FREEDOM OF INTERSTATE TRADE

By COLIN HOWARD*

Introduction

The justification for yet another article[1] on section 92 of the Constitution is that students, and possibly others, may find useful a straightforward account of the main line of development in its interpretation. The aim of this article is to give such an account, free from the mass of detail and case-law which attends the application to particular areas of legislation of the general principles which have been established.

The whole text of the section is as follows.

> 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.
>
> But notwithstanding anything in this Constitution, goods imported before the imposition of uniform duties of customs into any State, or into any Colony which, whilst the goods remain therein, becomes a State, shall, on thence passing into another State within two years after the imposition of such duties, be liable to any duty chargeable on the importation of such goods into the Commonwealth, less any duty paid in respect of the goods on their importation.

Nowadays the only material words are *trade, commerce, and intercourse among the States . . . shall be absolutely free.* Their importance is that they act as a restriction upon the powers of both the Commonwealth and the States to legislate with respect to trade and commerce.

It has been observed[2] that two distinct questions are inherent in every section 92 case. The first is whether the particular activity under consideration is properly characterized as interstate trade, commerce

* Ph.D. (Adel.); LL.M. (Lond. & Adel.), LL.M.; Barrister and Solicitor; Hearn Professor of Law in the University of Melbourne. This paper is drawn from a chapter in a forthcoming book on Australian federal constitutional law.

[1] The more recent literature includes 'The Commerce Power under the Australian Constitution', (1942) 42 *Columbia Law Review* 660; Beasley, 'The Commonwealth Constitution: section 92 — Its History in the Federal Conventions', (1948) 1 *University of Western Australia Annual Law Review* 97, 273, 433; Wright, 'Section 92 — A Problem Piece', (1954) 1 *Sydney Law Review* 145; Hart, 'Some Aspects of Section 92 of the Constitution', (1957) 30 *Australian Law Journal* 551; Lane, 'The Present Test for Invalidity under Section 92 of the Constitution', (1958) 31 *Australian Law Journal* 715; Lane, 'Approaches to and Principles of Section 92 of the Constitution', (1959) 32 *Australian Law Journal* 335; Anderson, 'Freedom of Interstate Trade: Essence, Incidence and Device under Section 92 of the Constitution', (1959) 33 *Australian Law Journal* 276; Lane, 'Section 92: Inconsistency, Shibboleths and Uncertainty', (1960) 33 *Australian Law Journal* 399; Singh, ' "Circuitous Means" or "Concealed Design" and Section 92 of the Australian Constitution', (1962) 36 *Australian Law Journal* 95; Morris, 'Section 92 of the Commonwealth Constitution', (1963) 4 *University of Queensland Law Journal* 369; Wynes, *Legislative, Executive and Judicial Powers in Australia* (3rd ed.) 317-388.

[2] *Hughes and Vale Pty Ltd v. N.S.W. (No 1)* (1953) 87 C.L.R. 49, 97-8, *per* Fullagar J. Repeated in *Grannall v. Marrickville Margarine Pty Ltd* (1955) 93 C.L.R. 55, 80.

or intercourse. The second is whether its freedom has been impaired. Logically the first is anterior to the second, for if the answer to the first is no, the second does not arise; but it is easier to understand the law the other way about. This is because the effect of the section depends far more on the meaning given to the vague words 'absolutely free' than on the reasonably precise words 'trade, commerce, and intercourse among the States'. This emphasis is reflected in the cases. The main preoccupations of the High Court in the interpretation of section 92 have been the definition of an appropriate concept of impairment of freedom and the invention of a criterion for its application. It is with the course of these preoccupations that this article is concerned.

Analysis of the Problem; Present Law

The difficulty with the expression 'absolutely free' is that it is logically incomplete. The concept of freedom implies and acquires meaning from the correlative concept of restraint. If something is said to be free, no significant meaning is conveyed unless it is made clear either by express statement or by the context what the freedom is from. The nearest section 92 comes to an express statement of what it is that interstate trade is to be free from is the word 'absolutely'. As a matter of grammar it might be argued that 'absolutely free' means free from any restraint at all. Since section 92 is a law, this becomes the argument that 'absolutely free' means free from any legal restraint. Section 92 is not, however, merely a law subject to grammatical analysis. It is also an instrument of government. To read it as saying that interstate trade can be made subject to no legal restraint at all is to convert it into an instrument of chaos. For this reason it has as a practical matter never been open to the High Court to read section 92 in the only sense in which it can be regarded as making an express statement about freedom.

There are three other possibilities: to gather the meaning of freedom from the context; to treat the section, apart from the transitional provisions, as expressing no credible proposition and being therefore meaningless and without effect; or to imply the restraints from which interstate trade is to be free by reference to some other principle of construction.[3]

The first possibility, gathering the meaning of freedom from the

[3] I am indebted to a student's answer to an examination problem in 1967 for the following additional suggestion, which I believe to have the merit of being original but the defect of being untenable. It rests on the presence in the passage 'trade, commerce, and intercourse among the States' of commas after the words 'trade' and 'commerce'. The suggestion is that these two words are not to be read as linked with 'among the States' but in isolation. Only the word 'intercourse' is to be read as qualified by 'among the States'. The effect is to render free not only intercourse among the States but also *all* trade and *all* commerce, whether interstate or not.

context, would have led the courts to an understanding of section 92 very similar to what was originally intended. The theme of the context is customs duties. Sections 86, 88-90 and 92-95 all refer to customs and several of them to events to occur upon the imposition of uniform duties of customs by the Commonwealth. They all appear in the chapter of the Constitution headed *Finance and Trade*. Section 92 itself starts with one of the references to the imposition of uniform duties and continues in its second paragraph with a transitional measure also concerned with customs. In such a surrounding it hardly requires an effort of the imagination to conclude that what was intended was freedom from duties or other taxes levied on goods by reason of their being sent interstate in the course of trade or commerce. This interpretation of section 92 is consistent with the transfer to the Commonwealth by section 90 of exclusive power to legislate with respect to customs, excise and bounties; for, together with the prohibition in section 99 on granting preferences in matters of trade, commerce or revenue to one part of the country over another, it prevents the Commonwealth from using its exclusive legislative power to reimpose the very border taxes which it was a main object of federation to abolish. Legislation by the States which erected trade barriers by means other than taxation, as for example by simple prohibition, could have been displaced by Commonwealth legislation under the trade and commerce power in conjunction with section 109.[3a] It is true that by the time section 92 came under scrutiny the High Court had committed itself to a mode of interpretation of the Constitution which excluded reference to the convention debates,[4] so that history could not be called in aid. But history hardly needed to be called in aid: an impartial examination of section 92 in context should have led to the same result. This was not done.

Neither was the second approach adopted. This requires the court to dismiss section 92, apart from the transitional provisions, as having no operative effect on the ground that freedom from legal restraint which is absolute is not a possible meaning and no other meaning is indicated. Although at first sight this solution seems cavalier, it leads in practice to much the same result as reading section 92 as referring only to border taxes. Its main apparent defect is that the States remain free to impose taxes, other than customs or excise duties, which operate in restrain of interstate trade, but this possibility has little substance. In the first place it requires constant ingenuity by the States to avoid trespassing on the exclusive power of the Commonwealth to legislate with respect to customs and excise. Secondly, the powers of the Com-

[3a] 'When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.'

[4] *Municipal Council of Sydney v. Commonwealth* (1904) 1 C.L.R. 208, 213-4; *Tasmania v. Commonwealth* (1904) 1 C.L.R. 329, 333.

monwealth not only to enact legislation displacing obnoxious State legislation, but also to bring financial pressure to bear, both under the Constitution and politically, are more than adequate to protect interstate trade from any interference inconsistent with Commonwealth policy. As to the Commonwealth itself, not only does it remain subject to the prohibition on preference in section 99 and the prohibition on discriminatory taxes in section 51(2), but also is hardly likely to find a use for border taxes which, however advantageous to any one State, almost by definition are neither politically nor economically advantageous to the country as a whole.

In the event the High Court, assisted at several critical stages by the authority of the Privy Council, has taken the third course and developed a theory of section 92 which neither treats it as a meaningless proposition nor restricts its effect by reference to the surrounding context. Interstate trade and commerce is free from all restriction, whether legislative or executive in character, except to the extent that reasonable regulation of any activity, interstate trade and commerce as much as any other, is necessary to the continued existence of an ordered society. This result is arrived at by construing the section as far as possible by inference from its exact terms. Reasonable regulation is consistent with section 92 because freedom to trade presupposes a society ordered by law. Without such a society there can be no trade. The reason for regulation is therefore that without it there can be no freedom. Ordered regulation of interstate trade, far from conflicting with the freedom guaranteed by section 92, is necessarily implied by it. Similarly it does not follow that because a legislative or executive act has restrictive effects on interstate trade it impairs the freedom of interstate trade. It depends whether the criterion upon which it operates is an act of interstate trade.

