: *G. Sawer,* Australian federalism in the courts, Melbourne 1967, p. 208.

[24] See: New South Wales *Monopolies Act,* [No. 54 of] 1923, as amended and *Industrial Arbitration Act* [No. 2 of] 1940; recently New South Wales has enacted a *Consumer Protection Act* [No. 28 of] 1969 which commenced on 1 July 1969; Queensland *Profiteering Prevention Act* [No. 34 of] 1948, as amended; South Australia *Fair Prices Act,* [No. 1655 of] 1924, as amended, and *Prices Act,* [No. 2 of] 1948, as amended in 1963; Victoria *Collusive Practices Act* [No. 7353 of] 1965; Western Australia *Unfair Trading and Profit Control Act* [No. 30 of] 1956, amended by the *Unfair Trading and Profit Control Act Amendment,* [No. 47 of] 1958 and given the title of *Monopolies and Restrictive Trade Practices Control Act,* 1956—1958. The Act was then repealed and replaced by the *Trade Associations Registration Act,* [No. 79 of] 1959.

[25] See: *G. Barwick,* Some aspects of Australian proposals for legislation for the control of restrictive trade practices and monopolies, Canberra 1963, p. 15.

[26] See: [1964] *Argus Law Reports* 618.

[27] See: *King* v. *Gates and another; Ex parte Maling,* C.L.R., vol. 41 (1928),