SECTION 92: QUO VADIS?

RICHARD CULLEN*

Introduction

The most litigated section in the Australian Constitution[1] is section 92.[2] The part of the section of continuing relevance reads:

> 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.

The High Court's interpretation of the section has been characterised by a series of major shifts in the construction of its meaning. Moreover, the court has frequently seen competing views of the section maintained concurrently. These competing views have, in turn, enjoyed support from shifting majorities. Thus, apparently similar fact situations have been resolved, on a not irregular basis, first one way and then another.

Recently, yet another significant shift in the interpretation of section 92 has occurred with the High Court's decision in *Cole v Whitfield* (1988).[3] This may turn out to be the most significant turning point of all.

This paper discusses the "new"[4] doctrine in some detail in Parts 3 and 4. This discussion is set against an overview of the section's history and the prior case law in Part 2. Part 5 of the paper draws together the previous discussions and makes some observations on the new section 92 wisdom.

* LLB (Hons) D Jur, Lecturer-in-Law, Monash University, Melbourne. I wish to thank Mr Jeff Goldsworthy and Ms Kathryn Rees for their assistance in the preparation of this article. The views expressed remain those of the author.

1. The Australian Constitution forms section 9 of the Commonwealth of Australia Constitution Act 1900 (UK), 63 & 64 Victoria c 12.
2. The High Court and the Privy Council have considered the section in over 140 cases.
3. (1988) 62 ALJR 303.
4. Perhaps "reborn" would be a more appropriate adjective.

Section 92 overview

The drafting of section 92

The first question to ask about the section is, where did the wording coming from? It was a product, along with the rest of the Constitution, of the Constitutional Conventions of late last century. But what drove the founders of the Constitution to craft such a provision?

Colonial border tariffs were one of, if not the, major commercial headache of the era. They interfered significantly with the development of trade within Australia as a whole. This was especially the case with the Victorian tariff regime where the imposts, more than elsewhere, served a protectionist as well as a revenue raising purpose. The Melbourne Age and its founder David Syme were powerful and influential apostles of protectionism.[5]

The consensus reached at the Conventions was that Australia needed an internal free trade zone coupled with protection from external competition. A number of sections were inserted in the Constitution to achieve this end, including Section 90, which confined the right to impose customs and excise duties to the Commonwealth, and section 92. It was envisaged that this uniform customs and excise regime would generate far more revenue than the Commonwealth needed so section 94 provided for the distribution of the surplus to the States. It all fitted together quite well. There was a prohibition on the States imposing customs and excise taxes, a guarantee that interstate trade would remain "absolutely free" and the States were to get most of their lost tariff revenue back via the surplus distribution formula. Unfortunately, for the States at least, it did not work out this way. Section 94 became a dead letter within ten years of federation,[6] section 90's prohibiting role expanded alarmingly and section 92, as we are about to see, grew to become something of a constitutional loose cannon.

As was noted above, it is the first paragraph of section 92 which is vital. In 1898, the Premier of the colony of New South Wales, George Reid, described the words as "A little bit of layman's language which comes in here very well". As Michael Coper points out, it

5. *Cole v Whitfield* supra n 3, 307.
6. See *New South Wales v Commonwealth* ("the *Surplus Revenue* case") (1908) 7 CLR 179.

was indeed lay language — and that has been a lot of the trouble.[7] An immediate problem with the section was that its wording was incomplete. It speaks of trade, commerce and intercourse being absolutely free — but free from what? — the section declines to inform us.

Mr Isaac Isaacs, as he then was, pointed out frequently at the Conventions the risks associated with this general wording. He said that in this form the section would be interpreted in a way it was not intended to be. However he made such a pest of himself in debates that eventually his co-delegates stopped listening[8] and the section went into the Constitution in the form set out above.

Still, it seems clear that, notwithstanding the infelicitous wording, the intention was for section 92:

A To help eliminate all forms of border customs duties; and

B To eliminate other non-fiscal but protectionist measures that might arise.[9]

Thus it was intended to help create the conditions for free trade in goods and services within Australia.

The first twenty years

The first High Court case on section 92, *Fox v Robbins* (1909),[10] was straight forward enough. A Western Australian law[11] stipulated that one had to pay fifty pounds for a liquor licence to sell out-of-state liquor and two pounds for a licence to sell intrastate liquor. The Court held that such a measure was invalid because it discriminated against interstate trade. Clearly the State law did so. Whether the court was saying that only such laws would contravene section 92 is less clear.

In any event, confusion soon set in. In *New South Wales v Commonwealth* (1915) ("the *Wheat* case")[12] the High Court said that a

7. M Coper *Encounters with the Australian Constitution* (North Ryde, NSW: CCH, 1987) 279.
8. Ibid.
9. As it was fiscal impositions which were the real problem of the time, it is arguable that only they were being addressed by section 92. In fact such an argument was made in some early section 92 cases, including *Duncan v Queensland* (1916) 22 CLR 556. The argument was rejected by the court. This theory of section 92 was subsequently revived by Mr Justice Murphy in the mid 1970s (see below p 102).
10. (1909) 8 CLR 115.
11. (WA) Wines Beer and Spirit Sale Act 1880.
12. (1915) 20 CLR 54.

New South Wales scheme[13] to regulate the wheat industry in that State by compulsorily acquiring all wheat (thus preventing any being sold interstate) did not contravene section 92 because it was only a law which transferred ownership in the wheat. The new owner, the New South Wales Government, could still trade in the wheat interstate. In *Foggitt Jones and Co Ltd v New South Wales* (1916)[14] the Court said a New South Wales law[15] meddling with stock movement rights interstate during the war was invalid. No change of ownership was involved and the majority of the court distinguished the *Wheat* case on that basis. However, in *Duncan v Queensland* (1916),[16] the High Court, when dealing with Queensland legislation[17] identical in all relevant respects with that considered in *Foggitt's* case, came to the conclusion that the legislation was valid. This time a majority of the Court said that this was a law dealing with property and not trade and commerce.

McArthur's case (1920)

Here we encounter the first major turning point in section 92 jurisprudence. Mr Justice Isaacs, who, together with Barton J, had penned a blistering dissent in *Duncan's* case, had a formula for resolving the emerging confusion. Now the opportunity to apply it presented itself. So too did the opportunity for Isaac J to fulfil his prophesy about section 92 made during the Convention debates.

In *W A McArthur Ltd v Queensland* (1920)[18] the Court was considering Queensland legislation[19] which made it unlawful for a trader to sell above a fixed Government price. McArthurs, a New South Wales Company, supplied calico and felt hats to Queensland purchasers from New South Wales and disobeyed the price fixing legislation. It was argued that the legislation was valid because it treated interstate and intrastate trade equally; that is there was no discrimination of a protectionist kind. However, Knox CJ and Isaacs and Starke JJ, in a joint judgment, rejected this argument. They

13. (NSW) Implemented by the Wheat Acquisition Act 1914.
14. (1916) 21 CLR 357.
15. (NSW) Meat Supply for Imperial Uses Act 1915.
16. Supra n 9.
17. (Qld) Meat Supply for Imperial Uses Act 1914.
18. (1920) 28 CLR 530.
19. (Qld) Profiteering Prevention Act 1920.

said that section 92 was not so confined. This legislation touched on a subject matter that was part of interstate trade and that trade was to be absolutely free.[20] There was a clear rejection of the free trade purpose argument.

Gavan Duffy J, in dissent, said that it was wrong to claim that section 92 forbade every interference with interstate trade. It guaranteed freedom from fiscal discriminatory burdens and possibly other discriminatory burdens. It was never meant to confer freedom from all regulation; no civilized nation could tolerate such a state of affairs.[21] This reasoning gave section 92 a clear free trade purpose.

The Isaacs led majority looked at the subject matter of interstate trade in isolation and said that, prima facie, you could not burden it at all. The majority[22] did, however, ameliorate its sweeping declaration in two ways:

1 By saying that section 92 does not apply to the Commonwealth. It thus could continue to regulate without being restricted by section 92 considerations.[23] This fitted nicely with the Isaacs view of the Commonwealth's expanding role established shortly beforehand in *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) ("the *Engineers* case")[24] and
2 By declaring that ordinary domestic laws of a State (not directed to trade and commerce) impinging on interstate trade would be valid.[25] This suggests, at best, a naive faith in the ability of the courts to categorise such laws.[26]

James v Commonwealth (1936)

The combative Mr Frederick Alexander James eventually won his epic struggle against the combined State and Commonwealth

20. Supra n 18, 551-556.
21. Ibid, 567-569.
22. Knox CJ, Isaacs and Starke JJ were joined in the majority by Higgins and Rich JJ whose separate judgments essentially agreed with the joint judgment of the first three named judges.
23. Supra n 18, 556-558.
24. (1920) 28 CLR 129. This proposition was neither argued nor necessary to decide the case, moreover, the Commonwealth was not even a party to the case.
25. Supra n 18, 552-553.
26. See also P Hanks *Australian Constitutional Law* Third Ed (Melbourne: Butterworths, 1985) 649 where this qualification is described as an intellectually suspect device designed to permit some public control of (interstate) commercial activities.

attempts to impose their schemes for the orderly marketing of dried fruits upon him. In doing so he precipitated some significant developments in section 92 jurisprudence.

The original South Australian restriction[27] on the amount of dried fruit that could be marketed was struck down as contrary to section 92 in 1927.[28] Then the South Australian attempt to compulsorily acquire dried fruits[29] was struck down by the Privy Council in 1932.[30]

In 1936 came *James v Commonwealth* ("the *James* case").[31] This time it was Commonwealth legislation[32] which prohibited the interstate delivery of dried fruits without the issue of a licence. This legislation was clearly based on the assumption that the Commonwealth was not subject to section 92. Alas for the Commonwealth (and Isaacs' theory of section 92) the Privy Council held otherwise. Given that the wording of the section itself lent no support to the Isaacs view, this outcome was not greatly surprising.