A simple instance is the arrest for drunken driving of a man carrying goods in the course of his interstate road transport business. He is effectively prevented from continuing in interstate trade, for the time being anyway, but the arrest does not contravene section 92. The reason is that the law justifying the arrest does not operate by reference to any act of interstate trade, commerce or intercourse. The driver is not arrested because he is travelling interstate but because he is driving whilst drunk. With this may be compared a law forbidding the carriage of goods by road for reward except under licence and leaving to an executive authority discretion whether to issue licences and on what terms. Such a law operates by reference to an act of trade or commerce, the carriage of goods for reward. Since it totally prohibits that activity, subject only to an unfettered executive discretion, it authorizes interference going far beyond reasonable regulation in the interests of a general freedom. Therefore it cannot apply to anyone carrying goods for reward interstate.

This approach to the problem of defining freedom under section 92 originated in dissenting judgments by Dixon J. in the 1930s.[5] The very fact that he was in dissent at the time indicates that it has not always been the guiding principle. Some acquaintance with anterior and parallel developments is still necessary for a proper understanding of its significance and meaning.

Early Developments; W. & A. McArthur Ltd v. Queensland (McArthur's Case)

The first attempt to state a coherent theory of section 92 was made in *McArthur's Case*[6] in 1920. Before that there had been only five reported decisions.[7] Little of enduring value emerged from them, but two points were settled. One was that section 92 is not complied with merely because goods have been allowed literally to enter a State freely.[8] A burden imposed after entry by reference to the interstate origin of goods is as much an interference with freedom as a restriction imposed at the border itself. This was decided in the first case on section 92, *Fox v. Robbins*[9] in 1909. Under Western Australian legislation wine could be sold only under licence. Licences were obtainable on payment of a fee. Fees for licences to sell wine produced from fruit grown elsewhere were twenty-five times dearer than fees for licences to sell wine produced from fruit grown in Western Australia.[10] They were also subject to more onerous conditions. Not surprisingly it was held that the differential against interstate wine was invalid. It was immaterial that the tax burden was imposed by reference to the sale of the wine rather than its entry. It was imposed because it had been brought from another State. Secondly, in *Duncan v. Queensland*[11] in 1916 the opinion was expressed by all the judges that section 92 was not limited to the prohibition of simple fiscal

[5] Particularly *O. Gilpin Ltd v. Commissioner for Road Transport* (1935) 52 C.L.R. 189, 202, *infra* n. 24. Also *Willard v. Rawson* (1933) 48 C.L.R. 316, 329; *The King v. Vizzard, ex p. Hill* (1933) 50 C.L.R. 30, 56. After adhering to his view in *Bessell v. Dayman* (1935) 52 C.L.R. 215, 220, decided on the same day as but after *Gilpin's Case* (above), his Honour accepted the contrary opinion in *Duncan and Green Star Trading Co. Pty Ltd v. Vizzard* (1935) 53 C.L.R. 493, 504, and *Riverina Transport Pty Ltd v. Victoria* (1937) 57 C.L.R. 327, 362-3, for the purposes of transport legislation, on the basis of authority alone.

[6] *W. & A. McArthur Ltd v. Queensland* (1920) 28 C.L.R. 530.

[7] *Fox v. Robbins* (1909) 8 C.L.R. 115; *The King v. Smithers, ex p. Benson* (1915) 16 C.L.R. 99; *N.S.W. v. Commonwealth (The Wheat Case)* (1915) 20 C.L.R. 54; *Foggitt, Jones & Co. Ltd v. N.S.W.* (1916) 21 C.L.R. 357; *Duncan* v. *Queensland* (1916) 22 C.L.R. 556.

[8] *Cf.* Quick and Garran, *Annotated Constitution of the Australian Commonwealth,* 845: 'the right of introduction without the right of disposition would reduce freedom of trade to an empty name'.

[9] (1909) 8 C.L.R. 115 (Griffith C.J., Barton, O'Connor, Isaacs and Higgins JJ.)

[10] £50 as against £2 ($100 as against $4).

[11] (1916) 22 C.L.R. 556, 571, 573, 587-9, 618-9, 636, 639, 644 (Griffith C.J., Barton, Isaacs, Higgins, Gavan Duffy, Powers and Rich JJ.).

burdens such as border tariffs. This view has been adhered to ever since.[12]

McArthur's Case[13] arose under Queensland price-fixing legislation. The Profiteering Prevention Act 1920 (Qld) authorized the setting of maximum prices at which goods could be sold in Queensland. McArthur was a company registered in New South Wales. It was not registered in Queensland and had no premises there. It dealt in textiles and operated by sending out travelling salesmen from Sydney. Sales made in Queensland were met by sending consignments from New South Wales. These sales were at prices above the Queensland maximum. Relying on section 92, McArthur sued for declarations and injunctions to prevent the enforcement of the Act against itself. It was held[14] that the Act could not apply to interstate sales, but to say as much gives no idea of the true significance of the case. The following components of the reasoning gave it an importance which in some respects continues at the present day.

First, what was meant by an interstate sale, as distinguished from an interstate movement of goods, was explained with precision. On the facts only a small part of McArthur's trade consisted of interstate sales although all of it, in relation to Queensland, led to the interstate movement of textiles. Secondly, the concepts of trade and commerce in general and interstate trade and commerce in particular were given a wide meaning, extending far beyond the mere act of transportation across a State border. Neither of these aspects of the case is relevant to this article. Thirdly, it was held[15] immaterial that the price restrictions did not on their face discriminate against interstate trade but applied equally to both interstate and intrastate trade. It was equally immaterial that since they would be set to suit internal conditions they might well in effect discriminate against interstate trade. If a burden was imposed on interstate trade it became no less a burden by applying to intrastate trade also. Fourthly, it was held[16] that section 92 did not bind the Commonwealth, but only the States. This remained the law until 1936, when it was overruled by the Privy Council in *James v. Commonwealth*.[17]

On its face the Constitution appears to give no warrant for this last decision. Section 92 itself is general in its terms and says nothing about applying only to the States. Moreover it operates primarily as a restriction on the trade and commerce power. So far as the Commonwealth is concerned this power derives in the first instance from section 51(1), which is expressly 'subject to this Constitution', and the remainder of the Constitution includes section 92. The reasons advanced in face of

12 *Commonwealth v. Bank of N.S.W.* (1949) 79 C.L.R. 497, 629 (P.C.)
13 (1920) 28 C.L.R. 530.
14 Gavan Duffy J. dissenting.
15 Gavan Duffy J. dissenting.
16 Gavan Duffy J. dissenting.
17 (1936) 55 C.L.R. 1, *infra* n. 58.

these obstacles to support the conclusion that nevertheless the Commonwealth could impair the freedom of interstate trade retain interest because they turn on the relationship between section 92 and section 51(1).

The premiss was that if the Constitution were read literally, section 92 virtually cancelled out section 51(1).[18] This could hardly have been intended. Moreover there were a number of express restrictions on Commonwealth legislative power in the Constitution, such as the requirement that duties be uniform and the prohibition on preferences, which effectively prevented the Commonwealth from interfering with interstate trade by the imposition of border tariffs or their equivalent. These restrictions rendered section 92 superfluous in its application to the Commonwealth but they did not apply to the States. It followed that section 92 was directed at the States.

This holding was distinguished above from the giving of a wide meaning to the concept of interstate trade, but the two were in fact interdependent *McArthur's Case*[19] was decided in the same year and by the same court as the case of the *Amalgamated Society of Engineers v. Adelaide Steamship Co. Ltd (Engineer's Case)*,[20] which marked a new point of departure in the interpretation of the Constitution. It was established in the *Engineer's Case*[21] that powers expressly conferred on the Commonwealth were to be given their widest, as opposed to their narrowest, reasonable interpretation. A wide definition of interstate trade was consistent with this approach because its effect was to give a wide scope to the trade and commerce power of section 51(1). Such a definition had correlative effects on State power. The wider the definition of interstate trade and commerce, the narrower the scope of the residual trade and commerce power left with the States. This happened by reason not only of section 92 but also of section 109.[22] It happened under section 92 because the greater the number of trading and commercial activities which had to be left free, the fewer became the number of such activities in respect of which the States could legislate. It happened under section 109 because the greater the number of activities falling within the meaning of interstate trade and commerce for the purposes of section 51(1), the greater the area in which Commonwealth laws enacted pursuant to section 51(1) would displace inconsistent State laws. The result of simultaneously freeing the Commonwealth from the restriction of section 92 and giving a wide content to interstate trade and commerce was to leave the Commonwealth the almost unhindered control of national trade and commerce.

18 (1920) 28 C.L.R. 530, 558.
19 (1920) 28 C.L.R. 530.
20 (1920) 28 C.L.R. 129.
21 Ibid.
22 *Supra*, n. 3a.

