INCHOATE RIGHTS TO INTERSTATE COMMUNICATIONS UNDER SECTION 92

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[*The analysis of s. 92 of the Constitution by the High Court has been marred by an inconsistency of approach which makes it difficult to understand why some of the rights it encompasses exist in real, practical terms while others, which are prima facie equally theoretically valid, remain inchoate and practically unenforceable. Mr B. O'Brien focusses his attention on the particular right to make interstate communications and shows that a restrictive approach akin to that taken by the High Court in marketing cases has been applied to those communications rights, when the Court might equally well have followed its more lenient approach to transport rights. The author argues that the answer to the analytical inconsistencies in the approach actually adopted lies in various 'inarticulated policy considerations' which the High Court has imported to its approach. Lacking a Bill of Rights per se, Australians must look to judicial interpretation of s. 92 as the source of many of our basic civil rights; rights which, as this article shows, can be so easily thwarted.*]

To some of the critics of s. 92 this constitutional mandate is dismissed as a 'capitalist charter'. The use of this provision to invalidate a key section in the Bank Nationalization legislation of the late forties provides, in the minds of some, proof that behind the high technique of constitutional interpretation lurks a more basic desire to defend the institutions of capitalism against socialist legislation. The image of judicial impartiality and disinterestedness is difficult to sustain when the High Court pronounces a legislatively created state-run monopoly in interstate air transport unconstitutional, and then subsequently upholds the validity of a legislatively maintained duopoly, incorporating private enterprise, in the same industry.[1] This inconsistency in the Court's approach to s. 92 is illustrated by contrasting the 'margarine' cases with the 'transport' cases. Thus not only is the sovereign legislative authority of Australian government seriously eroded by the width of the operation of s. 92, but the ambit and area of application

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[1] See *Australian National Airways Pty Ltd v. Commonwealth* (1945) 71 C.L.R. 29 compared with *R. v. Anderson; Ex parte Ipec-Air Pty Ltd* (1965) 113 C.L.R. 177 and *Ansett Transport Industries Pty Ltd v. Commonwealth* (1978) 52 A.L.J.R. 254. The distinction in these authorities supposedly rests on the constitutional ability of the Commonwealth to arbitrarily withhold the granting of import permits to import aircraft. The constitutional validity of refusing to grant such permits is apparently not affected by the fact that the obvious purpose in refusing the permits is to discriminate against interstate trade by preventing other airlines from engaging in a form of interstate trade. In *James v. Cowan* (1932) 47 C.L.R. 386 it was held by the Privy Council that if an executive power is used 'to place restrictions on inter-State commerce' the exercise of that executive power is unconstitutional. 'The Constitution is not to be mocked by substituting executive for legislative interference with freedom' (47 C.L.R. 386, 396). See also *Wragg v. New South Wales* (1953) 88 C.L.R. 353, 387, 388, 389, *per* Dixon C.J. and Taylor J. A contrary view was recently expressed in *Ansett Transport Industries Pty Ltd v. Commonwealth* (1978) 52 A.L.J.R. 254, 265 *per* Mason J.

of this lacuna in legislative power is seemingly determined on an *ad hoc* basis. Whilst there is an abundance of precedents on, and a rich analysis of s. 92, they both fail to provide an *a priori* set of principles capable of predicting, with much accuracy, the manner in which the provision will apply in any new fact situation. When it comes to s. 92 the constraints imposed on the exercise of judicial power by the intellectual discipline of the law are not immediately obvious.

It would be wrong to suggest that the High Court has failed to develop a logical and comprehensive set of principles which both substantially explain and potentially control the application of s. 92. The frustration which one feels in studying s. 92 cases is the difficulty encountered in discovering a consistent application of those principles. Hence one is at times forced to conclude that there exists a wide divergence between the theory and operation of s. 92. The study of this constitutional provision, requires distinguishing between those inchoate rights which theoretically exist, but which in practice are rarely if ever enforced, and those real rights which are not only established in principle, but which are enforced in practice. The right of margarine manufacturers to distribute their product interstate or the right of Ipec to engage in interstate air transport are examples of inchoate rights. In recognizing the existence of these inchoate rights one is asserting that the reasoning of the High Court, in some s. 92 cases, is quite spurious.

This article is concerned with what has proved to date to be an inchoate right and in all probability will continue to be so. The right is to make interstate communications, the status of which, as an inchoate right, is not surprising given its breadth. The existence of this right has been based on the meaning of the words 'intercourse' and 'commerce' as they appear in s. 92. As this article will be concerned for the most part with those non-economic rights to make interstate communications, emphasis will be placed on the definition of 'intercourse'.