Once this point was made by the Privy Council, a spectre of commercial anarchy loomed. If neither level of Government was able to legislate in such a way as to affect interstate trade, a huge regulatory gap presented itself. However, the Privy Council inadvertently provided a mechanism for avoiding the full consequences of their primary finding. They did so by apparently managing to approve two conflicting lines of cases which the High Court had been beavering away at in the post *McArthur* era.

In *R v Vizzard; Ex parte Hill* (1933)[33] the Court encountered a challenge to the New South Wales transport coordination (read railway protection)[34] legislation of 1931.[35] It was, in the words of Rich J, designed to avoid "mutual slaughter" of the various players in transportation.[36] On a strict *McArthur* approach it ought to have

27. (SA) Imposed by the Dried Fruit Acts 1924 and 1925.
28. *James v South Australia* (1927) 40 CLR 1.
29. Under the Dried Fruit Act 1924, as amended in 1927.
30. *James v Cowan* (1932) 47 CLR 386.
31. (1936) 55 CLR 1.
32. (Cth) Dried Fruits Act 1928.
33. (1933) 50 CLR 30.
34. See M Coper *Freedom of Interstate Trade under the Australian Constitution* (Sydney: Butterworths, 1983) 45.
35. (NSW) State Transport (Co-ordination) Act 1931.
36. Supra n 33, 50.

been held invalid; it was State legislation on the subject matter of interstate trade and commerce. The majority,[37] led by Evatt J said, however, that the legislation was valid because, among other things, it *facilitated* interstate trade and commerce by creating the conditions for free trade to occur. The legislation meted out equal treatment to interstate and intrastate transport operators. Evatt J stressed this lack of discrimination aspect and, in doing so, endorsed a free trade maintenance role for section 92 rather than a protection of individual interstate trading rights purpose. Dixon and Starke JJ both strongly dissented from this view.[38] In the same year, in the case of *Peanut Board v The Rockhampton Harbour Board* (1933),[39] the High Court[40] (Dixon J in the ascendency this time and Evatt J in dissent) gave an individual rights meaning to section 92 when it held invalid a Queensland compulsory acquisition scheme[41] which applied equally to peanuts destined for local and interstate markets. The fact that the legislation was non-discriminatory convinced Evatt J but the majority, led by Dixon J, said that, notwithstanding the lack of discrimination, this was a State law affecting interstate trade and commerce and the scheme was thus invalid.[42]

In the 1936 *James* case, the Privy Council seemed to attempt the impossible; namely reconciliation of the cases to date. They said that *Vizzard's* case was of great importance and also that what they were saying was consistent with *McArthur's* case and the *Peanut Board* case. These conflicting approaches to section 92 interpretation thus survived *James v Commonwealth* and continued to be applied. This muddle set the scene for the further development of the two lines of cases. Both could rely on the Privy Council judgment which could be read as endorsing a free trade purpose for section 92 and an individual rights thrust.

In the ensuing struggle the Evatt view prevailed more often than

37. The majority comprised Gavan Duffy CJ, Rich, Evatt, and McTiernan JJ.
38. Supra n 33, Dixon J, 56-71 and Starke J, 52-56.
39. (1933) 48 CLR 266.
40. The majority comprised Gavan Duffy CJ, Rich, Starke, Dixon and McTiernan JJ. Evatt J was in dissent.
41. Imposed by the (Qld) Primary Producers' Organisation and Marketing Act 1926.
42. Supra n 39, Dixon J, 285-288; Starke J, 277-288; Rich J, 273-277; and McTiernan J, 305-315.

not whilst he remained on the Court. He left the Court in 1940 for a political career and from then on the Dixon view, which emphasised a free enterprise — individual rights thrust, gained the ascendency.[43]

Lord Wright, who had delivered the Privy Council judgment, admitted, in the Sydney Law Review in 1954[44] that the Privy Council had been wrong and that probably a fiscal impost interpretation (a narrow free trade view) was correct. He also admitted, in conversation, that the Privy Council did not realise how hard it was to change the Australian Constitution and thus what very long lasting effects their somewhat rushed judgment would be likely to have.[45]

The *Bank Nationalisation* Case (1949)

The Case

The Privy Council had another chance to consider section 92, and their previous handiwork in 1949 when the dispute over the Chifley Labor Federal Government's attempt to nationalise the banks in Australia[46] came before it.

In *Commonwealth v Bank of New South Wales* (1949) ("the *Bank Nationalisation* case"),[47] the Commonwealth's case was argued by Dr H V Evatt the now Federal Attorney-General, whilst the bank's case was put principally by the then, Mr Garfield Barwick. The Privy Council[48] explained that it wanted to correct some misunderstandings arising from its earlier deliberations on section 92.[49] It did not do so by making a comprehensive review of the case law muddle. Rather, it chose to try and bring order to the chaos by opting

43. Coper supra n 34, 87.
44. Lord Wright "Section 92 — A Problem Piece" (1954) 1 Sydney L Rev 145. A year later ((1955) 33 Can Bar Rev 1123) Lord Wright also revealed that he had been in strong dissent after the *James* case in the deeply controversial labour conventions case (*A-G of Canada v A-G of Ontario [1937]* AC 326.
45. Coper supra n 7, 283.
46. Pursuant to the (Cth) Banking Act 1947.
47. (1949) 79 CLR 497.
48. In fact, technically, the Privy Council ought not have heard the case. An inter se question as to powers of Commonwealth and States was present here and section 74 of the Constitution provides that such questions have to have a High Court certificate before going to the Privy Council. No such certificate had been obtained. Nevertheless, the Privy Council proceeded to offer its opinion on the matters before it.
49. Supra n 47, 629.

for one of the competing views on section 92; namely, the individual rights theory as developed by Mr Justice Dixon. The Privy Council laid down some tests for establishing the validity or invalidity of legislation under section 92 consistent with this endorsement of the Dixonian doctrine. Their Lordships' said that direct interference with interstate trade would infringe section 92. This meant that what the section protected were the individual rights of a trader. Personal engagement in interstate trade would, of itself, attract the protection of the section — if the trader could show that the allegedly offending legislation placed a burden directly on that interstate trade. This meant that the Evatt theory, which was largely based on a free trade view of section 92, had been displaced.[50]

However, the Privy Council recognised the need to provide a limiting mechanism after applying the prima facie rule. They realised that, without some such limit, section 92 was capable of wreaking wide-spread havoc on much commercial regulatory legislation in Australia. Thus some regulation of aspects of interstate trade was to be permitted *without* section 92 being infringed. The guidance on what regulation would be allowed was quite limited. The Privy Council did say, however, that the *prohibition* of some activity could not equal regulation. Their Lordships then qualified this comment by suggesting that there may be some cases where the creation of State or Commonwealth monopolies might be justified as the only practical method of regulation.[51]

The road transport anomaly

This left one lingering problem from the competing Evatt view which required several more years and another visit to the Privy Council to settle. This resulted principally from the vagueness of the concept of regulation set out by the Privy Council in the *Bank Nationalisation* case. The High Court continued, by sometimes narrow majorities, to allow the States to regulate intrastate and interstate transport and thus protect their railway systems from competition. But it was clear that the State regulation of transport was being allowed on a scale not permitted in other areas.[52]

50. Ibid, 635-639.
51. Ibid, 639-641.
52. Coper supra n 34, Ch 15.

Essentially, the States controlled interstate transport by giving administrators an unfettered discretion to refuse licences for transport vehicles to travel State roads. This applied both to intrastate and interstate transport vehicles. This sort of legislation[53] was upheld by the High Court in *McCarter v Brodie* (1950)[54] (Dixon J dissenting). When the issue was relitigated in *Hughes and Vale Pty Ltd v New South Wales (No 1)* (1953)[55] the High Court was split 3:3 before Dixon, now Chief Justice, cast his vote. Rather than cast a vote to overrule the transport case exception, he voted against his own views and with the majority supporting the State legislation,[56] presumably knowing that there was considerable likelihood this would enable the Privy Council to reconsider the issue — and do a little more tidying up.

The case was appealed to the Privy Council. In *Hughes and Vale Pty Ltd v New South Wales (No 1)* (1954)[57] the Judicial Committee overturned the High Court decision and the long line of cases on which it depended stretching back to *Vizzard's* case.[58] This left the Dixon view alone in place. Individual rights were protected by section 92 and free trade based arguments were no longer relevant in arguing about the section's purpose.

Schizophrenia sets in

Alas this only disposed of one problem. The Court now entered a period with respect to section 92 described as a "twilight world of tautology, judicial groping and microscopic distinctions".[59] This was so because the Dixon test introduced, in deciding whether legislation had a direct effect on interstate trade, the concept of the "criterion of operation" of a law.

