CONSTITUTIONAL LAW

REGULATION AND SECTION 92

The Background

In August 1966 the Readers' Digest Association Pty. Ltd. mailed from New South Wales a promotional brochure which was designed to advertise a set of recordings entitled "120 Greatest Hit Songs from Broadway". There were two main benefits: firstly, the recipient of the brochure became eligible for certain prizes in the "Readers' Digest Lucky Number Contest", whether or not he decided to take the set of 10 recordings which the brochure was designed to advertise, and, secondly, if the recipient decided to take the set of recordings within a specified period, he was entitled to a free 12 inch long-playing recording entitled "Broadway Show Stoppers". One of the recipients of this brochure was a Mr. Davis of Glenunga, South Australia.

The Readers' Digest Association was charged with four offences under the South Australian Trading Stamp Act 1924-35 as a result of this promotion. The purpose of this enactment is to eliminate the practice of the offering or giving of rewards, with the purchase of goods. The ambit of the Act has been widely extended, however, to cover all types of offers which traders may use. The ingenuity of traders appears to have been the cause of the repeal of the earlier legislation[1], which was not so general[2].

The cause was tried before a special magistrate in the Adelaide magistrates court in April of 1967. Evidence was received by the court, and the magistrate made certain findings of fact. The magistrate further decided that he would convict the defendant company on all charges unless any construction of the Act could be given to protect them, and unless any protection could be given them by s.92 of the Commonwealth Constitution.

The evidence disclosed that the Readers' Digest Association Pty. Ltd. was preparing its own recordings and that sales of recordings constituted about half of the company's business in Australia, and that about ten per cent of the company's business was carried on in South Australia.

The brochures were shown to be a regular part of each sales programme, and that about 100,000 brochures would have been sent to South Australia as part of this particular programme. The brochures were all mailed in bulk from Sydney, N.S.W., and all stocks of recordings were held in that city.

There were only two previous decisions on this Act which had been reported[3]. In both cases the prosecutions had been directed against companies which had their headquarters in Sydney.

In *Home Benefits* v. *Crafter* the Full Court of the High Court had unanimously decided that s.92 of the Commonwealth Constitution offered no pro-

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1. The Trading Stamp Act 1904 (S.A.).
2. *Home Benefits* v. *Crafter* (1939) 61 C.L.R. 701 *per* Dixon J. at 719.
3. *Home Benefits* v. *Crafter* (1939) 61 C.L.R. 701 and *Goodwin* v. *Brebner* [1962]

tection to coupon companies operating from Sydney. In the opinion of Chief Justice Latham[4], the Act did not prevent trade in any goods, but in fact prohibited trading by a particular method. The provisions constituted a regulation of trade which was consistent with the decision of the Privy Council in favour of the Commonwealth[5]. The Act did not amount to a prohibition of the trade any more than is usually involved in regulation[6].

Dixon J. held that the coupon transaction was an accessory transaction only, and that, as the case-law on s.92 then stood, the legislation involved no forbidden interference with interstate trade or commerce[7].

The other members of the Court came to similar conclusions[8]. With the exception of Dixon J., and of Rich J. who gave no reasons for his decision, most of the Court appear to have relied on the decision of *James* v. *The Commonwealth*[9], which provided that the freedom given by s.92 is the freedom at the frontier.

On the question of the interpretation of the Act, the Court took the opportunity to make some criticism of the Act[10]. The Act suffers in its clarity, because of the necessity for the draftsman to use terms wide enough to cover the fertile imaginings of promoters of goods.

In *Goodwin* v. *Brebner*[11], there had been no argument on the question of the constitutionality of the Act, and a conviction was challenged purely on the basis of the interpretation of s.5(1)(b) of the Act. In this case, by a newspaper advertisement, the seller of electrical appliances had offered, with each purchase, the opportunity to purchase one other electrical appliance, from a list which included a television set, for the nominal price of ten shillings.

The Court held that such a newspaper advertisement fell within the definition of a "writing" in s.5(1)(b). While the Court admitted that the provisions of the Act would probably have to be restricted in their generality, the Court made no attempt to elucidate as to the true meaning of the sections[12].

This, then, is the background to the recent decision of the Full Court of the High Court in the case of *Re Readers' Digest Association Proprietary Limited*[13].