Evaluation of McArthur's Case

Although *McArthur's Case*[23] is no longer good law in respect of the limitation of section 92 to the States, it is to be observed that the solution is offered to the problem of the section made good economic and governmental sense. It was inevitable that with the passing of time more and more trade and commerce would come to have a national rather than an intrastate character. Moreover the State boundaries, however explicable historically, by no means correspond to natural economic divisions. It would have been and still would be a distinct national advantage for the central government to have unhampered control over the economic regulation of the country as a whole. It may well be that the pressure of events is arriving at the same result, but it can hardly be doubted that the development of coordinated national control of the economy has been and continues to be hindered by the restrictions imposed on the Commonwealth by section 92.

From this point of view it was unfortunate that the arguments advanced in *McArthur's Case*[24] to justify the conclusion that section 92 applied only to the States entailed several mistakes in constitutional interpretation. It is not the case that if it binds the Commonwealth it becomes a 'simple negation'[25] of section 51 (1) or will 'practically nullify'[26] that section. The reason is that although the words 'trade' and 'commerce' have the same meaning in both section 51(1) and section 92, the context gives them a different significance in the two places. In section 51(1) they occur in the context of a grant of power to legislate with respect not only to the subject matter of interstate trade and commerce precisely defined, but also, by reason of section 51(39), to matters incidental to the execution of that legislative power: with respect, in other words, to matters incidental to interstate trade and commerce as well as to interstate trade and commerce itself. In section 92 the context is a simple prohibition of infringement of the freedom of interstate trade and commerce itself, with no reference to matters incidental thereto. The legislative power of section 51(1) has therefore on the face of the Constitution a potential area of operation wider than that of section 92.

Secondly, and equally important, it is also not the case that a law with respect to interstate trade and commerce necessarily is a law restricting the freedom of interstate trade. It was well recognized by 1920, and continued to be recognized in *McArthur's Case*[27] itself, that section 92 presupposed a society ordered by law.[28] It followed that legislation could be enacted under section 51(1) for the purpose of ordering or regulating interstate trade which did not conflict with

[23] (1920) 28 C.L.R. 530.
[24] Ibid.
[25] (1920) 28 C.L.R. 530, 558.
[26] Ibid.
[27] (1920) 28 C.L.R. 530.
[28] *Duncan v. Queensland* (1916) 22 C.L.R. 556, 573, 592, 597, 620-1, 640, 650; *McArthur's Case* (1920) 28 C.L.R. 530, 550-1.

section 92. Also it has since become clear[29] that section 51(1) extends to empowering the Commonwealth to enter into trading and commercial activities on its own account, which again does not conflict with section 92. Once it is conceded that section 51(1) has a significant content even if section 92 does bind the Commonwealth, there remains no warrant for ignoring the implications of the words 'subject to this Constitution' with which it begins.

Practical Problems Arising

Notwithstanding these formidable objections to the view that section 92 did not bind the Commonwealth, it remained the law until overruled by the Privy Council in *James v. Commonwealth*[30] in 1936. In itself it did not cause difficulty. The problems it posed in practice arose from the corollary that what was interstate trade, and therefore what was an interference with interstate trade, should be given a wide interpretation.

The conflict which emerged between 1920 and 1936 was in effect between *McArthur's Case*[31] and an earlier decision, the *N.S.W. v. Commonwealth (Wheat Case)*.[32] In the *Wheat Case*[33] in 1915 the question was whether in the interests of facilitating control of the food supply during wartime the government of New South Wales could compulsorily acquire all wheat in the State, regardless of whether it was already the subject of interstate sale. It was held that there was no conflict with section 92 because the Act operated upon ownership and not upon trade. Whoever was the owner of the wheat for the time being remained free to trade with it. This decision implied a narrow view of the content of interstate trade; or, to put the same point differently, a narrow view of what amounted to an interference with interstate trade. In the interests of government regulation of the economy, section 92 was restricted in scope.

The doctrine of *McArthur's Case*[34] fundamentally conflicted with this approach, for it depended on giving section 92 a wide scope where it applied. This conflict was not foreseeable because it is clear from *dicta* in the cases preceding *McArthur's Case*[35] that the Court assumed earlier that section 92 did bind the Commonwealth.[36] If this assumption is made it follows that to give section 92 a wide interpretation is a serious restriction of governmental power to regulate the economy. In

29 *A.N.A. v. Commonwealth* (1945) 71 C.L.R. 29.
30 (1936) 55 C.L.R. 1.
31 (1920) 28 C.L.R. 530.
32 *N.S.W. v. Commonwealth* (1915) 20 C.L.R. 54 (Griffith C.J., Barton, Isaacs, Gavan Duffy, Powers and Rich JJ.).
33 Ibid.
34 (1920) 28 C.L.R. 530.
35 Ibid.
36 *N.S.W. v. Commonwealth* (1915) 20 C.L.R. 54, 66, 79, 95, 100, 105; *Duncan v. Queensland* (1916) 22 C.L.R. 556, 572-3, 593-4, 620, 639.

the *Wheat Case*[37] itself this consideration may have been given too much play, but in principle it is correct. Since the *Wheat Case,*[38] far from being overruled, was in effect approved in *McArthur's Case,*[39] the seeds of confusion were sown.[40]

Between 1920 and 1936 opinion in the High Court moved against restricting the trade and commerce powers of the States to the extent implied by *McArthur's Case.*[41] This movement of opinion necessarily relied to some extent on the continuing authority of the *Wheat Case.*[42] The author of the doctrine in *McArthur's Case,*[43] Isaacs J., attempted to combat it by arguing that the true basis of the *Wheat Case*[44] was that the legislation there in question was valid because it did not discriminate against interstate trade as such.[45] This was scarcely convincing because it had little or no support in the judgments in the *Wheat Case.*[46] The result was that while one part of the doctrine in *McArthur's Case,*[47] that which said that section 92 did not bind the Commonwealth, was consistently adhered to, its corollary, that as against the States the section should be given wide operation, was steadily undermined. This in turn removed much of the rationale of the main rule and prepared the ground for its removal.

It was during this period also that the third aspect of *McArthur's Case,*[48] the discrimination question, became important. Although it is now the law that section 92 is not limited in its operation to the protection of interstate trade against adverse discrimination, it has been argued[49] that section 92 was originally intended to do no more than protect interstate trade from discriminatory treatment based on its interstate character. For a long time there was support in the cases for this interpretation in the form that a law did not infringe the section if it applied impartially to both intrastate and interstate trade.[50]. The modern rule is the same as the one laid down in *McArthur's Case,*[51] that a law which burdens interstate trade does not escape the operation of section 92 merely because it imposes the same burden on intrastate trade.[52]

37 (1915) 20 C.L.R. 54. 38 Ibid.
39 (1920) 28 C.L.R. 530, 555.
40 *Cf.* the observation of Higgins J. in *Roughley v. N.S.W.* (1928) 42 C.L.R. 162, 201, that he did not know when taking part in the decision in *McArthur* that *Duncan v. Queensland* (1916) 22 C.L.R. 556 was going to be overruled. He discovered this only when the judgments were published.
41 Particularly *Roughley v. N.S.W.* (1928) 42 C.L.R. 162.
42 (1915) 20 C.L.R. 54. 43 (1920) 28 C.L.R. 530.
44 (1915) 20 C.L.R. 54.
45 *James v. South Australia* (1927) 40 C.L.R. 1, 34. *Cf.* the observation of Starke J. in *James v. Cowan* (1930) 43 C.L.R. 386, 392.
46 (1915) 20 C.L.R. 54. 47 (1920) 28 C.L.R. 530.
48 Ibid.
49 Sawer, *Australian Constitutional Cases,* (3rd ed.), 274.
50 Particularly in the *Transport Cases, infra* n. 78.
51 (1920) 28 C.L.R. 530.
52 *Commonwealth v. Bank of N.S.W.* (1949) 79 C.L.R. 497, *infra* n. 95.

The survival of this rule notwithstanding the ultimate overruling of *McArthur's Case*[53] owes much to the efforts of the South Australian government to compel a dried fruits merchant called James to comply with its policy on the marketing of dried fruits. The details of the prolonged litigation[54] to which these efforts gave rise may be passed over. Its relevance here is by way of background to *James v. Commonwealth*,[55] in which James achieved his greatest triumph, and secured for himself a permanent place in the legal history of Australia, by successfully invoking section 92 against the Commonwealth and thereby overturning *McArthur's Case*.[56]

The James Litigation; McArthur's Case Overruled

The significance of the James litigation was that on the facts discrimination against interstate trade in general became confused with interference with the interstate trade of a particular individual. The dried fruits marketing legislation in question, which imposed a quota system, was ultimately held invalid in its application to interstate trade by reason of section 92. This result could have been arrived at in either of two ways. One way would have been to hold that the legislation was invalid because it discriminated adversely against interstate trade in general, as contrasted with intrastate trade. The other would have been to hold it invalid because, regardless of comparisons with intrastate trade, it prevented any individual who wished to sell his dried fruits interstate from doing so if the quantity involved exceeded the quota set.