A law was said directly to burden interstate trade if its criterion of operation was something itself a part of interstate trade. This led, for example, to the findings over controls imposed by State

53. In the form of the (Vic) Transport Regulation Act 1933.
54. (1950) 80 CLR 432.
55. (1953) 87 CLR 49.
56. (NSW) State Transport (Co-ordination) Act 1931.
57. (1954) 93 CLR 1.
58. Supra n 33. In doing so, the Privy Council adopted Dixon CJ's reasoning (and language) from his dissents in the road transport cases.
59. Coper supra n 7, 298.

governments[60] on the production of margarine. The High Court sanctioned these controls (designed to protect State dairy industries) notwithstanding the fact that sometimes substantial production was destined for interstate sale. The legislation was not struck down by section 92 because the controls applied at the production stage and production was not part of interstate trade.[61] This provided another way of quarantining the effects of section 92; craft a narrow definition of what interstate means in a section 92 context and you have a means by which a swathe of State regulatory legislation can be kept beyond its reach. At the other end of an interstate transaction, the High Court for a time also said that the first sale after importation was subsequent to interstate trade.[62]

But even here the holdings were inconsistent. Thus potatoes brought into New South Wales from Tasmania could have their price fixed in New South Wales[63] because that occurred after interstate trade was complete,[64] but a Queensland law[65] restricting the way fish, including interstate fish, were to be sold in Queensland was struck down in *Fish Board v Paridiso* (1956).[66] The explanation lay in a special qualification in the Dixon formula. Even though only direct burdens on interstate trade would be struck down under the criterion of operation test, legislators could not achieve the same result indirectly by some circuitous device.[67]

Road transport continued to cause problems for the Court. The demise of the *Vizzard* line of cases led to a rapid expansion in interstate road transport, which in turn led to a new range of issues being litigated. These centred on the "continuous journey" cases and the "border hopping" cases.

In the continuous journey category there was *Hughes v Tasmania* (1955)[68] in which it was said that a transport component, com-

60. Under the (NSW) Dairy Industry Act 1915, for example.
61. See eg, *Grannall v Marrickville Margarine Pty Ltd* (1955) 93 CLR 55 and *Beal v Marrickville Margarine Pty Ltd* (1966) 114 CLR 283.
62. See *Wragg v NSW* (1953) 88 CLR 353.
63. By the (NSW) Price Regulation Act 1948.
64. According to *Wragg v New South Wales*, supra n 62.
65. (Qld) Fish Supply Management Act 1935.
66. (1956) 95 CLR 443.
67. Coper supra n 7, 299.
68. (1955) 93 CLR 113.

pleted within Tasmania, in the shipment of fruit from the mainland to Tasmania was not part of interstate trade. In *Pilkington v Frank Hammond Pty Ltd* (1974)[69] some twenty years later, this view was overruled.

In the second category, the Court allowed a number of doubtful instances of "border hopping" and disallowed a number of even more doubtful instances. Goods picked up and delivered within the one State but which had enjoyed a detour through a second State were held, in a number of cases, to have been a part of interstate trade with the consequence that the carriers escaped comprehensive State regulation applying to more orthodox intrastate carriers.[70]

Furthermore even after the Privy Council had expressed its view in *Hughes and Vale Pty Ltd v NSW (No 1)*,[71] the High Court continued to allow an exception which permitted the States to apply road taxes to interstate vehicles to recoup the cost of road maintenance occasioned by that interstate traffic. The same charges applied to intrastate hauliers and it could well be said that it was reasonable that these charges be made. The exception sat uncomfortably with the now firmly adopted individual rights theory, however, as these charges impacted directly on interstate trade and absence of discrimination arguments were supposedly no longer relevant.[72] This exception survived despite strong dissenting views from Kitto and Taylor JJ[73] until the States removed road taxes under pressure (most particularly, highway blockades) from interstate truck operators.

Although Dixon CJ's approach was flawed, he led the Court in limiting the havoc section 92 might otherwise have visited upon Australian commercial life. But what happened once he left the Court?

69. (1974) 131 CLR 124.
70. See eg, *Narracoorte Transport Co Pty Ltd v Butler* (1956) 95 CLR 455; *Golden v Hotchkiss* (1959) 101 CLR 568; *Beach v Wagner* (1959) 101 CLR 604; *Jackson v Horne* (1965) 114 CLR 82; *Roadair Pty Ltd v Williams* (1968) 118 CLR 644; *Ward (J & J) Pty Ltd v Williams* (1969) 119 CLR 318; but contrast the failed attempts to invoke section 92 in this context in *Harris v Wagner* (1959) 103 CLR 452 and *Western Interstate Pty Ltd v Madsen* (1961) 107 CLR 102.
71. Supra n 57.
72. Coper supra n 34, 162-169.
73. *Hughes and Vale Pty Ltd v NSW (No 2)* (1955) 93 CLR 127, Kitto J, 224; *Commonwealth Freighters Pty Ltd v Sneddon* (1959) 102 CLR 280; Taylor J, 296-298.

The post Dixon era

The Barwick individual rights theory

The departure of Sir Owen Dixon as Chief Justice in 1964 and his replacement by Sir Garfield Barwick marked another important turning point in the section 92 saga — though not as profound a turning point as the new Chief Justice had hoped for.

Chief Justice Barwick led a partly successful assault on the Dixon approach to section 92. He succeeded in reducing the narrowness of Dixon CJ's formal definitions of directness and interstateness by insisting that practical considerations be taken into account in evaluating the effect of section 92 on legislation. Barwick CJ gradually mustered a majority for this view, but in the end he failed to shift the consequences as dramatically as it appeared he might. Whilst he was able to convince the Court of the correctness of his view of the Dixonian tests, a number of judges, sufficient to make up recurring anti-Barwick majorities, sought refuge from allowing section 92 to sweep away large slabs of regulatory law. They achieved this by adopting a wider notion than had hitherto prevailed of what was allowable as reasonable regulation within the *Bank Nationalisation* case[74] proviso. Essentially, there were insufficient kindred spirits on the bench during Barwick's period as Chief Justice[75] prepared to travel the full distance with him on section 92. The Chief Justice's beliefs about the fundamental significance of section 92 were strongly held and widely (if irreverently) recognised. For instance, the editor of The National Times, Paddy McGuinness, asked, in reference to the Chief Justice's views, "If section 92 is so fundamental why is it not section 1?"[76]

As Coper says, the Barwick view that practical considerations had to be taken into account was compelling. The rule, crafted to quarantine section 92, that first sales interstate were not part of interstate trade was a quite legalistic and artificial device.[77] The effects of this new approach were seen strikingly in the *North Eastern Dairy Co Ltd v Dairy Industry Authority of New South Wales* (1975) ("the

74. Supra n 47.
75. Sir Garfield Barwick was Chief Justice from 1964 until 1981.
76. P P McGuinness "The High Court reviewed" National Times 7 October, 1978.
77. Coper supra n 34, 305.

NEDCO case").[78] On this occasion a majority of the Court[79] did favour the invocation of section 92 to strike down a New South Wales milk marketing scheme. NEDCO, a Victorian dairy company, was able to sell milk competitively into New South Wales. NEDCO was located near the New South Wales border, processed milk at Kiewa and had a Depot in Wodonga. It supplied milk to Albury and Junee in New South Wales, sometimes directly and sometimes via agents. NEDCO made its own deliveries into New South Wales.

The problem was, among other things, that certain regulations made under the New South Wales Pure Food Act 1908 banned the sale of milk in New South Wales which had not been pasteurised in that State. This was quite an effective protectionist measure. It *appeared* to be a legitimate health and safety regulation and it applied without discrimination. The New South Wales Dairy Industry Authority knew, however, that the processing of milk in Victoria involved pasteurising it and that the same milk could not be satisfactorily pasteurised more than once. The Court found for NEDCO and in the process began to overturn the rule that the first sale interstate was beyond the reach of section 92.[80] However, in a later case,[81] the Court retained the rule that (egg) production for interstate trade was still outside of the concept of interstateness.

The Mason public interest theory

In the *NEDCO* case Mason J was in the process of formulating yet another theory about section 92. Mason J stressed that the individual rights enjoyed under section 92 were incidental to the public interest character of section 92. Thus looking after NEDCO, in effect, was primarily in the public interest.[82] He had made similar

78. (1975) 134 CLR 559.
79. The majority comprised Barwick CJ, Gibbs, Stephen, Mason and Jacobs JJ. McTiernan J was in dissent. He clearly felt psychologically bound by a case some 36 years earlier in which he had held the same scheme to be valid. See *Milk Board (New South Wales) v Metropolitan Cream Pty Ltd* (1939) 62 CLR 116.
80. Arguably, a majority of the court held that the first sales interstate in the *NEDCO* case, supra n 81, were a part of interstate trade. The fact of *NEDCO* selling interstate itself and some other factors clouded this issue, however (see Coper, supra n 34, 236-240). By the time of *Permewan Wright Consolidated Pty Ltd v Trewitt* (1979) 145 CLR 1, the demise of this rule had been accepted by a majority of the court.
81. *Bartter's Farms Pty Ltd v Todd* (1978) 139 CLR 499.
82. Supra n 78, 614-615.

observations previously.[83] These were the beginnings of his long judicial haul through to *Cole v Whitfield*[84] in 1988.

This concept of public interest was being developed in the context of the Privy Council qualification in the *Bank Nationalisation* case[85] which stated that the reasonable regulation of interstate trade was permissible. Chief Justice Barwick had a narrow view of what amounted to reasonable regulation. He put his views on the scope of permissible regulation most clearly in *Samuels v Readers Digest Association Pty Ltd*[86] in 1969. In Barwick CJ's view, the achievement of free trade required laissez-faire economic conditions.[87] Thus, in order to achieve the goal of a common market in Australia, it was critical that only the minimum possible amount of regulation, namely that needed to preserve an ordered society or a law which the very nature of trade and commerce required,[88] be allowed. Barwick CJ warned of the apparently innocent guises which legislation in breach of this precept could take. It was only by guaranteeing individual interstate trading rights, he argued, that the common market could be preserved.[89] Professor Zines has suggested that, in the Barwick theory, orthodox free trade and individual rights principles were merged.[90]

The Mason view of permissible regulation was much wider. Laws which were in the interest of the community as a whole might prevail notwithstanding that they burdened the interstate trade of individual traders. This meant that, unlike the Chief Justice, Mason J was not prepared to allow only those regulations compatible with a laissez-faire, economic philosophy. The balancing of interests of interstate traders and the country as a whole had, Mason J said, to

83. See *Pilkington v Frank Hammond Pty Ltd* supra n 69, 185-186.
84. Supra n 3.
85. Supra n 47.
86. (1969) 120 CLR 1.
87. Laissez-faire is the term used to describe an economy where the activities of government are kept to an absolute minimum; A Bullock and O Stallybrass (eds) *The Fontana Dictionary of Modern Thought* (London: Fontana/Collins, 1977).
88. See *Mikasa (New South Wales) Pty Ltd v Festival Stores* (1972) 127 CLR 617 where antitrust legislation was, accordingly, approved by the Chief Justice (who, incidentally, had been the architect of the original modern version of this legislation during his time as Commonwealth Attorney-General).
89. Supra n 86, 14ff.
90. L Zines *The High Court and the Constitution* Second Ed (Sydney: Butterworths, 1987) 120.

be carried out according to contemporary dictates and not according to the doctrines of political economy which prevailed in 1900.[91]

The Barwick view of the importance of the common market, and hence individual rights, was so fundamental that few other social interests could counter it. The Mason view was far less doctrinaire but also, necessarily, less distinct.

