REDFERN v. DUNLOP RUBBER AUSTRALIA LIMITED[1]

Constitutional law—Trade and commerce power—Restrictive trade practices —Validity of Australian Industries Preservation Act—Extent of Commonwealth power.

This was an action for treble damages under section 11 (l)[2] of the Australian Industries Preservation Act 1906-1950 (Cth).

The plaintiffs were engaged in the business of buying, selling and dealing in motor and cycle tyres and tubes and alleged that the defendants who were manufacturers of tyres and tubes for sale throughout Australia had either entered into a contract or combined among themselves with respect to the distribution, sale and delivery of tyres and tubes so that prices and terms of sale to dealers were fixed. The effect of this, it was alleged, was a restraint on trade and commerce among the States. Damages were claimed by the plaintiffs in respect of their inability to obtain tyres at wholesale prices because of this price fixing arrangement.

The defendants demurred to the statement of claim and submitted that sections 4[3] and 11 (l) of the Australian Industries Preservation Act were invalid, not being laws with respect to trade and commerce with other countries and among the States.

The High Court rejected this argument and over-ruled the demurrer. Taylor J. agreed in rejecting the constitutional objection raised by the defendants but dissented on the ground that the facts alleged did not

[1] (1963-1964) 110 C.L.R. 194; 37 A.L.J.R. 413. High Court of Australia; Dixon C.J., McTiernan, Kitto, Taylor, Menzies, Windeyer and Owen JJ.

[2] '11 (1.)—Any person who is injured ... by reason of any act or thing done ... in contravention ... of this Act ... may, in the High Court, before a Justice without a jury, sue for and recover treble damages for the injury.'

[3] '4 (1.)—Any person who, either as principal or as agent, makes or enters into any contract, or is or continues to be a member of or engages in any combination, in relation to trade or commerce with other countries or among the States—(a) in restraint of or with intent to restrain trade or commerce; or (b) to the destruction or injury of or with the intent to destroy or injure by means of unfair competition any Australian industry the preservation of which is advantageous to the Commonwealth, having due regard to the interests of producers, workers and consumers, is guilty of an offence.'

disclose any injury arising from any combination in respect to interstate trade and thus disclosed no cause of action.

Dixon C.J., with whom McTiernan and Kitto JJ. agreed, upheld the validity of section 4 despite the apparent generality of its terms and held that before it could operate there must be, in the contract or combination, a restraint or intention to restrain trade or commerce and that the contract or combination must be in relation to interstate or overseas trade and commerce.[4] Section 11 (l), the treble damages provision, was a valid enactment under the trade and commerce power being a recognised means of enforcing or inducing compliance with the federal law.[5]

Furthermore—

> . . . suppression of restraint of trade and of monopolies, is, in my opinion, clearly within the subject of trade and commerce with other countries and among the States provided, of course, that intra-State trade is not included as a direct subject.[6]

Taylor J. agreed with this view and elaborated more fully on the purpose and extent of the legislation.[7] However, while admitting the initial trading agreement to be in restraint of trade within section 4 (l) (a), his Honour took the view that ' common action ' under it, to give the plaintiffs a cause of action, could not be common action wholly in relation to intrastate trade.[8]

Menzies J. was careful to point out the limits of Commonwealth power holding that it could extend only to such intrastate trade and commerce as was inseparably connected with interstate trade and commerce.[9] Windeyer J. pointed out that the Commonwealth could prohibit an agreement that related to trade generally. Owen J. expressed the view that in this case it was not necessary for the actual restraint on trade to be of an interstate or overseas character.[10] This may be contrasted with the dissenting opinion of Taylor J. on this point.

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[4] (1963-1964) 110 C.L.R. 194, 208.

[5] *Ibid.* 209.