The matter came before the Privy Council twice, in *James v. Cowan*[57] in 1932 and in *James v. Commonwealth*[58] in 1936. In both cases their Lordships decided the issue favourably to James but in neither did they indicate clearly upon which ground they were proceeding. By the time *James v. Commonwealth*[59] was decided there were already conflicting precedents in the High Court, both views of section 92 having received support.[60] The opportunity was thereby presented for one or the other interpretation to be put on a secure foundation. It was not taken. Their Lordships seem to have seen their main task as being the overruling of *McArthur's Case*.[61] This being decided upon, they preferred to rationalize and approve as much of the

53 (1920) 28 C.L.R. 530.

54 *James v. South Australia* (1927) 40 C.L.R. 1; *James v. Commonwealth* (1928) 41 C.L.R. 442; *James v. Cowan; in re Botten* (1929) 42 C.L.R. 305; *James v. Cowan* (1930) 43 C.L.R. 386 (H.C.), (1932) 47 C.L.R. 386 (P.C.); *James v. Commonwealth* (1935) 52 C.L.R. 570 (H.C.), (1936) 55 C.L.R. 1 (P.C.); *James v. Commonwealth* (1939) 62 C.L.R. 339.

55 (1936) 55 C.L.R. 1.

56 (1920) 28 C.L.R. 530.

57 (1932) 47 C.L.R. 386.

58 (1936) 55 C.L.R. 1.

59 Ibid.

60 The *Peanut Board Case* (1933) 48 C.L.R. 266 proceeded on an individual freedom basis, the *Transport Cases* on a non-discrimination basis. For the *Transport Cases* see *infra* n. 78.

61 (1920) 28 C.L.R. 530.

existing law on section 92 as possible rather than undertake more overruling as a prelude to a new start. The result was that for practical purposes the law was left very much as it had been before. The decision that section 92 bound the Commonwealth in no way diminished the difficulty of applying the section to particular legislation. All it did was extend those difficulties to Commonwealth as well as State legislation.

The actual question before the Board was whether a Commonwealth Act which in effect imposed quotas on interstate trade in dried fruits was valid. It was held that it was not. No-one seems to have doubted that this result followed if the Commonwealth was subject to section 92, for 'the contrary was but faintly contended'.[62] The greater part of the judgment is devoted to suggesting the true criterion for the operation of section 92 and demonstrating that nearly all the decided cases up to that time illustrated it. Several formulations of the criterion their Lordships had in mind were offered. The fundamental rule was that whether in any given case there was an interference with freedom must always be a question of fact.[63] On this basis it was said that section 92 required 'freedom as at the frontier'.[64] Alternatively, quoting from section 112 of the Constitution, freedom in respect of 'goods passing into or out of the State'.[65] Or again, that 'the people of Australia were to be free to trade with each other and to pass to and fro' among the States without any burden, hindrance or restriction based merely on the fact that they were not members of the same State'.[66] This last formulation came the closest to precision and appeared to adopt the view that all that section 92 prevents is discrimination against interstate trade based on its being interstate. That this was not intended is made clear in two ways. The first is that earlier in the judgment the discrimination test was expressly rejected.[67] The second lies in their Lordships' handling of previous authority.

Two cases are particularly relevant, the earlier Privy Council decision in *James v. Cowan*[68] and a High Court decision, the *Peanut Board v. Rockhampton Harbour Board (Peanut Case)*,[69] in which both *James v. Cowan*[70] and *McArthur*[71] were followed. Each of them was on compulsory acquisition powers. Their relevance here is that in each of them the compulsory acquisition power was held inapplicable to interstate trade on the ground that its effect in the context was to prevent traders from selling their goods interstate if they wished to do so. Neither case was decided on the

62 (1936) 55 C.L.R. 1, 61.
63 (1936) 55 C.L.R. 1, 59.
64 (1936) 55 C.L.R. 1, 58.
65 Ibid.
66 Ibid.
67 (1936) 55 C.L.R. 1, 56.
68 (1932) 47 C.L.R. 386.
69 (1933) 48 C.L.R. 266.
70 (1932) 47 C.L.R. 386.
71 (1920) 28 C.L.R. 530.

ground that the powers were invalid because they discriminated against interstate trade by contrast with intrastate trade.[72] This reasoning was a direct application of *McArthur's Case*.[73] If in *James v. Commonwealth*[74] the discrimination test was going to be approved it would have been necessary to overrule *McArthur's Case*[75] on this point as well as the main doctrine, to explain *James v. Cowan*[76] on a discrimination ground and to overrule the *Peanut Case*.[77] Instead both the more recent decisions were approved and this part of the doctrine in *McArthur's Case* was left untouched.

The extent of the inconsistency in the law thereby perpetuated by the Privy Council is shown by their Lordships' simultaneous approval of what are known collectively as the *Transport Cases*.[78] In these cases State motor transport legislation was in question. By its terms the carriage of goods for reward or by way of trade was prohibited except under licence. The economic object was to protect the State railways from undue competition. Licences were issued at administrative discretion subject to conditions and to the payment of fees. This legislation had been repeatedly upheld on the ground that neither in object nor in effect did it discriminate against interstate transportation as such. In approving these cases in *James v. Commonwealth*[79] the Privy Council made it clear that they accepted from them the view that individual traders did not by reason of section 92 have the 'right to ignore State transport or marketing regulations, and to choose how, when and where each of them will transport and market the commodities'.[80] This passage taken in isolation is unexceptionable. Section 92 has nothing to say as to many regulations, particularly those relating to health and safety. It is nevertheless misleading because it confuses that proposition with the quite different one, the one in fact being advanced in the judgment from which the quotation was taken, that interstate traders cannot escape being regulated in the same way as anyone else by virtue of the interstate character of their trade. This second proposition is the discrimination test in different words. By their approval of the *Transport Cases*[81] their Lordships were uphold-

72 This may not have been wholly clear in *James v. Cowan* but it was certainly true of the *Peanut Case*.

73 (1920) 28 C.L.R. 530.

74 (1936) 55 C.L.R. 1.

75 (1920) 28 C.L.R. 530.

76 (1932) 47 C.L.R. 386.

77 (1933) 48 C.L.R. 266.

78 *Willard v. Rawson* (1933) 48 C.L.R. 316; *The King v. Vizzard, ex p. Hill* (1933) 50 C.L.R. 30; *O. Gilpin Ltd v. Commissioner for Road Transport* (1935) 52 C.L.R. 189; *Bessell v. Dayman* (1935) 52 C.L.R. 215; *Duncan v. Vizzard* (1935) 53 C.L.R. 493, decided before *James v. Commonwealth*. After that case there were *Riverina Transport Pty Ltd v. Victoria* (1937) 57 C.L.R. 327; *McCarter v. Brodie* (1950) 80 C.L.R. 432; and *Hughes and Vale Pty Ltd v. N.S.W. (No 1)* (1953) 87 C.L.R. 49 (reversed on appeal to P.C. (1954) 93 C.L.R. 1).

79 (1936) 55 C.L.R. 1.

80 (1936) 55 C.L.R. 1, 51, quoting from Evatt J. in *Vizzard's Case* (1933) 50 C.L.R. 30, 94.

81 *Supra*. n. 78.

ing this view of section 92 at the same time as they were rejecting it elsewhere.

Individual Right Theory Established; The Monopoly Cases

The result of this confusion of thought in *James v. Commonwealth*[82] was an increasing degree of inconsistency in the decisions of the High Court. The two main areas of litigation continued to be marketing control and transportation. Inconsistency showed itself at two levels. Within the area of marketing control there were conflicts between particular cases.[83] In due course they were resolved by the final rejection of the discrimination test. But this step only revealed with greater clarity the more fundamental inconsistency between the rule thus established and the *Transport Cases*.[84] This conflict in turn was ultimately resolved by the overruling of the *Transport Cases*.[85]

The final rejection of the discrimination test in favour of what is sometimes called the individual right theory[86] of section 92, was the result of the monopoly cases: *Australian National Airways Pty Ltd v. Commonwealth (Airlines Case)*[87] in 1946 and *Commonwealth v. Bank of N.S.W. (Bank Nationalization Case)*[88] in 1949.In the *Airlines Case*[89] the Commonwealth attempted to do two things: to set up a government airline to undertake interstate air transportation and to give this airline a monopoly. It was held that the legislation was valid in respect of the first of these aims but invalid in respect of the second. The first turned on the scope of the trade and commerce power of section 51(1). The attempt to set up a monopoly failed because it contravened section 92.

The Australian National Airlines Act 1945 (Cth) set up the Australian National Airlines Commission with power to establish, maintain and operate interstate[90] commercial airline services. The monopoly provisions were in Part 4 of the Act which consisted of Sections 46-49. The Commission was obliged in the same way as anyone else to obtain a licence if it wanted to run an air service, but by section 46 anyone else's licence to provide a service over any particular interstate route ceased to be operative as long as an adequate service was being pro-

82 (1936) 55 C.L.R. 1.