The Murphy fiscal burden theory

It is now appropriate to divert briefly to consider the view of Mr Justice Murphy on section 92. In *Buck v Bavone*,[92] in 1976, Murphy J advanced his view of the significance of the section.

This case involved one Luigi Bavone, a resident of South Australia, who was prosecuted under South Australia legislation[93] prohibiting the sale of potatoes by a grower unless the grower was registered by the Potato Board. Mr Bavone tried to sell potatoes in New South Wales whilst unregistered under the South Australian Act. This is, incidentally, a good example of the failure of the Barwick view to carry the day. The Court, apart from Murphy J, found that prima facie the legislation infringed section 92, but the majority (Barwick CJ dissenting) then found that the South Australian legislation fell into the permissible regulation category.

In his judgment, Murphy J took the Constitution itself as his starting point. He considered, especially, the context in which section 92 was embedded. He referred also to Lord Wright's admission that the Privy Council had been wrong in the *James* case[94] in 1936 and also to his Lordship's remarks that section 92 was about creating a free trade environment rather than individual rights. This led him to conclude that the Court had, over the preceding years, taken the section out of context. The consequences of allowing total reign to the words "absolutely free" had been recognised as intolerable. So the Court had crafted all these elusive exceptions to avoid that consequence and in the process made those words mean "relatively free".

91. Supra n 78, 615.
92. (1976) 135 CLR 110.
93. (SA) Potato Marketing Act 1948.
94. Supra n 31.

The solution was, he said, that the context tells us that "absolutely free" means freedom from fiscal imposts on trade among the States.[95] A narrow free trade view of section 92 was the result of his reasoning. This presented a major practical problem. It clearly is possible to introduce non-fiscal burdens which can meddle with interstate trade, for example, quotas and technical tests. Murphy J's answer was that the Commonwealth could regulate directly to stop them, unhindered by section 92 and empowered by his wide view of Commonwealth powers in section 51(i), the trade and commerce power, and section 51(xx), the corporations power.

This perspective broke with the other mainstream trends then prevailing in the Court. It was closest to the Mason view in that it emphasised the public character of section 92 and not surprisingly, Murphy J found himself in the Mason voting block in many section 92 cases.

Which theory does apply?

A major problem with the Mason public interest test was that one could argue that all laws passed by a democratically elected Parliament are, by definition, in the public interest. How then could the Court devise a test to tell, with some consistency, which laws are going to be in the public interest in a section 92 context?

The dilemma was confronted starkly in 1978 in *Clark King & Co Pty Ltd v Australian Wheat Board.*[96] In this case, a combined Commonwealth-State wheat marketing scheme[97] was under challenge. It provided for the compulsory acquisition of all Australian wheat by the Australian Wheat Board (AWB) and for growers to be paid a guaranteed price. The scheme was designed to bring equilibrium to both local and overseas wheat markets. On the Barwick individual rights theory this was not reasonable regulation. Nor was it so on an orthodox reading of the *Bank Nationalisation* case[98] because it had been said there that *prohibition* was not *regulation*. This scheme prohibited anyone selling to other than the AWB.

95. See also n 9.
96. (1978) 140 CLR 120.
97. Implemented by the (Cth) Wheat Industry Stabilization Act 1974 and equivalent State legislation.
98. Supra n 47.

Barwick CJ, dissenting in a conventional application of his own theory, said that the AWB scheme was invalid as contravening section 92.[99] Stephen J, also in dissent, was more cautious than Barwick CJ but, like the Chief Justice, he emphasised the presence of prohibition to deny the existence of permissible regulation.[100] Mason and Jacobs JJ, in a joint judgment, held the scheme valid on the basis of some surprise reasoning (and Murphy J voted with them on the basis of his own reasoning).[101] They concluded that the AWB scheme fell within the rider to the Privy Council statement about prohibition not equalling regulation. That is, that there may be some cases (such as this, interpolated Mason and Jacobs JJ) where a government monopoly is the only practical form of regulation.[102] As Coper points out, this was hardly a plausible argument. At about the same time, the Industries Assistance Commission (IAC) was saying that the AWB scheme was not working and ought be dismantled![103] Stephen J relied on this report by the IAC in his finding that the evidence before the Court did not satisfy him that the AWB scheme was the only practical and reasonable manner of regulating the industry or, indeed, a practical and reasonable manner of regulation.[104] Mason and Jacobs JJ did not refer to the IAC report in their judgment.

In all the circumstances, it was not surprising that the issue was re-opened almost immediately. In 1980, in the case of *Uebergang v Australian Wheat Board*,[105] the AWB scheme was under challenge again but for procedural reasons its substantive validity was not fully reconsidered. The Court largely confined itself to deciding whether determining the validity of the AWB scheme required certain facts to be established before the Court.[106] However, both

99. Supra n 96, 146ff.
100. Ibid, 172ff.
101. Ibid, 193-194.
102. Ibid, 188ff.
103. Coper supra n 7, 307.
104. Supra n 96, 177.
105. (1980) 145 CLR 266.
106. In the *Clark King* case, supra n 104, the parties had agreed on the facts but, following their success in that case, the AWB declined to facilitate similarly this further challenge. Barwick CJ and Murphy J both dissented from the majority view that the validity of the AWB scheme could not be decided in the abstract but required the factual context to be decided upon first. Barwick (at 285ff) predictably found that the scheme was invalid and Murphy (at 309) equally predictably, found that it was valid.

Mason and Stephen JJ took the opportunity to retreat from their respective positions in the *Clark King* case. They noted, in a joint judgment, that their conclusions had differed in that case but they agreed that the correct section 92 test was: were the restrictions imposed by a given piece of regulatory legislation no greater than was reasonably necessary in all the circumstances, due regard being had to the public interest?[107] Such a formulation likely would have allowed the AWB scheme to be held valid on the basis that, as this was a national initiative of all governments, State and Federal, with bipartisan political support, it could be seen, in all the circumstances, to be in the public interest. As Coper points out this can really be analysed as testing for what is in the public interest with reference to whether or not the legislation is discriminatory in a protectionist way. The AWB scheme was not so tainted and, accordingly, was held to be valid whereas the scheme under consideration in the *NEDCO* case[108] was protectionist and therefore invalid.[109]

This uneasy coexistence of three quite separate section 92 theories surfaced again in *Permewan Wright Consolidated Pty Ltd v Trewhitt* (1979).[110] On this occasion Aickin J agreed with the Barwick view that the Victorian egg marketing legislation[111] requiring testing and grading of all eggs sold in Victoria (including those sent from New South Wales where they had already been graded and tested) was invalid.[112] A majority comprising Mason, Stephen, Gibbs and Murphy JJ found the legislation valid. Stephen and Mason JJ by applying the public interest test,[113] Murphy J through the application of his fiscal burden theory[114] and Gibbs J, in a characteristically watchful judgment, by an appeal to precedent.[115] This case is often contrasted with the *NEDCO* case where a somewhat similar regulatory device was resoundingly struck down by the court.[116] Perhaps the best explanation for the strikingly dif-

107. Supra n 105, 306.
108. Supra n 78.
109. Coper supra n 7, 308.
110. Supra n 80.
111. (Vic) Marketing of Primary Products Act 1958.
112. Supra n 80, Aickin J, 67 and Barwick CJ, 12.
113. Ibid, Stephen J, 31 and Mason J, 35-36.
114. Ibid, 40-41.
115. Ibid, 18.
116. Coper supra n 34, 258-262, Hanks supra n 26, 712.

ferent outcomes in the two cases lies in the factual differences between them. Whilst the re-pastuerising required by the regulations under challenge in the *NEDCO* case damaged the product, the re-grading and re-testing of the eggs in *Permewan Wright Consolidated v Trewhitt* did not have this consequence.[117]

The answer to the query as to which theory applies then, was that no theory applied and all theories applied. No theory enjoyed majority support but behind majority outcomes all theories were used, from time to time, to support individual conclusions in particular cases.

Summary

By now a large number of discarded theories were languishing in the section 92 dustbin, including:

A The early fiscal burden theory;
B The Isaacs, Commonwealth control theory;
C The Gavan Duffy free trade based theory;
D The Evatt free trade based theory; and
E The literal Dixon version of the individual rights theory.

Barwick CJ's call to look at practical considerations had been heeded but its effect much diminished by varying majorities refusing to apply its full rigour. Devices were found (yet again) to limit the effects of section 92. In particular, refuge was sought in the reasonable regulation qualification in the *Bank Nationalisation* case. However, this allowed anomalies to flourish, initially in the transport cases but, in due course, in a widening range of cases.