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4. *Home Benefits* v. *Crafter* (1939) 61 C.L.R. 701 at 711.
5. *James* v. *The Commonwealth* [1936] A.C. 578; 55 C.L.R. 1.
6. *Home Benefits* v. *Crafter* (1939) 61 C.L.R. 701 at 713.
7. *Ibid.*, at 723.
8. Rich J. at 715, Starke J. at 717, Evatt J. at 730 and McTiernan J. at 734.
9. [1936] A.C. 578; 55 C.L.R. 1.
10. See, for example, the criticism of s.5(5) by Latham C.J. at 708-9, and the criticism of all of s.5a by Dixon J. at 718.
11. [1962] S.A.S.R. 78.
12. Case note in (1963) 2 *Adelaide Law Review* 102-3.
13. [1969] Argus L.R., 43 A.L.J.R. 116. Although this case was argued in October 1967, judgment was not delivered until March 1969.

The Decision on Section 92

The attitude towards s.92 of the Commonwealth Constitution has undergone a major reappraisal since the time of the decision in *Home Benefits* v. *Crafter*[14]. It is still well accepted that the regulation exception to s.92 remains, but the extent of that exception has been the subject of much discussion and thought.

The most momentous decision was *The Bank Case*[15], where the Privy Council effectively departed from the authority of *James* v. *The Commonwealth*[16], the authority relied on in *Home Benefits* v. *Crafter*[17]. The decision is no less important because of its political implications.

In *The Bank Case*[18], it had been decided that s.92 did more than protect the mere transfer of commodities and materials. The Privy Council had affirmed, however, that regulation was compatible with s.92, and that s.92 was violated only when a legislative or executive act operates to restrict trade and commerce directly as distinct from indirectly.

In succeeding years, a successful attack was made on other earlier legislation, in spelling out the meaning of the decision. Such a later case was *Hughes and Vale Pty. Ltd.* v. *The State of New South Wales (No. 2)*[19].

It was at this stage that a reviewer[20] was able to say of Federal constitutional law in general and s.92 in particular:

> "One advantage possessed by a work on Australian Constitutional Law written at this time is that there is now a reasonably static body of constitutional doctrine, due largely no doubt to the impact of the views of Dixon J. as a member of the High Court from 1929-1964 . . . His influence and the acceptance by his contemporaries of the principles and interpretations he has expounded over many years have left relatively small margin for any substantial measures of dissent and little room for any major doubt about questions of validity in the traditional fields of power."

The influence of the former Chief Justice can be strongly seen in the decisions of the majority of the judges[21]. The fact that regulation of trade and commerce must in the normal course of events have some effect as a prohibition was accepted by the majority.

> "The provisions of the Act which are in question are prohibitory measures. But it is equally clear that regulation of trade may take the

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14. (1939) 61 C.L.R. 701.
15. *The Commonwealth* v. *The Bank of New South Wales* [1950] A.C. 235.
16. [1936] A.C. 578.
17. (1939) 61 C.L.R. 701.
18. [1950] A.C. 235.
19. (1955) 93 C.L.R. 127.
20. His Honour Mr. Justice Rae Else-Mitchell reviewing Howard, *Australian Federal Constitutional Law 1968,* in (1969) *7 Melbourne University Law Review* 302.
21. McTiernan J., Taylor J., and Menzies J. Note especially the comments of Menzies J. 43 A.L.J.R. at 130, where he expressly approves the decision in *Home Benefits* v. *Crafter* by reference to the membership of Dixon J. on the court in that case.

> form of denying certain activities to traders even though they include 'nterstate traders"[22].

Given that government is turning strongly to the regulation of trading practices, the majority were prepared to hold that the Trading Stamp Act fell within the implied exception to s.92.

Kitto J. also came to the conclusion that s.92 offered no protection to the Readers' Digest Association Pty. Ltd., but for a somewhat different reason. He held that the protection of s.92 did not extend to a trading practice which was not part of trade and commerce itself but ancillary to it[23].

Kitto J. applies the test used by Dixon J. in *Hospital Provident Fund Pty. Ltd.* v. *Victoria*[24], and goes on:

> "The purpose of the test which Dixon J. propounded is . . . to bring thought on the subject back to the very terms of the Constitution, and to insist that since s.92 decrees freedom for nothing but trade, commerce and intercourse among the States, no considerations of logic or supposed reasonableness should be allowed to extend the freedom beyond that concept to facts events or things which, though incidental or ancillary or conducive to or necessarily consequential upon some activity of trade commerce or intercourse: neither form part and parcel of it nor give it the quality of interstateness"[25].