83 The most notable was between the *Peanut Case* (1933) 48 C.L.R. 266, on the one hand, and *Hartley v. Walsh* (1937) 57 C.L.R. 372, and the *Milk Board Case* (1939) 62 C.L.R. 116, on the other.

84 *Supra.* n. 78. 85 Ibid.

86 After a *dictum* by Isaacs J. in *James v. Cowan* (1930) 43 C.L.R. 386, 418, in a dissenting judgment approved by the Privy Council and described as 'convincing': (1932) 47 C.L.R. 386, 398. What Isaacs J. said was that the protection afforded by section 92 was *'a personal right attaching to the individual and not attaching to the goods'*. [Italics in original.]

87 (1945) 71 C.L.R. 28 (Latham, C.J., Rich, Starke, Dixon and Williams JJ.).

88 (1949) 79 C.L.R. 497 (P.C.).

89 (1945) 71 C.L.R. 29.

90 The Act also extended to the federal territories but section 92 problems did not arise because section 92 does not mention territories.

vided by the Commission on the same route. By section 47 the issue of a licence to anyone other than the Commission was prohibited unless the licensing authority was satisfied that such a licence was necessary to meet the needs of the public. By section 49[91] it became an offence to enter into a contract for interstate air transport with anyone not holding an operative airline licence. The effect of this scheme was to prohibit interstate air transportation by anyone other than the Commission.

The granting of a monopoly to a body under a duty, or at least a strong incentive, to provide adequate services introduced a new element into the contest between the two main competing interpretations of section 92. The individualist theory, that anyone in a position to do so had a right to engage in interstate trade unhindered by governmental restriction, unquestionably led to the invalidity of the monopoly provisions. Nothing could be a clearer restriction of freedom of trade than a prohibition of trading at all and as long as the Commission provided the services, prohibition of everyone else was the result; but the application of the discrimination test became obscured. One way in which the argument could be put was that invalidity followed here also, for the prohibition of interstate trade to anyone except the Commission introduced a discrimination between interstate trade and intrastate trade, to which no such restriction applied. An alternative way of using discrimination as a criterion was to say that there was no discrimination because the free flow of air transportation among the States was in no way affected by the Act. On this view section 46 did not contravene section 92 because it imposed no burden. It was not interstate trade which was restricted but the number of people enabled to engage in it. There is a close parallel with the argument of the *Wheat Case*[92] that compulsory acquisition did not infringe section 92 because it operated upon ownership, not trade.

The reason why the *Airlines Case*[93] marks a significant stage towards the present dominance of the individualist theory is that the High Court was unanimous in deciding that the monopoly section infringed section 92. Inevitably a decision in this sense continued the *McArthur-James v. Cowan-Peanut* line of thought in stressing the right of the individual to trade interstate. Not all of the Court saw it in that light. Latham C.J. in particular rested his decision on the ground that the Act was 'directed against'[94] interstate trade. This was a perfectly tenable position but on the facts of the case it necessarily implied that freedom of interstate trade was linked with the freedom of individuals to engage in interstate trade, for what was in question was a monopoly excluding everyone but the government. It took a

91 The intervening section 48 was immaterial to section 92.
92 (1915) 20 C.L.R. 54.
93 (1945) 71 C.L.R. 29.
94 (1945) 71 C.L.R. 29, 61.

critical step away from the position that interstate trade as such remained free if it was not subjected to adverse discrimination based on its interstate character or to any burden not equally shared by intrastate trade.

This movement of opinion received the approval of the Privy Council in the *Bank Nationalization Case*[95] in 1949. This case was concerned with the validity of the Banking Act 1947 (Cth) which in effect nationalized banking in Australia. Section 92 questions arose in connection with Part 7 of the Act, which consisted only of section 46. This section in its more material parts empowered the Treasurer by notice to prohibit any private bank from continuing in business. The Privy Council upheld the majority decision of the High Court that this power to prohibit was an infringement of freedom of interstate trade. It has been said with some force[96] that the form in which the litigation reached the Privy Council was excessively artificial because the *inter se* provisions of the Constitution[97] had the effect that the section 92 question alone could be argued. This divorced one aspect of the whole legislative scheme from the rest and required that it be treated as an isolated phenomenon without context. Moreover the Privy Council held that in this attenuated form the section 92 issue was so interwoven with *inter se* questions that they lacked jurisdiction to decide the case. The outcome has been aptly described as an 'authoritative *obiter dictum*',[98] but authoritative it is.

As in the *Airlines Case*[99] questions arose as to the scope of the trade and commerce power and whether banking fell within the meaning of trade and commerce for the purpose in hand. It was held that it did. On section 92 the Privy Council accepted the individual right theory in the clearest terms. In answer to the argument that the section did not guarantee the freedom of individuals they cited *James v. Cowan*[100] and *James v. Commonwealth*[1] as directly in point and continued:[2]

> Yet James was an individual and James vindicated his freedom in hard-won fights. Clearly there is here a misconception. It is true, as has been said more than once in the High Court,[3] that section 92 does not

95 (1949) 79 C.L.R. 497.
96 Sawer in *The British Commonwealth: Australia,* (ed. Paton), 73.
97 By section 74 of the Constitution no matter relating to the powers of the Commonwealth and the States, or of two or more States, *inter se,* can be taken on appeal to the Privy Council without the certificate of the High Court. Such a certificate is now never given. A question arising under section 92 is not such a matter.
98 Sawer in *The British Commonwealth: Australia,* (ed. Paton), 73.
99 (1945) 71 C.L.R. 29.
100 (1932) 47 C.L.R. 386.
1 (1936) 55 C.L.R. 1.
2 (1949) 79 C.L.R. 497, 635.
3 But most notably later by Dixon J. in *James v. Commonwealth* (1939) 62 C.L.R. 339, 361-2. *Infra* n. 59.

> create any new juristic rights, but it does give the citizen of State or Commonwealth, as the case may be, the right to ignore, and if necessary, to call upon the judicial power to help him to resist, legislative or executive action which offends against the section. And this is just what James successfully did.

Their Lordships went on to deal with an argument which in effect was another variation of the discrimination test. This was that section 92 invalidated legislation which reduced the total volume of interstate trade. Three objections were advanced. First, the authority of the *James Cases,* 'for there the section was infringed though it was not the passage of dried fruit in general, but the passage of the dried fruit of James from State to State that was impeded.'[4] Secondly, it was impracticable to measure the effect of interference on the total volume of interstate trade because other factors might affect it. Thirdly in section 92 the words 'trade' and 'commerce' were cut down by association with 'intercourse' because this word contemplated individual freedom to cross State borders.

Without impugning the main ground of decision, the observation may be made that this reasoning is not strong. The true answer to the argument lay not so much in the difficulties of the conception of volume of trade as in its being an attempt to characterize interstate trade as an economic phenomenon apart from the rights of individuals to engage in it. If this approach was to be rejected in the form of the discrimination test itself, there was no point in reintroducing it in another form. In any event mere volume of trade is inadequate as a criterion of interference. Interstate trade may increase in volume even though burdened or discriminated against. The argument from authority depends on a particular reading of the two main *James Cases* and thereby begs the question. The inconsistencies in the reasoning of *James v. Commonwealth*[5] in particular render it equally cogent to explain the result on the ground that the Commonwealth Act in fact discriminated against interstate trade, for it imposed quota restrictions on interstate trade alone. As to the word 'intercourse', no reason suggests itself why on a discrimination approach parallel reasoning should not apply in the same way as to trade and commerce: no greater restriction may be placed on movement among the States than on personal movement generally.

The straightforward proposition that there was no discrimination against interstate trade in the Banking Act because the power to prohibit private banking applied as much to intrastate as to interstate transactions was rejected as irrelevant.[6] This was in accord with the previous express rejection of the relevance of this form of the discrimination argument in *James v. Commonwealth.*[7] Similarly the

[4] (1949) 79 C.L.R. 497, 635.
[5] (1936) 55 C.L.R. 1.
[6] (1949) 79 C.L.R. 497, 636.
[7] (1936) 55 C.L.R. 1, 56.

proposition that the question whether section 92 had been infringed was always a question of fact was reaffirmed.[8] As to expressions in the earlier cases tending to suggest that the court was entitled to look beyond the precise terms of the Act to discover whether its 'real object' was 'directed against' or 'aimed at' interstate trade, the Privy Council held that they were not intended to take the inquiry beyond the 'necessary legal effect'[9] of the statute as revealed by what it said on its face. In the present case the necessary legal effect of section 46 of the Banking Act was to authorize the total prohibition of privately-owned interstate banking. Such a prohibition was a manifest contradiction of freedom of interstate trade in banking. The proposition that simple prohibition cannot be justified as reasonable regulation was expressly approved.[10]

Apart from the concept of regulation, the only qualification of the wide meaning assigned to section 92 was that the mere fact that legislative or executive action incidentally affected interstate trade adversely was not enough to infringe the section. With little elaboration beyond the caution that the words in themselves furnished no more than general guides, a distinction was drawn between direct and immediate impediments and indirect or consequential impediments.[11] The idea behind this distinction is best described in the context of the theory of construction of section 92 advocated throughout by Dixon J., particularly in the *Transport Cases*.[12] This follows.