Murphy J added a vote towards reducing section 92's impact based on his own revival of the fiscal burden theory. Perhaps more significantly, he explicitly emphasised from the bench, for the first time in over 50 years, that section 92 had a free trade purpose. Mason J, meanwhile, commenced his own trek towards a free trade view of the section. He began by observing that individual rights enjoyed under the section were incidental rather than primary rights. Moreover, he developed the view that reasonable regulation in the public interest was also consistent with section 92. The difficulty with this view was how to tell what legislation was in the public interest in a section 92 context. The developing answer seemed to

117. Ibid, Hanks.

be, at least in part, to ask: is the legislation protectionist? In fact, in *Finemores Transport Pty Ltd v New South Wales* in 1978, Mason J said:

> I have always doubted whether section 92 was intended to do more than protect interstate trade from burdens of a discriminatory kind of which (the NEDCO case) provides a convenient example. But I acknowledge that the cases have taken the section a good deal further...[118]

Which brings us to the most recent turning point in the section 92 saga.

Cole v Whitfield (1988)

The facts and the applicable legislation

Whitfield and a related company,[119] (hereafter the defendants) ran a crayfish processing business in Tasmania. They bought live crayfish, usually from Tasmanian fishermen. They then packaged them in such a way as to sell them alive in Tasmania, interstate and also overseas, especially to the United States.

To conduct their business successfully and efficiently, it was apparently necessary for the defendants to supply their customers all year round. The problem with doing this was that the Tasmanian crayfish industry had a lay-off in October each year; that is, the season is closed at that time so no crayfish are available from Tasmanian fishermen. The defendants bought crayfish directly from South Australia during this period; crayfish taken in accordance with South Australian law.

Section 9 of the Tasmanian Fisheries Act 1959 gives the Governor power to make regulations. Pursuant to this power the Sea Fisheries Regulations of 1962 provide, in regulation 31(1)(d), that no person is to take or have in their possession any undersized crayfish whether or not they were taken in State fishing waters. The minimum sizes are specified as males — 11 centimetres and females — 10.5 centimetres. The regulation created an absolute liability offence.

The South Australian crayfish which the defendants took delivery of were, as stated above, taken in conformity with South Australian law but the minimum sizes allowed to be taken in South Australia

118. (1978) 139 CLR 338, 352.
119. J & D Investments Pty Ltd.

are less than in Tasmania. It appears that the minimum sizes are set in each case to ensure that the breeding stock are not harvested thus bringing ruin to the respective industries and, due to differences in South Australia, this end can be achieved in that State with a lower limit.

After the defendants took delivery of the crayfish in October 1982, Cole, a senior inspector with the Tasmanian Fisheries Development Authority paid a visit and discovered the defendants in possession of a number of undersized (South Australian) crayfish. The defendants were charged under regulation 31(1)(d). A Magistrate in Tasmania found that the regulation imposed a direct burden on the defendants' interstate trade and was not excusable as reasonable regulation. Cole then appealed to the High Court.[120]

The judgment

Introduction

This case became the vehicle for a complete review of the previous judicial learning on section 92 and the Court chose, in a unanimous judgment, to set down a major doctrinal change in the law with respect to section 92. In doing so, the Court adopted many of the arguments of, and reached the essential conclusion contained in, Professor Coper's book on section 92 *Freedom of Interstate Trade under the Australian Constitution.*[121]

The conclusion of the Court was that section 92 does no more than prohibit *factually* discriminatory burdens on interstate trade of a protectionist kind.[122]

It is important to note that the facts set out above were as agreed by the parties. Also the Court apparently assumed that the absolute liability, random sampling mechanism for checking crayfish size was the only practical way of so checking.[123]

Preliminary matters

The judgment begins by pointing out what Part 2 of this paper makes clear. Despite over 140 cases on section 92 no clarity or certainty about its operation has emerged; quite the contrary.

120. Supra n 3, 304-306.
121. Coper supra n 34.
122. Supra n 3, 317.
123. Ibid, 318. This point is discussed further below.

The view that came closest to achieving general acceptance for the longest time was the Dixonian criterion of operation theory. The Court notes that it enjoyed an ascendency, despite much difficulty of application in a number of cases, from the early 1950s through until the mid 1970s. But in cases such as the *NEDCO* case[124] its decline was becoming apparent. The *Clark King* case[125] and *Uebergang's* case[126] signalled that it could no longer command majority support. In fact no theory of section 92's role could.[127]

Historical background

The Court undertakes a lengthy review of the drafting history of section 92. That historical review demonstrates, it is said, that the principal goals of the movement towards federation of the Australian colonies included the elimination of intercolonial border duties, discriminatory burdens and preferences in intercolonial trade and the achievement of intercolonial free trade. Moreover, that goal was enshrined in section 92.

The Court then gives a brief definition of the term free trade. It says that the term commonly signifies an absence of protectionism. That is, the protection of domestic industries from outside competition. Such protection may be achieved in a variety of ways such as by the imposition of tariffs on foreign goods, quotas, differential freight charges, subsidies for local goods and other burdens on handling imports. All these are designed to discourage entry on an equal level of imported goods (or services) into a local market. Thus section 92 was meant to prohibit the imposition of discriminatory burdens of a protectionist kind.[128]

Intercourse a separate issue

The Court next sets out some interesting general comments about the meaning of intercourse being absolutely free in section 92.

Their Honours make it clear that the guarantee of absolutely free intercourse among States is a guarantee separate from the guarantee of absolutely free trade and commerce. That is, there is no need for any correspondence in the respective freedoms guaranteed. This,

124. Supra n 78.
125. Supra n 96.
126. Supra n 105.
127. Supra n 3, 306-307.
128. Ibid, 310-311.

it seems, is a necessary precursor to the limited reading of the interstate trade and commerce guarantee. That is not to be read as limiting the interstate intercourse guarantee.[129]

This point is not developed in detail. It may be of considerable significance, however, especially with respect to any laws apparently interfering with the movement of persons across State borders.

Absolutely free from what?

Having determined the historical intent of the section, the Court enters into the case law to try and discover the contemporary meaning of the section. Immediately it confronts the problem which has beset the section from the time of its drafting: what is it that section 92 provides absolute freedom from?

The Court notes a number of the previous attempts at a durable answer to this question over the last 80 years. The dissent of Gavan Duffy J in *McArthur's* case[130] in 1920 is approved of in that it suggests that discriminatory burdens of a protectionist kind were what section 92 prohibited. It is noted also that Gavan Duffy J was correct in his view that the section bound the Commonwealth and that the *James'* case[131] in 1936 vindicated this view. The Court hints at, rather than states, the confusing nature of the 1936 *James* judgment.[132]

Their Honours also make the point that accepting a free trade purpose for section 92 involves departure from the notion of equality of treatment being critical. They add the rider, however, that not every such departure from equality of treatment of intrastate and interstate trade and commerce will infringe section 92. Some such regulations may not impose a burden or they may not be

129. Ibid, 311. In *Dobinson v Crabb* (Unreported) Supreme Court of Victoria, 16 August 1988, Mr Justice Marks rejected an argument that the guarantee of absolutely free interstate intercourse of the Builders' Labourers Federation (BLF) had been infringed by the passage of legislation restricting and controlling BLF activities. His Honour acknowledged that the High Court had drawn a distinction between intercourse and trade and commerce in *Cole's* case, and that a greater content could be given to the former (at p 10). However, he drew a distinction between the practical effects (in a section 92 context) of legislation and the operational by-products of legislation. The relevant effects, if any, of the impugned legislation were in the latter category, he said, and the guarantee was thus not infringed (at pp 15-16).

130. Supra n 18.

131. Supra n 31.

132. Supra n 3, 311-313.

discriminatory in a protectionist way.[133]

Factual as well as formal discrimination

The Court then makes the important point that this freshly dusted off view of section 92 necessarily involves the prohibition of factual discrimination of a protectionist kind and not just the prohibition of discrimination apparent on the face of the legislation being considered. The *NEDCO* case[134] is cited as a clear example of this principle at work. There, the factual operation of a law produced discrimination of a protectionist kind whilst the regulatory provisions did not, on the face of it, discriminate.[135]

National schemes

The Court, in an important aside, notes that it will still be possible, under the new rule, for Commonwealth legislation to be found invalid for infringing section 92. This might result from a lack of power at the Commonwealth level. But if an otherwise discriminatory Commonwealth law were part of a national scheme comprising Commonwealth and State laws applying, via this combination, to all intrastate and interstate trade and commerce of the relevant kind, then the factual discrimination may be eliminated.[136] This would appear to be, potentially, a most important part of the judgment. Schemes such as the AWB scheme considered in the *Clark King* case[137] would seem to pass such a test comfortably.

The Dixon theory

In the process of formally rejecting this theory the Court looks at its development from its source in the dissenting judgment, of Dixon J, in a 1935 transport case *O Gilpin Ltd v Commissioner for Road Transport and Tramways (New South Wales).*[138] The Court describes the doctrine as highly artificial in its operation. The difficulties of the theory's application and the muddle of results litter-

133. Ibid, 313. On one view, the court here is preserving a role for a rule of reasonable regulation, although their Honours seem to be saying, too, that what is reasonable regulation will be so because, although it may discriminate against interstate trade, it will not do so in a protectionist way. I return to this issue in Part 5.
134. Supra n 78.
135. Supra n 3, 314.
136. Ibid.
137. Supra n 96.
138. (1935) 52 CLR 189.

ing the Commonwealth Law Reports enabled the Court to conclude that it does not feel bound by authority to accept it any longer.