Thus Kitto and Taylor JJ. were not prepared to extend the protection of s.92 into a fact which is incidental to a purely commercial transaction[26].

Given the influence of the former Chief Justice, it is most interesting to note the strong dissent of Barwick C.J. from the views of the majority. Barwick K.C., as he then was, as the leading counsel for the Australian banks in *The Bank Case*, was signal in his persuasion of the Privy Council to accept his wide view of the protection granted by s.92. It has been suggested that his argument went deliberately beyond the actual necessities of the case to this end[27]. The nature of Barwick C.J.'s views can be seen from his decision in this case.

The Chief Justice touched on the topic of allowable regulation under s.92[28], but went on to emphasize the width of the freedom which s.92 guarantees. First, the Chief Justice sets out what appears to be the philosophy guiding him in his approach to s.92.

> "The inhibition of the freedom of trade and commerce can take such multifarious and at times seemingly innocent forms, and its prevention

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22. McTiernan J. 43 A.L.J.R. at 123-4.
23. Kitto J. 43 A.L.J.R. at 125-127. This ground was also used as an alternative ground by Taylor J. at 129.
24. (1953) 87 C.L.R. 1 at 17,18.
25. Kitto J. 43 A.L.J.R. at 127.
26. In coming to this conclusion, Kitto J. felt himself guided by *Grannal* v. *Marrickville Margarine Pty. Ltd.* (1955) 93 C.L.R. 55 and *Beal* v. *Marrickville Margarine Pty. Ltd.* (1966) 114 C.L.R. 283 even though these cases extended the protection of s.92 well into the processes of manufacture.
27. A. L. May: *The Battle for the Banks*, Sydney University Press, 1968 at 95.
28. 43 A.L.J.R. at 121.

> is so vital to the commercial life of the members of the Federation as well as of the Federation as a whole that only sweeping and absolute language is appropriate to express the necessary constitutional position"[29].

The Chief Justice supported this by contrasting it with the position of the signatories to the *Treaty of Rome*[30], and noted that the purpose of s.92 was not to provide a freedom "from" regulation, but rather a freedom "to" trade. Of its nature, he says, s.92

> "demands a liberal construction and application and does not warrant any judicial attempt to restrict its connotation or to limit its operation"[31].

The practical result of this is that the Chief Justice would interpret s.92 as including all the mutual communings and negotiations, verbal and by correspondence, and the endeavours which lead up to a transaction of an interstate commercial nature. To suggest that ancillary matters do not fall within the protection he considers an unauthorized view of the Privy Council decision in *The Bank Case*[32], and the protection of s.92 must extend to matters which, even if only economically, affect the operation of interstate trade and commerce.

The Decision on Interpretation

The interpretation of the Act can hardly be said to have been advanced by the conflicting opinions of the High Court[33]. The defendant Company had been charged with offences under s.5(1)(a), s.5 (1)(b), s.5a(2) and s.5a (2)(b) of the Act.

The position was complicated by the fact that South Australian law[34] allows the prosecution to state charges containing alternatives in the terms of the section on which they are based. Taylor J. thought that this manner of framing the charges was cumbersome and embarrassing[35], while Barwick C.J. thought that perhaps the magistrate should have required the prosecution to elect in respect of the charges[36].

Taylor J. decided that the promotional brochure fell within the terms of all four charges[37]. Barwick C.J., on the other hand, felt that none of the charges could apply to the facts set before them. Because the brochure was only an

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29. 43 A.L.J.R. at 120.
30. Treaty establishing the European Economic Community, 1957, U.N. Treaty Series 298, 11.
31. 43 A.L.J.R. 120.
32. [1950] A.C. 235.
33. McTiernan J. and Menzies J. did not deal with interpretation of the Act, and presumably agreed with the magistrate's decisions.
34. The Justices Act 1921-1960 (S.A.) s.51.
35. 43 A.L.J.R. 127.
36. 43 A.L.J.R. 117.
37. The charges included being a "trading stamp" (s.5(1)), a "writing" (s.5(2)), a "promise, offer, representation, or advertisement" (s.5a(1)), and an "invitation or encouragement" (s.5a(2)(b)).

offer to supply, it did not constitute a trading stamp; or a promise, or an invitation that rewards would be delivered in exchange for anything.