[6] *Ibid.*

[7] *Ibid.* 213—' The purpose of the section is to destroy contracts which operate in restraint of, or made with intent to, restrain trade or commerce and to render unlawful any such contract or the formation of, or the participation in, any combination having that effect or formed with that intention. . . . To my mind a contract or combination is, within the meaning of the section, in relation to such trade and commerce where it can be seen that, according to its tenor, the contract will operate directly on some activity which constitutes some part of such trade or commerce or where it appears that the designed activities of the combination will so operate. . . . Nor can I see that legislation can be said to transcend constitutional power where it purports to make unlawful agreements or combinations which . . . relate generally and without discrimination both to inter-State and intra-State trade. . . . it is not, I think, a valid objection that some such contracts or combinations may be found to relate also to other matters.'

[8] *Ibid.* 217.

[9] *Ibid.* 221.

[10] *Ibid.* 231-232—' In other words, the Parliament may validly enact a law forbidding the making of contracts or the formation of combinations in relation to overseas or inter-State trade or commerce which in fact restrain or are intended to restrain trade or commerce, be it overseas, inter-State or intra-State in character.'

Although the judgments are couched in differing phraseology, the Court was in agreement that for a valid exercise of Commonwealth power there must be a combination or contract relating to interstate or overseas trade and that this combination have the effect or intention of restraining trade. The judgments are also in agreement that restraining trade and commerce is a general term and that a restraint which operates on both interstate and intrastate trade may be prohibited by the Commonwealth.

Provided that the contract or combination relates to interstate or overseas trade, it can be invalidated, or provide the basis for a cause of action, under Commonwealth law even though it also relates to other matters. It would seem also that in giving a cause of action to a person who has been injured by such a contract or combination it is from the point of view of Commonwealth power irrevelant that the injury results from the intrastate operation of the contract or combination.

A feature of the case however is the lack of elaboration and definition of the extent of the power of the Commonwealth over restrictive trade practices. The source of such power was taken as being section 51 (i) of the Constitution. The question of a possible source of additional power in section 51 (xx) by control of the behaviour of trading or financial corporations was not discussed; nor was the possible limitation on power arising from section 92 examined.[11] In view of the proposals by the Commonwealth to extend control over restrictive trade practices these questions will undoubtedly be subjected to further judicial scrutiny.

Trade and commerce power

It must be noted that only interstate and overseas trade and commerce and matters incidental thereto are included in the grant of power to the Commonwealth.

There have been unsuccessful attempts to obtain adoption of the view that a matter is 'incidental' if it has *some* connexion with interstate and overseas trade and commerce.[12] However, it appears that the relation of matters incidental to the power must be more intimate—inseparable—such that they are, in the circumstances, a part of interstate or overseas trade.

Even in *O'Sullivan v. Noarlunga Meat Limited*[13] which has been regarded as extending the scope of section 51 (i), the validity of the Commonwealth Regulations was dependent on the acceptance by the Court of the submission that slaughter for export was an objectively definite

[11] Reference to pp. 171-174 of the transcript of argument discloses that s. 4 of the Act was discussed in relation to s. 92; the defendants wanted to preserve the right to raise this point at the trial but the plaintiffs wanted it to be dealt with. Although it would seem that the Court did not leave the matter open there is nothing to prevent the Court from saying in the future that the case had nothing to do with s. 92.

[12] *The King v. Turner*; *Ex parte Marine Board of Hobart* (1927) 39 C.L.R. 411; *The King v. Burgess*; *Ex parte Henry* (1936) 55 C.L.R. 608.

[13] (1954) 92 C.L.R. 565.

process and in the circumstances a part of the export trade in meat.[14] In this context the statement of Fullagar J. that in applying the trade and commerce power it ' may very reasonably be thought necessary to go further back, and even to enter the factory or the field or the mine '[15], may be viewed as being less unorthodox than it appears to be outside this context. Indeed this limited view of the *Noarlunga Case* was adopted by the High Court in *Swift Australian Company (Pty) Limited v. Boyd Parkinson.*[16]

The views expressed by some members of the Court in *Airlines of New South Wales v. New South Wales*[17] have been taken to indicate a relaxation of this rigid distinction between interstate and intrastate trade; but it should be noted that any such breakdown is attributable to the operation of the external affairs power.[18]

The more recent *Airlines Case*[19] involved a more detailed analysis of the scope of the Commonwealth power over trade and commerce. It was held that proper control of interstate and overseas air traffic did justify a large area of control of intrastate air traffic. The reason, however, seems essentially to have been that air navigation within a State has a real and tangible effect on interstate air navigation and by virtue of this real connexion, the manner in which intrastate air traffic is conducted is part of interstate and overseas trade and commerce.