Some additional reasons for rejecting the theory are also cited. Firstly, the protection it afforded was too wide. Instead of placing interstate trade on an equal footing with intrastate trade it in fact gave interstate trade an advantage. For example, in 1978, in *Finemores Transport Pty Ltd v New South Wales*,[139] the Court held that vehicles involved in interstate trade and commerce were exempt from ad valorem stamp duty on registration[140] of all vehicles without discrimination simply because these vehicles were involved in interstate trade. Secondly, the theory didn't allow for genuine regulatory trade and commerce laws. Because of this problem the Court had developed the notion of permissible or reasonable regulation but that in turn had developed into an uncertain and, at times muddy, concept. The Court also rejects Dixon J's various statements dismissing a free trade view of section 92.[141]

The Murphy contribution

The Court notes Murphy J's fiscal impost theory but rejects it because it would not make sense that section 92 should only prohibit discriminatory fiscal imposts and not other discriminatory protectionist burdens such as those outlined earlier by the Court. Under the Murphy theory a complete prohibition of imports would be permissible. The Court also rejects the theory for the reason explained by Barwick CJ in the *Clark King* case. There, Barwick CJ pointed out that, as section 90 already prohibits State fiscal imposts of a discriminatory kind or, in fact, of any kind, this left section 92 with no work other than to control Commonwealth legislation, if the Murphy theory was accepted.[142]

139 Supra n 118.

140 Imposed by the (NSW) Stamp Duties Act 1920.

141 Supra n 3, 314-317.

142 Ibid, 317. In fairness to Mr Justice Murphy it needs to be pointed out that his views on section 92 were embedded in a much wider view of the Constitution. In particular he saw the Commonwealth possessing virtually complete powers over interstate and intrastate trade and commerce pursuant to his reading of the section 51(i) trade and commerce power and the section 51 (xx) corporations power. Moreover, he saw a significantly reduced role for section 90. The Court's rejection of his view not surprisingly ignores this context; far too many difficult issues would have to be addressed if it were to be fully considered.

What is the test now?

The Court concludes, not surprisingly, that section 92 prohibits discriminatory burdens of a protectionist kind. To judge whether one has such a burden it is necessary to test for factual discrimination as well as to check the legal operation of the law. The fact that a law applies in a legally equal way to both intrastate and interstate trade and commerce will not save it if its practical effect is discriminatory in a protectionist way.

In a final throw away line, the Court notes, perhaps ominously for unilateral State market regulation initiatives, that "..acquisition of a commodity may still involve potential for conflict with section 92."[143]

Applying the law to the facts

The very end of the judgment returns to the defendants and their undersized crayfish. All the facts as stated were accepted. Moreover, the Court appeared to conclude that there was no alternative to the absolute liability method of regulation based on random sampling embodied in regulation 31(1)(d).

Their Honours held that the regulation was not on its face, discriminatory. What was equally clear was that it did impose a burden on interstate trade and commerce. However, it was held it did not discriminate against interstate trade and commerce; it applied to all crayfish equally thus there was no factual discrimination. One can't help but feel uneasy about this finding. It seems that the Court was too ready to assume that the form of regulation 31(1)(d) was the only practical way for this crayfish stock conservation measure[144] to work. Other possibilities readily spring to mind. For example, a reverse onus provision possibly coupled with a requirement to keep imported crayfish separately from local crayfish.

Before reviewing the judgment any further, it is now appropriate to consider *Bath v Alston Holdings Pty Ltd.*[145] Argument in this case was heard in 1987, shortly after argument in *Cole's* case. So whilst the judges had the advantage of considering all the arguments as

143 Ibid, 317. On a literal reading, this observation would appear to cast a shadow over national inter-governmental regulatory schemes also. However, the remarks about national schemes referred to above tend to counter this interpretation.

144 The court expressly observed that the purpose of the regulation was fishery conservation.

145 (1988) 62 ALJR 363.

a whole before handing down judgment in either case, counsel in *Bath's* case did not have the judgment in *Cole's* case from which to argue. In this sense it does not represent a comprehensive test of the reverberations of *Cole's* case.

Bath v Alston Holdings

The facts and the applicable legislation

Alston Holding Pty Ltd was a company incorporated in New South Wales which carried on a business of retailing tobacco products in Dandenong and Geelong in Victoria. It applied, under the Victorian Business Franchise (Tobacco) Act 1974 for a retailer's licence, in October 1986. The Commissioner for Business Franchises in Victoria, Susan Bath, assessed Alston initially as being liable to pay a licence fee of almost $180,000. She then amended this figure to a little over $31,000. Alston said that the figure due was $10 each for the Dandenong and Geelong outlets and tendered this amount.[146]

How did this discrepancy arise? The formula for setting these licence fees followed that approved by the High Court as an exception to the prohibition on the States levying excise (or sales) taxes contained in section 90 of the Constitution. This exception, which sits awkwardly with the mainstream practical effects view of section 90, was suggested, in obiter, by Dixon J in 1949 in *Parton v Milk Board of Victoria*.[147] The High Court subsequently approved a business franchise fee (similar in design to the mechanism suggested by Dixon J) in 1960 in *Dennis Hotels Pty Ltd v Victoria*[148] (notwithstanding the recantation by Chief Justice Dixon in *Dennis Hotels*[149] of the view he had expressed in *Parton's* case). Further (sometimes reluctant) endorsement for the exception came in 1974 in *Dickenson's Arcade Pty Ltd v Tasmania*,[150] in 1977 in *H C Sleigh Ltd v South Australia*[151] and in 1984 in *Evda Nominees Pty Ltd v Victoria*.[152] At the same time the Court has shown great reluctance to allow

146 Ibid, 364.
147 (1949) 80 CLR 229, 263.
148 (1960) 104 CLR 529.
149 Ibid, 549.
150 (1974) 130 CLR 177.
151 (1977) 136 CLR 475.
152 (1984) 154 CLR 311.

the exception to grow.[153] The essence of the *Dennis Hotels* formula is that a licence fee is imposed for the privilege of carrying on an otherwise prohibited distribution business and is calculated by reference to sales already completed during a specified period prior to the prospective period for which the licence is granted. Here there was a flat charge of either $10 or $50 and an additional amount (both being components in the fee for the relevant licence) which was calculated by reference to completed sales during a period prior to that for which the licence was issued. This additional ad valorem fee was 25 per cent of the value of tobacco products sold during the said period. Thus section 10(1)(c) stipulated a flat fee of $50 plus 25 per cent of the value of tobacco sold in a specified year (for a yearly but revocable at will licence) and section 10(1)(d) stipulated a flat fee of $10 plus 25 per cent of the value of tobacco sold in the specified month (for a monthly licence).

However, not all retailers paid an amount calculated in this way. This was because wholesalers of tobacco products in Victoria also paid a fee calculated in the same way. If a retailer bought tobacco products in Victoria from a licensed (Victorian) wholesaler then the retailer did not have to pay the ad valorem amount. Sections 10(1)(c) and (d) provided that if tobacco products were bought in Victoria from the holder of a wholesale tobacco merchant's licence then only the flat fee had to be paid for a retailer's licence.

The reason that Alston was denied the concession by the Commissioner and assessed to pay an ad valorem amount was that it had been buying tobacco products in Queensland and not from Victorian wholesalers. In January 1987, in particular, it purchased approximately $27,000 worth of tobacco products from ICP Tobacco Wholesalers in Salisbury in Queensland pursuant to an oral contract. The consignment was paid for in cash at the time and then shipped to Victoria. From 21 January until 6 February 1987 Alston sold these products from its Dandenong and Geelong retail outlets. Alston's reason for doing so was a good commercial one. At that time (and until the Queensland Budget of 1988) there was no business franchise fee system for tobacco products in

153 See eg, *M G Kailis (1962) Pty Ltd v Western Australia* (1974) 130 CLR 245 and *Gosford Meats Pty Ltd v New South Wales* (1985) 155 CLR 368.

Queensland. Thus the wholesale price in that State was approximately 25 per cent less than in Victoria. This made the purchase and transhipment an attractive commercial proposition, provided one could avoid paying any ad valorem fees in Victoria. Not surprisingly, Commissioner Bath declined to accommodate Alston in the achievement of this last aim and issued the ad valorem assessment referred to above.[154]

The two step method of collecting the fees in Victoria had been adopted for reasons of tax collecting efficiency. There are a limited number of wholesalers transacting in large amounts. There are many thousands of retailers, often transacting in very small amounts. Collection is thus more efficient at the wholesale level. However, to prevent widespread avoidance through retailers dealing with interstate (in particular, Queensland) wholesalers, it was necessary to impose ad valorem duty on retailers who did so deal.

During the preliminary stages of this litigation, Alston advised that, as well as challenging the legislation on the grounds that it infringed section 92, it also intended to challenge the validity of the licence fees on the ground that they infringed the section 90 prohibition on the States imposing excise (or sales) taxes. That is, it planned to challenge the validity of the *Dennis Hotels* exception. However, at a hearing in Chambers before Mason CJ on 1 June 1987, all the parties (which included the Commonwealth and the other States) agreed that the section 90 issue would not be argued with the section 92 issue. Rather, the parties would await the outcome of the section 92 arguments. If that outcome was unsatisfactory from Alston's point of view, Alston said it reserved the right to raise the section 90 arguments as to invalidity. The Chief Justice agreed with this arrangement, though he pointed out that, formally, it was a matter for the Full Court to decide. He said that this seemed to be the most appropriate initial step "in the endeavour to agitate the excise question".[155] As it transpired the Full Court agreed with this arrangement and Alston won on the section 92 argument. Thus the section 90 question was not raised.

154 Supra n 145, 364-366.
155 Transcript of Directions Hearing, Mason CJ, 1 June 1987.

The judgments

Introduction

The majority, who found the relevant provision invalid as contravening section 92, was comprised of Mason CJ, Brennan, Deane and Gaudron JJ. In the minority were Dawson, Wilson and Toohey JJ.