The Anomaly of the Transport Cases

The result of the *Bank Nationalization Case*[13] was to leave the *Transport Cases*[14] in a category of their own. It will be recalled that the difficulty with them was that a bare prohibition of an activity had been repeatedly held to infringe section 92, yet simple prohibition subject to executive relaxation was the legislative basis on which road transport licensing rested. Distinctions could still be drawn between the *Transport Cases*[15] and the rest but none could be regarded as tenable. It could be said that road transport was not interstate trade or commerce but merely a means whereby trade and commerce was carried on. This argument characterized trade and commerce as consisting in the movement of goods and not the furnishing of the means to move them. It was scarcely possible to justify the *Transport Cases*[16]

8 (1949) 79 C.L.R. 497, 635.

9 (1949) 79 C.L.R. 497, 636-37. *Cf.* the reference to 'pith and substance' at 641-2. The reference to 'necessary legal effect' was taken from the dissenting judgment of Isaacs J. in *James v. Cowan* (1930) 43 C.L.R. 386, 409. This was the judgment described on appeal by the Privy Council as 'convincing': (1932) 47 C.L.R. 386, 398.

10 (1949) 79 C.L.R. 497, 640.

11 (1949) 79 C.L.R. 497, 639.

12 *Supra.* n. 78.

13 (1949) 79 C.L.R. 497.

14 *Supra.* n. 78.

15 Ibid.

16 Ibid.

on this ground after the *Airlines Case*[17] and the *Bank Nationalization Case*.[18] In each a similar argument had been advanced and rejected. Both air transportation and banking were said to be incidents of, facilities for, trade and commerce and not trade or commerce itself. It is implicit in the results of those cases, quite apart from express rejection, that this argument was wrong.

Alternatively, it might be said that the road transport legislation kept within the limits of permissible regulation because its object and effect was not to impair the freedom of interstate trade as an end in itself but to order the state of competition between road and rail transportation in general in the economic interests of the community. In the state of authority by 1949 this argument ran into several difficulties. Initially it failed to meet the repeated express holdings that prohibition was not regulation. Secondly, the fact that interstate road transportation was not singled out for particular treatment was not relevant. Thirdly, the object and effect of the legislation were not relevant in any sense beyond the legal effect of its precise terms, which led straight back to prohibition. The only distinction to be drawn between the *Transport Cases*[19] and the *Airlines*[20] and *Bank Nationalization Cases*[21] lay in the element of total elimination of private competition, which did not go to the basic principles of interpretation which had been developed.

Since the *Transport Cases*[22] were overruled in *Hughes and Vale Pty Ltd v. New South Wales (No 1)*[23] in 1954, these considerations would have no more than historical interest were it not that they provided for some years the context in which Dixon J., in dissent, developed the views as to the proper construction of section 92 which have since come to be generally accepted. His Honour's starting point was that so far as possible the application of the section to particular facts must be deduced from the exact terms of the section itself. His general view has never been better expressed than in the following passage, which has been influential.[24]

> Any act or transaction for which protection is claimed under section 92 must be a part of trade, commerce or intercourse among the States, that is to say, it must be something done as preparatory to, or in the course of, or as a result of, inter-State movement of persons and things or inter-State communication. There can be no doubt that the use of motor vehicles for the carriage of goods from one State to another for the purpose of sale fulfils this requirement. But it does not follow from the possession of this character that the act of transportation is entirely free from Government control. The question whether section 92 applies

17 (1945) 71 C.L.R. 29.
18 (1949) 79 C.L.R. 497.
19 *Supra*. n. 78.
20 (1945) 71 C.L.R. 29.
21 (1949) 79 C.L.R. 497.
22 *Supra*. n. 78.
23 (1954) 93 C.L.R. 1.
24 *O. Gilpin Ltd v. Commissioner for Road Transport* (1935) 52 C.L.R. 189, 204-6.

to a given case involves one or more of several considerations which are susceptible of separate examination. First, the nature and operation of the interference or of the exertion of power complained of, must be considered in order to determine whether it amounts to a restriction of or a burden upon the acts of transactions for which immunity is claimed as part of inter-State trade, commerce and intercourse. Second, the nature of the acts or transactions found to be restricted or burdened must be examined in order to ascertain whether they are part of inter-State trade, commerce, or intercourse. Third, the nature and incidence of the restriction or burden must be examined in order to determine whether it belongs to that class freedom from which is secured by section 92. For acts or transactions which in fact occur in the course of inter-State trade may be restrained or burdened in consequence of the intervention by the State in the affairs of the citizen for causes which have no relation or relevance to trade, commerce and intercourse among the States. The expression 'trade, commerce, and intercourse among the States' describes a section of social activity by reference to special characteristics. The freedom it gives plainly relates to those characteristics. It is only where they are present that the activity is to be absolutely free. It appears to me to be natural to understand a freedom that is so given as referring to restrictions or burdens imposed in virtue of those characteristics upon the presence of which the grant of immunity is based. It is, perhaps, upon some such reasoning that the interpretation of section 92 proceeds which confines it to discriminatory laws, that is to forbidding discrimination against inter-State transactions in favour of domestic trade. But that interpretation overlooks the fact that a restriction conditioned on any one of the characteristics which are connoted by the description 'trade commerce and intercourse among the States' discriminates against such transactions in favour of transactions from which that characteristic is absent. There is no reason why the freedom should be limited to restrictions based upon the inter-State character of the activity so described. Its character of trade or intercourse is just as essential to the description. 'Free' must at least mean free of a restriction or burden placed upon an act because it is commerce, or trade, or intercourse, or because it involves movement into or out of the State. By this I mean that the application of the restriction or burden to the act cannot be made the consequence of that act's being of a commercial or trading character, or of its involving intercourse between two places, or of its involving movement of persons or things into or out of the State.

Very many of the difficulties which have been felt as to a logical application of the words 'absolutely free' to inter-State trade, commerce and intercourse, disappear, I think, if it is recognized that it is a freedom from restrictions or burdens which have reference to one or other of the distinguishing features which form the basis of the immunity. Thus a deserting husband might be arrested under a law of a State notwithstanding that his destination lay over the border. But if the State law made his liability to arrest depend not on the fact of desertion but upon his attempting to leave the State, I should think that section 92 would invalidate it. In the first case, his inter-State journey might be interrupted but only as a consequence produced by a law which had no reference to any aspect of trade, commerce and intercourse among the States. In the other case, the State boundary

is adopted by the law as the limit of the deserting husband's movement; the inter-State character of his flight is made the reason for his detention.

A law of a State forbidding the mixing of straw chaff with hay chaff would be perfectly good even if such a mixture were desired or required for an inter-State commercial dealing; but, if the law simply penalized the sale of such a mixture, it could not extend to sales made for delivery across the inter-State boundary. The first law applies independently of any quality which goes to constitute inter-State trade, the second depends for its application upon an essential ingredient of commerce, sale.

Under a State Income Tax Act taxation clearly might be levied on income derived exclusively from a business of inter-State carrying, because the criterion of the liability does not relate to any of the ingredients of inter-State commerce. But a tax on consignment notes might well be considered incapable of application to contracts of inter-State carriage, on the ground that it made commercial transportation between two places the ground of liability.

Further, it is not every regulation of commerce or of movement that involves a restriction or burden constituting an impairment of freedom. Traffic regulations affecting the lighting and speed of vehicles, tolls for the use of a bridge, prohibition of fraudulent descriptions upon goods, and provisions for the safe carriage of dangerous things, supply examples.

But, given an act or transaction which falls within the conception of trade, commerce, or intercourse among the States and a restriction or burden operating upon that act or transaction, it appears to me that it must be an infringement upon the absolute freedom guaranteed by section 92 unless the restriction or burden is imposed in virtue of or in reference to none of the essential qualities which are connoted by the description 'trade, commerce, and intercourse among the States'.

It will be seen from the examples given that on this view the question whether section 92 has been infringed depends not on the substance of what the legislature wishes to achieve but on the form of the legislation. This, it is submitted, is the idea behind the vague distinction between direct and indirect or consequential burdens on interstate trade. A direct burden is one the criterion for operation of which is some act of trade or commerce. An indirect burden is one which does not as a matter of law operate by reference to a criterion which is itself an act of trade or commerce, although in practice it may entail a marked interference with trade or commerce. It would be superfluous to invent further examples, but it may be noted that this approach has been criticised.