Thus the power of the Commonwealth must be limited to those combinations or agreements which restrain interstate and overseas trade or agreements or combinations in the course of interstate trade which restrain trade whether interstate or intrastate. What is outside Commonwealth power, it would appear, is an agreement or combination in the course of intrastate trade where the object or effect of such agreement or combination is the restraint of intrastate trade. In other words, the Commonwealth has power over agreements and combinations in the course of interstate trade because they are part of that concept and has power over contracts or combinations in the course of intrastate trade only if they affect interstate trade.

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[14] *Ibid.* 575—' The process of slaughtering for export is part of the external trade in meat and it is not at all comparable with the process of mere manufacture, which can be divided off from the trade itself '; see also Fullagar J. at 596-597.

[15] *Ibid.* 598.

[16] (1962) 108 C.L.R. 189—In (1964) 38 A.L.J.R. 63, 64, the author of the case note dealing with *Redfern v. Dunlop* suggests ' In *Swift Australian Co. (Pty.) Ltd. v. Boyd Parkinson* (1962) 108 C.L.R. 189, at p. 226, the Court has similarly allowed s. 51 (i) with its incidental powers to reach to slaughtering for the intra-State market '. It should be noted that the author is referring to the dissenting judgment of Owen J. and that the decision of the Court was to the opposite effect.

[17] (1963-1964) 37 A.L.J.R. 399.

[18] *Ibid.* 402 *per* Dixon C.J. ' . . . the legislative power which arises from the need of carrying out the Convention given by s. 51 (xxix) would suffice to support laws made with a complete disregard of the distinction between interstate and intra-State trade ; it would follow that no reliance upon s. 51 (i) by the Commonwealth would be necessary '. Taylor J. did not consider this disregard of the distinction as detracting from the validity of that distinction in the operation of the trade and commerce power: *ibid.* 407 and regarded Commonwealth power as extending only to ' properly defined controlled airspace ' : *ibid.* 408 and not to intrastate flights outside such airspace.

[19] *Airlines of New South Wales v. New South Wales* [No. 2] 38 A.L.J.R. 388.

Corporations power

It is possible that section 51 (xx) may provide a source of power over restrictive practices by permitting a law removing the capacity of companies to enter into combinations or agreements in restraint of trade. As is apparent from the instant case, the main 'offenders' in the field of restrictive practices are corporations. Thus, if the power of the Commonwealth over corporations extends to enable control over restrictive practices by companies, the bulk of this subject matter would come under unified control.

This question, however, has already been fully discussed elsewhere.[20]

Section 92

It would seem clear that section 92 would not be infringed by a law prohibiting a restrictive practice in the course of intrastate trade and commerce which has an effect on interstate trade and commerce. Indeed, such a law would have the effect of removing from interstate trade restrictions that intrastate traders may impose on it in the course of their intrastate trade. It is simply an example of section 51 (i) extending to matters to which section 92 does not apply.

The position does not seem so clear in the case of control of restrictive practices in the course of interstate trade. Here there would appear to be two broad categories—

(a) restrictive practices in the course of interstate trade restricting interstate trade or, as in the instant case, trade generally, including interstate trade ; and

(b) restrictive practices in the course of interstate trade restricting intrastate trade only.

The broad test for determining whether a law of the Commonwealth or a State infringes section 92 has been laid down in the *Bank Nationalization Case*[21] where it was said—

(a) that regulation of trade, commerce and intercourse among the States is compatible with its absolute freedom; and

(b) that section 92 is violated only when a legislative or executive act operates to restrict such trade, commerce and intercourse directly and immediately as distinct from creating some indirect or consequential impediment which may fairly be regarded as remote.[22]

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[20] Professor J. E. Richardson 'The Control of Monopolies and Restrictive Business Practices in Australia' (1962) 1 *Adelaide Law Review* 239, 260-262.