The majority declined to look at the marketing of tobacco vertically; that is, they would not look at the system as an integrated distribution process from wholesale through to retail levels. By concentrating on the retail market, where, technically, this dispute was focused, they much more readily were able to identify the offending portions of sections 10(1) (c) and (d) as discriminatory provisions of a protectionist kind.

The minority, on the other hand, looked at the vertically integrated distribution and sales system for dealing in tobacco products and found that the factual application of the Victorian provisions did not impose discriminatory burdens of a protectionist kind.

The majority judgment[156]

At the outset the majority states that there would have been no section 92 problems had a uniform tax applied directly to sales of tobacco products at the retail level without discrimination as to whether intrastate or interstate products were being sold. Of course such a tax would contravene section 90, being a tax on goods. After canvassing the facts and the provisions of the Victorian Act the majority notes that the fee is not such a tax on goods but a fee for a licence to carry on a business with a calculation method based on the formula approved in *Dennis Hotels* and subsequent cases. They then repeat the observation that an ad valorem fee, such as the one under consideration here, applied equally at the retail level, regardless of whether the product being sold had been obtained intrastate or interstate, would not have contravened section 92. But the exclusion of tobacco bought from a Victorian wholesaler from the total value on which the ad valorem fee was based did constitute at least prima facie discrimination. In other words, the legislation was, on its face, discriminatory; retailers buying tobacco from in-

156 Supra n 145, 364-369.

terstate were assessed to a higher fee than those buying from Victorian wholesalers. Moreover, viewed in the isolation of the retail market, the Victorian Act, on its face and in effect, was discriminatory in a protectionist sense.

The majority acknowledges that an out of state wholesaler may be at an advantage relative to a Victorian wholesaler for a variety of reasons including not having to pay a tobacco business franchise fee in the wholesaler's home State. However, the majority says that, even when the suspect provisions are read in the context of the Act as a whole, they retained their discriminatory and protectionist character. The majority then addresses the argument that all the system does is compensate for the lack of tax paid at the wholesale level by out of state wholesalers. This explanation, they say, tends to undermine the arguments as to the sections' validity. The effect of the tax at the retail level is to make out of state wholesalers stay out of the Victorian market if they pay taxes in their own State or deny them their competitive edge if they do not. Either way the effect of the relevant sections is discriminatory in a protectionist sense. Thus the ad valorem content of the retail licence fee is invalid as contravening the section 92 test in *Cole's* case.

The majority eschews the presumption that this is merely an equalisation process, a levelling of the playing field for the distribution and retailing of tobacco products in Victoria, that is not incompatible with the section 92 test in *Cole's* case. They say that to hold that a fee such as this is consistent with section 92 because it eliminates an advantage which the same goods from interstate would otherwise enjoy would be to ignore the critical constitutional purpose which the section is designed to serve.

Things begin to look grim when, in their rather repetitive judgment, the majority say:

> If a tax is challenged on the ground that it offends section 92, it is necessary first to identify what is the transaction or thing which attracts liability.[157]

Professor Howard has remarked that this passage reads as if it might have been penned by Sir Owen Dixon in 1935![158]

The majority concludes that if the tax is imposed on a transac-

157 Ibid, 368.

158 C Howard "Section 92 of the Constitution: the first rift in the new order" (1988) 62 Law Inst J 760, 761.

tion in a particular market (that is the Victorian retail tobacco market) it is the effect of the tax on transactions in that market which is material. The effect of an equivalent tax at another stage in the chain of distribution is immaterial.

The minority judgment[159]

At the outset the minority make the point that it is the test in *Cole's* case which is applicable. Thus Alston has to show that the relevant provisions discriminate against interstate trade in a protectionist way. They admit that the argument in favour of invalidity has a superficial plausibility if one looks just at the retail level. But such a view, they say, presents an incomplete picture of the practical operation of the Act and it is the practical operation of legislation which will largely determine whether the test has been infringed.

What matters here is that, under this legislation, an interstate wholesaler is not subject to the Victorian tobacco business franchise fee and is thus able to sell tobacco in Victoria at a price which reflects the absence of this expense. The legislation balances this advantage by imposing the extra fee at the retail level where tobacco has been obtained from interstate. The legislation does not seek to advantage or disadvantage the retailer according to whether the tobacco comes from within or outside of the State. Moreover, it is obvious that the legislation has been framed in this way for tax-collecting efficiency reasons. However the economic effect is the same wherever the retailer obtains the tobacco from and it is the ultimate effect in economic terms which determines the issue. Here, such a test reveals no protectionism.

If you accept the majority view, they continue, either: (a) you have to afford a *preference* to interstate trade in tobacco (and section 92 can scarcely be read as requiring such a result); or (b) the State will be forced to adopt the administratively inefficient mechanism of collecting the fee only at the retail level. The minority conclude that the Act is wholly valid from a section 92 point of view.

Initial comments on the majority judgment

The majority appear fearful of the extended consequences of dealing with the distribution and ultimate sale of tobacco products for

159 Supra n 145, 369-371.

consumption as one process. The purpose of the legislation was to provide a level playing field but the majority indicates that the principle which would allow this scheme to succeed would extend to allow States to indulge in wide ranging "equalising" (the majority's inverted commas) tactics which would be quite antithetical to the purpose of section 92. They do not present this point very clearly. Moreover, they cast the arguments in favour of validity in excessively wide terms. There is an element of constructing a straw man here that helps justify the majority's ultimate retreat to the segmentation of the process of tobacco distribution and sale, which, in turn, swiftly leads to the invalidation of the relevant provisions. The isolation of the retail tobacco market from its wider context appears to be a case of artificial distinction drawing.

Initial comments on the minority judgment

This judgment reads the better of the two. But the minority do not address what seems to be the major concern in the majority judgment, namely, what is the principle at work which justifies this balancing or equalisation of taxes and what is the extent of balancing or equalisation which it permits consistent with section 92's interdictions? There is a perhaps even more difficult question left unconsidered by the minority; how does one judge when this permitted economic balance or equilibrium has been achieved? The minority seems confident that such an equilibrium was being achieved in the instant case, apparently on the basis that this was self evident. But, even if it was, is it likely always to be so? More challenging fact situations are not difficult to imagine.

Perhaps the key to meeting both questions lies in the High Court having access, in such cases, to independent expert economic assistance of a kind not readily available at present.[160] It may be that the recently resuscitated Interstate Commission would be the appropriate body to assist the court in this regard.

160 I am not suggesting this as a panacea. Currently the court draws economic conclusions without the assistance of any independent expert comment. A move towards institutionalising access to such advice would, I believe, be an improvement on the current position.

Conclusion

The recent cases

Cole v Whitfield (1988)

The decision in *Cole v Whitfield*[161] has effected a major constitutional change which states that section 92 prohibits laws which factually discriminate against interstate trade in a protectionist way.

It re-states the law with an explicit free trade thrust and unambiguously rejects the theory that section 92 primarily protects individual rights. It remains the case that section 92 will have the effect of protecting individual rights when it is successfully invoked (this is what happened in *Bath's* case)[162] but that protection arises incidentally in the application of the section to serve its purpose of guaranteeing free trade within Australia.

Bath v Alston Holdings (1988)

Here the Court had its first opportunity to apply the new test, albeit in the absence of counsels' argument based on the *Cole v Whitfield* judgment. The results are not entirely happy. A 4:3 split emerges on what the practical effects of the legislation in question are.

The legislation involved, the Business Franchise (Tobacco) Act, did present singular problems. To begin with, the challenged provisions were drafted such that they formally imposed a discriminatory burden on interstate trade. Did you buy your tobacco products out of state? Yes? Well in that case you pay a much higher licence fee. Next, the argument that this formal discrimination had to be seen in the context of all the circumstances of tobacco distribution and sale whereupon it became apparent that it was doing no more than balancing or equalising the market in a manner consistent with section 92's free trade intent worried the majority. They saw, buried in this argument, real dangers of equalisation arguments being used to thwart drastically that very intent. Might not such an argument be used to justify the application of a wide range of State "adjustments" to out of state competitors in intrastate markets? What role would section 92 be left to play?

This characterisation of the argument in favour of validity does

161 Supra n 3.
162 Supra n 145.

appear to overstate the menace. It also helped justify the majority's decision to resolve the issue by retreating to a rather artificial definition of the retail tobacco market.

Another matter which may have exercised the mind of the majority was that, if this legislation was not found invalid pursuant to section 92, invalidity arguments based on section 90 of the Constitution would follow. The problem was that the *Dennis Hotels*[163] line of cases which have underpinned the validity of the taxing mechanism employed in the Victorian Act, depend for their maintenance on the court eschewing a practical effects test of such legislation. If a majority had found the legislation valid as not contravening section 92 they would have had to do so on a practical effects test. It would then have required the most subtle of drafting skills to sustain the fees as not being excise duties pursuant to the singular legal operation test employed in *Dennis Hotels* and its offspring.[164]

Although the minority judgment seems to come closer to the spirit of the judgment in *Cole v Whitfield* it is not without problems. The principal ones concern the identification and application of the largely unexplained guiding principle which led the minority to its conclusion. Briefly put, the question is when is a balancing tax permissible and how does one tell if it has achieved the permissible balance?

Section 92: Quo Vadis?

Conceptual matters

One of the themes which neither case addresses is just what is interstate trade within the new meaning of section 92. In both *Cole's* case and *Bath's* case the facts clearly were embedded in interstate trade and commerce. We know that the concept of "interstateness" has been the subject of some very fine legal distinctions in the past. It may be that, for section 92 purposes (the term has a different meaning within the context of the section 51(1), trade and commerce

163 Supra n 148.

164 The court is on record as being (reluctantly) committed to sustaining these taxes for policy reasons. See *H C Sleigh Ltd v South Australia* supra n 151, Mason J, 501.

power),[165] the meaning of interstate trade and commerce will be widened given that a new, hopefully more consistent and manageable quarantining device for section 92 has now been crafted. The earlier microscopic distinctions were principally driven by the need to keep the effects of the basic section 92 rule within bounds.