One criticism has been that the appearance of logical inference is illusory and 'can only result in politico-economic conceptions being brought into the meaning of the section either unconsciously or without adequate attention to their origin and nature'.[25] Another has been that the result of its application is not 'one which the framers of

[25] Sawer, *Australian Constitutional Cases*, (3rd ed.), 274.

section 92 either intended or foresaw'.[26] As to the second of these criticisms the observation may perhaps be permitted that although it is no doubt well-founded its relevance is by no means confined to section 92. There are many sections of the Constitution of which the same might be said, conspicuously section 96[27] and the provisions for an interstate commerce commission.[28] As to the first, the best answer may be that although the Dixonian approach may have the incidental effect of tying the Constitution to a particular mode of economic thought, its main purpose and virtue is to achieve consistency in the law without over-simplification. If the criticism is that the High Court should relax its traditional reluctance to decide constitutional issues by reference to other than strictly legal criteria, then again it goes further than section 92. It must, however, be conceded that in the present situation section 92 is little, if anything, more than an impediment to the effective ordering of the economy on a nationwide basis. This result approaches the antithesis of what the section was originally intended to do.

Transport Cases Overruled: Uniform Rule Established

In this account of the development of the main line of interpretation of section 92 it remains only to record the bringing into line in *Hughes and Vale Pty Ltd v. New South Wales (No 1)*[29] in 1954 of the law relating to road transport legislation. The legislation under attack was the State Transport (Co-ordination) Act 1931–1951 (N.S.W.) which had been upheld in its application to interstate trade twenty-one years before in *Vizzard's Case*.[30] Its basic relevant characteristic was that it prohibited commercial road transport except under licence. There was an executive discretion to issue licences. Fees were payable for them and conditions could be imposed. In the High Court the legislation was again sustained, by a majority of four to three.[31] The Privy Council reversed this decision in an opinion

26 *Hughes and Vale Pty Ltd v. N.S.W. (No 2)* (1955) 93 C.L.R. 127, 183, *per* McTiernan J.

27 'During a period of ten years after the establishment of the Commonwealth and thereafter until the Parliament otherwise provides, the Parliament may grant financial assistance to any State on such terms and conditions as the Parliament thinks fit.' On the scope given to the section by judicial interpretation see *Victoria v. Commonwealth (Second Uniform Tax Case)* (1957) 99 C.L.R. 575, 603-11.

28 Sections 101-104. On the fate of this proposal *vide* Sawer, *Australian Federal Politics and Law 1901-1929*, 92, 152-3, 204.

29 (1954) 93 C.L.R. 1.

30 (1933) 50 C.L.R. 30.

31 (1935) 87 C.L.R. 49. The dissenters were Fullagar, Kitto and Taylor JJ. It is particularly interesting that Dixon C.J., whose view of section 92 was close to that of the dissenters, should on this occasion have chosen to form a majority with McTiernan, Williams and Webb JJ. to uphold the legislation, notwithstanding his earlier reversion to dissent from the established view in *McCarter v. Brodie* (1950) 80 C.L.R. 432, where he voted with Fullagar J. It was no doubt his vote, in effect a casting vote, in *Hughes and Vale (No 1)* which rendered the appeal to the Privy Council inevitable and thereby led to the rationalization of the law.

notable for the unusually large number of quotations from High Court judgments. This course was taken for two reasons.[32] First the Privy Council did not think it could improve on the High Court's own language. Secondly, the question under consideration had been the subject of acute disagreement in the High Court and their Lordships wished to leave no doubt with whom they agreed. The opinion traversed the history of the *Transport Cases*[33] and parallel developments in the interpretation of section 92 to reach the logical conclusion. In doing so it reaffirmed the several propositions of law with which the *Transport Cases*[34] were inconsistent, particularly approving passages from the dissenting judgments of Dixon and Fullagar JJ. in 1950 in *McCarter v. Brodie*,[35] the last of the *Transport Cases*[36] before *Hughes and Vale (No 1)*[37] itself, and from the judgment of Dixon C.J. in the Court below.

In *McCarter v. Brodie*[38] Dixon J. dealt with six propositions which he regarded as essential to the reasoning of the *Transport Cases*.[39] Three of them he expressed negatively, regarding them as wrong since the *Bank Nationalization Case*.[40] They were: 'that sec. 92 of the Constitution does not guarantee the freedom of individuals'; 'that if the same volume of trade flowed from State to State before as after the interference with the individual trader . . . then the freedom of trade among the States remained unimpaired'; and that a burden on interstate trade escapes section 92 if it is equally a burden on intrastate trade. Two others he regarded as positively established by the *Bank Nationalization Case*.[41] They were 'that the object or purpose of an Act challenged as contrary to section 92 is to be ascertained from what is enacted and consists in the necessary legal effect of the law itself and not in its ulterior effect socially or economically'; and 'that the question what is the pith and substance of the impugned law, though possibly of help in considering whether it is nothing but a regulation of a class of transactions forming part of trade and commerce, is beside the point when the law amounts to a prohibition or the question of regulation cannot fairly arise'. The sixth proposition his Honour regarded as established by the *Airlines Case*.[42] It was that whereas the tendency of the *Transport Cases*[43] had been 'to thrust the carriage of goods and persons towards the circumference of the conception of commerce', the *Airlines Case*[44] had 'shown that it must lie at or near the centre'.

The unqualified approval given to these observations by the Privy

32 (1954) 93 C.L.R. 1, 33-4.
33 *Supra*. n. 78.
34 Ibid.
35 (1950) 80 C.L.R. 432.
36 *Supra*. n. 78.
37 (1954) 93 C.L.R. 1.
38 (1950) 80 C.L.R. 432, 465-6.
39 *Supra*. n. 78.
40 (1949) 79 C.L.R. 497.
41 Ibid.
42 (1945) 71 C.L.R. 29.
43 *Supra*. n. 78.
44 (1945) 71 C.L.R. 29.

Council in *Hughes and Vale (No 1)*[45] left as the only remaining ground on which the transport legislation might be sustained the argument that it was merely regulatory in character. If it was, the *Bank Nationalization Case*[46] established its validity. In answer to this their Lordships turned to the judgments of Fullagar J. in *McCarter v. Brodie*[47] and of Dixon C.J. in the case before them.[48] The discussion in those judgments of the meaning of regulation in the general context of section 92 goes beyond the scope of this article. Here it is sufficient to say that no difficulty presented itself on the legislation before the Privy Council in this case. Fullagar J. had said in the earlier case:[49] 'As to what is not regulatory in the relevant sense, one thing at least is clear. Prohibition is not regulation.'[50] And a little later:[51] 'It is quite impossible, in my opinion, to distinguish the present case from the case of a simple prohibition. If I cannot lawfully prohibit altogether, I cannot lawfully prohibit subject to an absolute discretion on my part to exempt from the prohibition. The reservation of the discretion to exempt by the grant of a licence does not alter the true character of what I am doing.'

In *Hughes and Vale (No 1)* itself Dixon C.J. had said:[52]

> [T]o my mind the distinction appears both clear and wide between, on the one hand, such levies and such provisions prohibiting transportation without licence as [the ones before the Court] and on the other hand the regulation and registration of motor traffic using the roads and the imposition of registration fees. In the same way the distinction is wide between such provisions and the use of a system of licensing to ensure that motor vehicles used for the conveyance of passengers or goods for reward conform with specified conditions affecting the safety and efficiency of the service offered and do not injure the highways by excessive weight or immoderate use or interfere with the use of the highways by other traffic. The validity of such laws must depend upon the question whether they impose a real burden or restriction upon inter-State traffic.

The similarly unqualified approval given by the Privy Council to these passages[53] completed the process of reaffirming the general principles of interpretation laid down in the *Bank Nationalization Case*[54] and the *Airlines Case*[55] and making it clear that they applied to road transport legislation as much as to any other.

45 (1954) 93 C.L.R. 1, 23.
46 (1949) 79 C.L.R. 497.
47 (1950) 80 C.L.R. 432, 483.
48 (1953) 87 C.L.R. 49, 62.
49 (1950) 80 C.L.R. 432, 498.
50 The *locus classicus* of a bare prohibition is *Tasmania v. Victoria* (1935) 52 C.L.R. 157. Victoria prohibited completely the importation of Tasmanian potatoes on the basis of an executive opinion that they were 'likely' to introduce disease. Held, invalid. A complete prohibition was not a reasonable regulation of the potato trade to keep out disease. *Ex p. Nelson (No 1)* (1928) 42 C.L.R. 209, which went the other way with an equally divided court, can no longer stand in view of later developments.
51 Ibid.
52 (1953) 87 C.L.R. 49, 68-69.
53 (1954) 93 C.L.R. 1, 32.
54 (1949) 79 C.L.R. 497.
55 (1945) 71 C.L.R. 29.