Further he decided that the "writing" in the brochure did not make the offer of the gift dependant on the purchase, but is related to delivery.

Kitto J. thought that only the second charge could succeed, as he held that the "writing" did promise entitlement to a gift. His rejection of the other charges was for reasons somewhat different to those of the Chief Justice.

Thus the decision appears to have added to, rather than ameliorated, the lack of clarity which existed after the decision in *Goodwin* v. *Brebner*[38].

Although the learned writer of the book review quoted above was able to exult over the static nature of constitutional law, further changes in the law may take place[39]. In the circumstances surrounding s.92, it would be alarming if the charges took the direction indicated by the Chief Justice. The effect of his decision would be to atrophy the regulation exception to s.92 to its vanishing point. The legislatures are being called upon repeatedly to provide protection for consumers from practices of traders which are seen to be reprehensible. Legislation in South Australia which has already resulted includes the Trading Stamp Act 1924-1935[40], the Hire Purchase Agreements Act 1960-1966[41], the Book Purchasers Protection Act 1963-1964[42], the Hawkers Act 1924. Some States have gone further[43]. The present demand is for more and more protection from the training and ingenuity of traders[44]. In such circumstances, it would be nothing less than alarming if a trader could avoid the conditions enforced upon him, by carrying on his operations from interstate premises. Modern society requires of its legislatures a protection which the judgment of the Chief Justice would deny them.

This is probably the first occasion in which the High Court has been faced with a decision on the protection to be given to a purely commercial transaction by s.92[45]. It is thus interesting to see the varying approaches of members of the Court to this problem. It is the writer's opinion that the judgments of Kitto and Taylor JJ. which are concerned with the ancillary nature of the transaction, are of greater moment than the judgments of McTiernan and Menzies JJ.[46], which merely expand on the extent of the regulation exception to s.92. Both grounds will be important to any practitioner faced with a similar problem of regulations, however.

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38. [1962] S.A.S.R. 78.
39. Barwick C.J. has already persuaded the High Court to break from the English authorities on a question of natural justice in *Banks* v. *Transport Regulation Board*, (1968) 42 A.L.J.R. 64.
40. See also the Trading Stamp Act 1948 (W.A.) and the Trading Coupons Act, 1931 (N.Z.)
41. Equivalents in all States, as with Moneylenders Acts.
42. Door-to-door Sales Acts (W.A., N.S.W., and Qld.).
43. *E.g.*, the Victorian Consumers Protection Act 1964.
44. See the *Report on the Law relating to Consumer Credit and Moneylending*, Law School of the University of Adelaide, at 69-72.
45. The majority of cases to date have involved either transport or manufacture.
46. Also the alternative ground in the judgement of Taylor J.

It is surprising, in view of the range of opinions on the interpretation of the Act, that the High Court did not refer to the judgment of the Full Court of the South Australian Supreme Court in *Goodwin* v. *Brebner*[47]. While this earlier decision does not cover the Act in great detail, the comments of the Supreme Court on the drafting of the Act could have been of at least some assistance to the High Court, where some of the judges seem to have been embarrassed by the ambit of the Act, particularly of s.5a.

Conclusion

Perhaps it is appropriate to note at this stage that in recent years the Trading Stamp Act has suffered some revival, especially in prosecution of traders for gifts or concessions on goods with purchases of, say, petroleum products. But in the writer's opinion, the protection given by this Act is only a beginning, and extensions are long overdue into the fields of consumer credit, and advertising of consumer goods[48]. If these extensions are made, practitioners instructed to oppose statutes which legislatures enact against trading practices which they consider reprehensible would be well advised to look to the extent of s.92. While the extent of the protection given by this section of the Constitution remains unsettled, long and expensive litigation, such as that which occurred following *The Bank Case*[49], will again fill the cause lists of the High Court.

J. R. O'BRIEN*

47. [1962] S.A.S.R. 78. Napier C.J., Millhouse and Travers JJ.
48. Particularly electrical goods.
49. [1950] A.C. 235.

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