This issue was encountered in a recent (post *Cole v Whitfield*) case in the Victorian Supreme Court. In *Dobinson v Crabb* (1988),[166] the Builders' Labourers Federation (BLF) argued that they were involved in interstate trade and commerce and that certain legislative controls on their activities infringed the guarantee the BLF enjoyed in this regard under section 92. Mr Justice Marks doubted that the BLF were involved in trade and commerce. He said it was even more doubtful that any such activities had an interstate character. He concluded that, in any event, the legislation imposed no protectionist burden on any such activities.[167] His Honour also considered, and rejected, an argument that the BLF's guarantee of absolute freedom of interstate intercourse had been violated.[168]

Another issue which remains unclear is whether there is still a separate category of regulations which will be permitted because they are reasonable or whether, in all cases, such regulations will be tested under the new general rule. That is, will it be the case that to be found reasonable, all regulations will have to be found not to impose protectionist burdens even if they are discriminatory? A passage near the end of the judgment in *Cole's* case suggests that this latter view is the one favoured by the Court. The Court says:

> A law which has as its real object the prescription of a standard for a product or a service or a norm of commercial conduct will not ordinarily be grounded in protectionism and will not be prohibited by section 92. But if a law, which may be otherwise justified by reference to an object which is not protectionist, discriminates against inter-state trade or commerce in pursuit of that object in a way or to an extent which warrants characterisation of the law as protectionist, the court will be justified in concluding that it none the less offends section 92.[169]

165 See C Howard *Australian Federal Constitutional Law* Third Ed (Sydney: Law Book Co, 1985) 283-293.
166 Supra n 129.
167 Ibid, 8-10.
168 See n 129.
169 Supra n 3, 317.

The only reasonable method of regulating

Both the Court in *Cole's* case and the minority in Bath's case characterised the respective regulatory devices as justified by practical, enforcement considerations.[170] Similar reasoning was used by the majority in *Richardson v Forestry Commission (Tasmania)*[171] to justify the sweeping interim protection regime created by the Commonwealth[172] for the Lemonthyme and Southern Forests in Tasmania in 1987.[173] We can anticipate no small amount of argument over what sort of devices are justified on practical enforcement grounds in future section 92 cases.

As pointed out earlier, it is not difficult to mount an argument that the Court much too readily concluded this point in a manner favourable to the Tasmanian Fisheries Development Authority in *Cole's* case. Moreover, in *Bath's* case the minority concluded, perhaps a little too easily, that the collection of the tax at the retail level would have been a great deal more difficult than with the two-tier system. Retail sales taxes are collected quite efficiently at the cash register on a wide variety of low-cost, high-volume products in 9 out of 10 Canadian Provinces,[174] for example.

Transport regulation

The new reading of section 92 appears to have opened the way for major changes in the manner in which interstate transportation is regulated in Australia. Many of the laws struck down as infringing the former rule(s) do not possess the character of being discriminatory burdens of a protectionist kind, for example, the State stamp duty law held inapplicable to interstate road transport vehicles in *Finemores' Transport Pty Ltd v New South Wales* in 1979.[175]

More importantly, given the Court's support of national intergovernmental regulation, it would appear that the States and the Commonwealth, in concert, can now comprehensively regulate interstate road transport in a manner not hitherto thought possible.

170 See *Cole's* case supra n 3, 306 and 318; *Bath's* case, supra n 145, 370-371.
171 (1988) 164 CLR 261.
172 By the (Cth) Lemonthyme and Southern Forests (Commission of Inquiry) Act 1987.
173 The majority on this point comprised Mason CJ, Brennan, Wilson, Dawson, Toohey JJ Deane J (in part) and Gaudron J dissented.
174 Alberta does not levy a sales tax.
175 Supra n 118.

Clearly many of the problems of the industry trace back to its relatively uncontrolled nature. There are too many operators, apparently, for the amount of available work. A national scheme regulating in identical fashion interstate and intrastate operators is now probably a valid legal option. Whether it is a valid political option is an entirely different matter. The logical starting point would be to move towards equalizing all road use charges. The next step might be to restrict entry to the industry, at both the interstate and intrastate levels, on prerequisite skill and commercial viability grounds.

The Court did say, however, in another aside, that absolutely free intercourse among the States is something different (and likely broader) than absolutely free trade and commerce. Just what practical effects this distinction may produce we do not know. But the Court has left room for the application of a more radical theory of section 92's purpose where the movement of people amongst the States is in issue.

Market regulation

Without doubt, significant uncertainty still surrounds the operation of current State based, marketing schemes. Prior to *Cole's* case, many of these schemes lived in a constitutional twilight zone. It remains to be seen whether the new jurisprudence will leave them any more vulnerable to attack than before. As the cases unfold, one would hope that, which ever way they go, greater certainty will emerge.

In an aside, the Court suggested that compulsory acquisition schemes may still offend section 92. A recent paper by Professor Coper[176] has thrown a little more light on what the Court may have been driving at here. He refers to a series of exchanges between Brennan and Deane JJ and counsel during argument in *Cole's* case.[177] From these interchanges comes the rather novel suggestion that one might have to compare, not the treatment of producers in one State with producers in another State under such a scheme

176 M Coper "Section 92 and the Future of Agricultural Marketing" Proceedings of Australian Agricultural Economics Society (Victorian Branch) Section 92 Symposium, Melbourne 13 October 1988, 39-41.

177 As Coper points out, judges hate having such remarks quoted as they may have been playing devil's advocate. Ibid.

but, rather, out-of-State producers and the intrastate, compulsorily acquiring, marketing authority. That is, the question might not be; are the intrastate and interstate producers being treated equally (as, normally, they will be — produce from both sources being acquired at the same price)? but is the State marketing authority protecting itself from interstate competition?[178]

The vulnerability of State marketing authorities to actions under the Commonwealth Trade Practices Act 1974 has not been affected by the new view of section 92. Where a State authority is within the shield of the Crown, it is not subject to that legislation.[179] Moreover, the Trade Practices Act exempts such authorities not within the shield of the Crown from its application in certain circumstances.[180] It is also the case that the Trade Practices Act can be amended at any time should the Commonwealth wish to facilitate a species of State market regulation which might otherwise fall foul of it.[181]

With respect to national marketing schemes the position is much clearer. The Court will look favourably upon them provided that, in total, they do not discriminate in a protectionist way. Any doubts about the validity of the outcome of the *Clark King* case[182] have largely been laid to rest by *Cole's* case. The message seems clear. There is a clear incentive for marketing schemes to be put together on a national basis. However, although the hazards are greater for State-based schemes, intergovernmental politics being what they are, they doubtless will be with us for a long time to come.

178 Ibid.

179 *Bradken Consolidated Ltd v BHP Co Ltd* (1979) 145 CLR 107.

180 Section 51(1) exempts, from Part 4 of the Trade Practices Act certain activities of, among other things, marketing authorities (State and Commonwealth). So long as the authority is acting in a way specifically authorised by the relevant statute and any regulations made thereunder it will not be regarded as being in breach of Part 4 when otherwise it might so be regarded. The exemption offers no protection from Part 5 of the Trade Practices Act however, so if, for example, an authority, contrary to section 52A were to engage in conduct in trade and commerce in connection with the supply of goods or services to a person, that was, in all the circumstances, unconscionable, section 51(1) would be of no help.

181 In this regard, it should be noted that section 172(2) of the Trade Practices Act empowers the Governor-General to make regulations which exempt from the Act certain conduct, either conditionally or subject to such conditions as are specified, engaged in by a specified organisation or body performing functions in relation to the marketing of primary products.

182 Supra n 96.

Finis

Cole v Whitfield states the "new" law clearly. It is a radical departure from the previous learning[183] and stands poised to claim the rubric of the most singular turning point thus far in the section 92 saga. Although the new jurisprudence has not given us greater certainty overnight,[184] it has provided a better basis for a fairer and more predictable application of section 92 than before. In this regard, I do not think that the new order is in danger of imminent collapse (even following *Bath's* case)[185] although there is High Court precedent for such a development.[186] Even in areas of real continuing difficulty, such as State-based market regulation, greater certainty should ensue.

Politically, the new view alters the balance of power between the High Court and the legislatures in favour of the latter. It has shifted an area (as yet, not fully mapped) of commercial regulation out of a capricious, constitutional no-go zone squarely back into the realm of the legislatures. There can be little doubt that the days of section 92 being used (albeit with limited success) as the cornerstone of a constitutionally entrenched, laissez-faire economic order are over. The fundamental flaw in this view of section 92 always was that if this was its purpose then why on earth did it only apply such a policy to interstate trade and commerce? The sensible answer to this riddle is the one adopted by the court in *Cole's* case; the section does not enshrine interstate free enterprise — it does no more than guarantee interstate free trade.

183 One measure of the extent the alteration of the Constitution effected by the *Cole's* case, is to contemplate the likelihood of the same change ever having been achieved through the formal referendum based process set down in section 128 of the Constitution. I think that had such a route been chosen we likely would have seen a new record high set for a referendum "no" vote.

184 Just "less uncertainty" as Professor Coper has remarked.

185 We should at least be thankful that the division of opinion was contained in joint majority and minority judgments.

186 See the High Court's brief flirtation with unanimity on section 90 in *Bolton v Madsen* (1963) 110 CLR 264 and then *Anderson v Victoria* (1964) 111 CLR 353 and the cases immediately following on section 90.