[21] (1949) 79 C.L.R. 497.

[22] Thus in *Wragg v. New South Wales* (1953) 88 C.L.R. 353 it was held that an economic effect arising out of restrictions placed on an act of intrastate trade, however inevitably it may affect interstate trade did not infringe section 92 as the law operated directly on intrastate trade only and interstate trade was left legally free, the economic restrictions being an indirect effect of the law. Again, in *Mansell v. Beck* (1956) 95 C.L.R. 550 a law aimed at restricting gambling transactions was held not to restrict trade commerce or intercourse among the States; gambling as such was not regarded as part of the concept of interstate trade and it followed that a law restricting gambling had no direct effect on interstate trade.

In the case of restrictive practices in the course of interstate trade, any law prohibiting or penalising them must operate directly on such trade. The question must therefore be asked whether such a law is regulatory or not.

The question of the distinction between regulatory and restrictive laws arose before the High Court in *Grannall v. Marrickville Margarine Pty Limited*—

> If some fact or event or thing which itself forms part of trade, commerce or intercourse or forms an essential attribute of that conception (essential in the sense that without it you cannot bring into being that particular example of trade, commerce or intercourse among the States) is made the subject of the operation of a law which by reference to it or in consequence of it imposes some restriction or burden or liability, it does not matter how circuitously it is done . . . it will infringe upon s. 92. . . . But generally speaking, it will be quite otherwise if the thing with reference to or in consequence of which the law operates or which it restricts or burdens is no part of inter-State trade and commerce and in itself supplies no element or attribute essential to the conception.[23]

The concept of regulation adopted in this case appears to refer to the restricting of an incident of what is essentially trade and commerce for an end or purpose other than the restricting of the freedom of interstate trade.

This notion of ' regulation ' distinguishes between restraint of an activity or thing that is not an essential part of trade or commerce among the States and one that operates on matters that are merely incidental to interstate trade. Even in the latter case, the law may under the guise of regulating an incident of interstate trade create ' a real obstruction or impediment in carrying it on '.[24]

Moreover in dealing with the validity of a restrictive practices law, it would not be a sufficient justification to say that such laws ' facilitate trade ' and may, indeed, raise the level of such activity. It would be just as true to say that the second category of restrictive practices under discussion has this effect and so cannot be controlled.

James v. Commonwealth[25] affirmed that section 92 safeguards the individual's right to freedom of trade and the final overthrow of the ' volume of trade ' concept in *Hughes and Vale Pty Limited v. New South Wales* [No. 2] demonstrates that such considerations are of no relevance when considering the applicability of section 92 to a particular law.

Do provisions such as sections 4 and 11 of the Australian Industries Preservation Act deal with mere incidents of the trade protected by section 92 or do they directly restrict the features of transactions in

[23] (1954-1955) 93 C.L.R. 55, 78 *per* Dixon C.J., McTiernan, Webb and Kitto JJ.
[24] *Hughes and Vale Pty Limited v. New South Wales* [No. 2] (1956) 93 C.L.R. 127, 163 *per* Dixon C.J.
[25] (1935) 52 C.L.R. 570; (1936) 55 C.L.R. 1.

virtue of which they fall within the category of interstate trade or commerce? It is difficult to see how a certain answer can be given to this question on a purely logical basis.

It may be that a solution may be found along the lines adopted in *Mansell v. Beck*[26]—that is, to hold that restrictive practices, because, for example, of their 'unlawful' or 'destructive' nature, do not form a part of the concept of interstate trade and therefore laws prohibiting such practices do not take as the basis of their operation anything connected with such trade. But is it any restrictive practice or only 'unreasonable' practices that may be so treated?

It would seem, therefore, that the operation of section 92 on restrictive trade practices legislation needs more examination than is suggested by the confident but unsupported dictum of Starke J. in *Home Benefits Pty Limited v. Crafter* that—

> It is, however, no contravention of the freedom so prescribed to legislate for the repression of destructive monopolies or illegitimate means of trading . . .[27]

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[26] (1956) 95 C.L.R. 550.
[27] (1939) 61 C.L.R. 701, 717.