Executive Action

It is settled that section 92 applies as much to executive as to legislative interference with freedom of interstate trade.[56] The effect of this is that a statute which does not contravene section 92 cannot authorize executive action which does. The action taken is therefore without lawful justification under statute. Whether it gives rise to a liability in damages depends on the ordinary rules of private law.[57] A related rule is that a statute which authorizes action contravening section 92 is not saved from invalidity by proof that it is in fact administered in a manner which does not contravene section 92.[58]

Private Right of Action

In the third of the cases which the fruit grower James brought against the Commonwealth, *James v. Commonwealth*[59] in 1939, tried before Dixon J., he claimed damages for conversion of five consignments of dried fruits and for general loss of business. The basis of his action was that the legislation relied on as justifying the interferences with his business had proved to be invalid. He recovered damages for four consignments of dried fruits only. The interest of the case so far as constitutional law is concerned is that part of the plaintiff's argument was that he was entitled to recover damages for breach of section 92. He had previously advanced this argument unsuccessfully before the full High Court in *James v. South Australia*[60] in 1927. The reason for attempting to rely on it again now was that in *James v. Cowan*[61] the Privy Council had made an observation which might be understood as having removed the basis for the earlier decision of the High Court on this point.[62]

Dixon J. held that nothing in *James v. Cowan*[63] affected this part of the decision in *James v. South Australia*[64] and that section 92 confers no private right of action. He said:[65]

56 *James v. Cowan* (1932) 47 C.L.R. 386, 396; *Commonwealth v. Bank of N.S.W.* (1949) 79 C.L.R. 497, 635; *Wilcox, Mofflin Ltd v. N.S.W.* (1952) 85 C.L.R. 488, 522; *Kerr v. Pelly* (1957) 97 C.L.R. 310.

57 See next section of text.

58 *Collier Garland Ltd v. Hotchkiss* (1957) 97 C.L.R. 475.

59 (1939) 62 C.L.R. 339.

60 (1927) 40 C.L.R. 1.

61 (1932) 47 C.L.R. 386.

62 The Privy Council, at 47 C.L.R. 396, had remarked that the 'Constitution is not to be mocked by substituting executive for legislative interference with freedom'. The meaning of this observation was that section 92 applies to executive as much as to legislative action. The argument being put to Dixon J. was that it meant that the earlier holding in the High Court in *James v. South Australia* (1927) 40 C.L.R. 1, that section 92 did not confer private rights of action because it was an inhibition addressed to parliaments, had been disapproved by the Privy Council. The Privy Council of course intended not to overrule the High Court's decision on this point but to expand it.

63 (1932) 47 C.L.R. 386.

64 (1927) 40 C.L.R. 1.

65 (1939) 62 C.L.R. 339, 362.

> There is, in my opinion, no sufficient reason to regard section 92 as including among its purposes the creation of private rights sounding in damages. It gives to all an immunity from the exercise of governmental power. But to find whether a government act be wrongful the general law must be applied. Section 92 will do no more than nullify an alleged justification. The plaintiff cannot, therefore, recover damages under section 92 independently of any tort by the Commonwealth.

The law may be regarded as settled in the sense that 'section 92 does create any new juristic rights'[66] by way of private entitlement to damages, but this rule cuts both ways. If section 92 does not create any new liability to damages, neither does it allow the extinction of existing liability. This was decided in *Commissioner for Motor Transport v. Antill Ranger & Co. Pty Ltd*,[67] in 1956. In consequence of *Hughes and Vale (No 1)*[68] State governments became liable to repay licence fees exacted under legislation now decided to be invalid. New South Wales enacted further legislation to extinguish this liability. It was held both in the High Court and in the Privy Council that this legislation also infringed section 92.

The difficulty, such as it was, lay in the argument that the Act did not of itself operate on or burden interstate trade or commerce. The answer[69] was that to put the argument this way obscured the issue. The protection given by section 92 would be illusory if the executive could act in contravention of the section and then have its action ratified by the legislature. It was necessarily[70]

> implicit in the declaration of freedom of inter-State trade that the protection shall endure, that is to say, that if a governmental interference could not possess the justification of the anterior authority of the law because it invaded the freedom guaranteed, then it could not, as such, be given a complete *ex post facto* justification. By the words 'as such' is meant that it cannot be given a justification *ex post facto* in virtue or by reason of its very nature as an interference with the freedom of inter-State trade.[71]

Perhaps because of indications in the judgments in that case that one fault with the legislation was that it was not merely 'an attempt to clear up a difficult administrative situation' with justice,[72] but applied with out distinction to all classes of liability which might arise, New South Wales passed further legislation designed to achieve sub-

66 *Bank Nationalization Case* (1949) 79 C.L.R. 437, 635.

67 (1955) 93 C.L.R. 83 (H.C.); (1956) 94 C.L.R. 177 (P.C.). In the High Court Dixon C.J., McTiernan, Williams, Webb, Fullagar, Kitto and Taylor JJ.

68 (1954) 93 C.L.R. 1.

69 See on this particularly the majority judgment in the High Court at 93 C.L.R. 101.

70 (1955) 93 C.L.R. 83, 101. The judgment does not say 'necessarily' but 'it seems', but the quotation in the text states a proposition which appears to be necessarily implied by the decision itself.

71 (1955) 93 C.L.R. 83, 101-102.

72 (1955) 93 C.L.R. 83, 101.

stantially the same effect by means of a limitation period. This was held similarly invalid in *Barton v. Commissioner for Motor Transport*[73] in 1957. The limitation period imposed was twelve months.[74] In the view of the majority there was no distinction in relation to the claims extinguished between total extinction and partial extinction by means of a limitation period. The dissenters[75] took the ground that there was a difference in kind between extinction and limitation, at all events if the limitation period was reasonable.

Hypothetical Cases

It should be mentioned finally that the Court will not decide a hypothetical section 92 question, that is to say, a question relating to the validity of a statute under section 92 which does not arise on the evidence.[76] This rule is merely a particular application of the general rule in common law countries that the courts will not decide hypothetical cases. Another manifestation of the same principle in Australian constitutional law is that it is no part of the federal judicial power to give advisory opinions on the validity of a statute or a proposed statute before an actual case arises under it.[77]

The requirement in a section 92 case that the facts include an interstate element is not to be confused with the question whether the parties engage in interstate trade. Dixon C.J. has observed[78] that the practice of interstate trade does not of itself give a person standing to sue. The question is whether the legislative power under consideration extends to certain transactions. If the parties cannot prove any relevant transactions it is nothing to the point that in other respects they engage in interstate trade.

Conclusion

It seems clearest to attempt a summary of the result in the form of separate propositions.

1. Section 92 binds both the Commonwealth and the States.

2. The freedom section 92 guarantees is from governmental restriction of any kind, whether legislative or executive in character. It is not limited to freedom from fiscal impositions alone.

[73] (1957) 97 C.L.R. 633 (Dixon C.J., McTiernan, Webb, Fullagar, Kitto and Taylor JJ.).

[74] Which in practice was reduced to eleven months because one month's notice of action had to be given.

[75] Fullagar and Taylor JJ. The headnote at 97 C.L.R. 634 is wrong in saying that the dissenters expressed no opinion on this point. Fullagar J. clearly expressed his dissent from the majority at 97 C.L.R. 659-60 and Taylor J. at 97 C.L.R. 666 concurred in the judgment of Fullagar J.

[76] *Crothers v. Sheil* (1933) 49 C.L.R. 399; *The King v. Connare, ex p. Wawn* (1939) 61 C.L.R. 596; *The King v. Martin, ex p. Wawn* (1939) 62 C.L.R. 457; *Graham v. Paterson* (1950) 81 C.L.R. 1.

[77] *In re Judiciary and Navigation Acts (Advisory Opinions Case)* (1921) 29 C.L.R. 257.

[78] *Redfern v. Dunlop Rubber Australia Ltd* (1964) 110 C.L.R. 194, 207.

3. The freedom section 92 guarantees is freedom of the individual to engage in interstate trade or commerce.

4. The freedom section 92 guarantees is not limited to literally crossing, or bringing goods across, a State border.

5. Whether an admitted burden is an infringement of the freedom of an activity admitted to be interstate trade or commerce depends on whether the criterion for bringing the burden into operation is itself an act of trade or commerce. If the operative criterion is of that character, there is an infringement of section 92. If it is not, there is no infringement, whatever the incidental economic effects on interstate trade or commerce.

6. Whether the freedom guaranteed by section 92 has been impaired is a question of fact.

7. The freedom section 92 guarantees is not inconsistent with reasonable regulation of interstate trade and commerce.

8. Prohibition of an activity, whether total or subject to executive discretion, is not regulation and is inconsistent with freedom to engage in that activity.

9. The object, purpose, substance or effect of legislation is immaterial to the extent that it is distinguishable from the legal effect of the actual terms of the legislation.

10. It is immaterial that legislation applies impartially to both intrastate and interstate trade or commerce.

11. The volume of interstate trade after the interference complained of, as compared with the volume before, is immaterial.

12. In applying section 92 no distinction is to be drawn between different kinds of interstate trade or commerce.

13. Section 92 confers no private right of action but protects rights of action arising from invalidity brought about by section 92 itself.

14. The court will not determine the validity of legislation in relation to section 92 unless a relevant interstate element arises on the evidence.