As the reader will discover, the right to make interstate communications very clearly forms part of that bundle of rights which s. 92 protects. Whilst the authorities may be clear on this point, the extent to which this theoretical right will be practically enforced is in reality a more important and a much more difficult question to answer. The Court has developed a very clear distinction in its approach to the marketing cases compared with the transport cases. The narrow and restrictive attitude of the Court to marketing contrasts sharply with its liberal approach to transport. The handful of cases which deal with communications indicates that the Court is unwilling to develop the logical analogy which exists between communications and transport. The narrow, and at times, unjustified restraints which the Court imposes on the enjoyment of rights to marketing under s. 92 is reflected in its approach to the cases on communications. The author will attempt to show that many of the fine distinctions which have been developed in this

area cannot be supported analytically, and in fact reveal the desire of the Court to qualify the operation of s. 92 by reference to inarticulated policy considerations. Finally, it is suggested that with respect to the enforcement of rights to interstate communications, it would be preferable for the Court to openly qualify the enjoyment of such rights by an expansion of the reasonable regulation doctrine. The use of this doctrine will provide a perfect context in which the Court can explore the extent to which those absolute rights granted by the Constitution must give way to the requirements of modern government and the collective needs of society.

The Right to Communicate Interstate

The first occasion which the High Court was given to consider the meaning of 'intercourse' under s. 92 was in *R. v. Smithers; Ex parte Benson.*[2] That case concerned the Influx of Criminals Prevention Act 1903 (N.S.W.), s. 3 of which provided that it was an offence for any person, not being a resident of N.S.W., to enter N.S.W. within three years following the termination of a period of imprisonment of a year or longer for a crime committed in another State. Benson, a resident of Victoria, had been found guilty in Victoria of having insufficient lawful means of support and was sentenced to twelve months imprisonment. Shortly after his release he moved to Sydney whereupon he was charged and convicted under s. 3 of the Influx of Criminals Prevention Act. Benson sought and obtained an order nisi for a writ of certiorari to have the matter removed into the High Court. Before the Court he argued that s. 3 was invalid in that it infringed both ss. 92 and 117 of the Constitution.

None of the four judges[3] hearing the case decided, or even commented at length, on the point based on s. 117. Griffith C.J. and Barton J. based their decision that s. 3 was invalid on broad implications drawn from the fact of federation. In both instances their Honours relied heavily on a passage taken from the judgment of Miller J. of the U.S. Supreme Court in *Crandall v. State of Nevada.*[4]

Having referred to this case his Honour, Barton J., went on to say:

> The whole of that memorable judgment is instructive upon the rights of the citizens of a federation. The reasoning shows that the creation of a federal union with one government and one legislature in respect of national affairs assures to every free citizen *the right of access to the institutions, and of due participation* in the activities of the nation. In my opinion the reasons for the decision are conclusive as to all parts of Australia. . . . It is probable that the right of the citizen, so far as it may be described by the word 'intercourse' is not carried much further by sec. 92 of the Australian Constitution than the fact of union necessarily carried it. . . .[5]

Both conceded that this right of access and participation could be

[2] (1912) 16 C.L.R. 99.
[3] The bench consisted of Griffith C.J., Barton, Isaacs and Higgins JJ.
[4] (1867) 6 Wall 35.
[5] 16 C.L.R. 99, 109-110 (emphasis added).

qualified by State law to the extent to which it was necessary to protect the general welfare and legitimate interests of the State.[6]

The remaining two judges, their Honours Isaacs and Higgins JJ., also held that s. 3 was invalid, relying solely on the language of s. 92. Isaacs J., when determining the meaning of 'intercourse', firstly rejected the contention that the term was merely confined to commercial transactions of an interstate nature.[7] He then went on to say:

> Once admit that the word includes a personal right in an Australian as such, and independent of any commercial attributes he may possess to pass over this continent irrespective of any State border as a reason in itself for interference, then I turn in vain to the Constitution, to find any limitation whatever in the word.[8]

Similarly Higgins J. tended to treat the meaning of 'intercourse' as confined to the interstate movement of persons and things.

> No due effect can be given to the word 'intercourse' unless it be treated as including all migration or movement of persons from one State to another. . . .[9]

However, it should be observed that whilst neither of the judgments of Isaacs or Higgins JJ. suggest that 'intercourse' carries the broader meaning, including the right of interstate communication, their judgments nevertheless avoid definitely confining its meaning to interstate movement.

The drawing of broad implications from the mere existence of a federal union received a lethal blow in the *Engineer's* case.[10] The reasoning underlying the judgments of Griffith C.J. and Barton J. is therefore suspect. However, at the same time, one should be cautioned against dismissing them out of hand. Those principles, based on implications drawn from the Federal Constitution, may nevertheless find adequate expression in the text of the Constitution itself, and in particular in s. 92. Such implications are certainly not out of place when construing a provision as fundamental and as vague as s. 92. Its basic importance in building a nation out of a federation of six colonies has been emphasized more than once by Windeyer J.[11] Its role in establishing a national economy is obvious. The inclusion of the word 'intercourse' gives s. 92 an additional role in contributing to the establishment of a national community. It performs this role, as Barton J. indicated, by conferring on Australians rights 'of access to the institutions, and due participation in the activities of the nation'. The right to participate in the activities of the nation would carry with it the right to make interstate communications as between the citizens of the nation.

The approach taken by Barton J. in *Smithers* was followed, and at the

[6] 16 C.L.R. 99, 109, 110, 111.
[7] 16 C.L.R. 99, 113.
[8] 16 C.L.R. 99, 113-114.
[9] 16 C.L.R. 99, 118.
[10] *Amalgamated Society of Engineers v. Adelaide Steamship Co. Ltd* (1920) 28 C.L.R. 129.
[11] See *S.O.S. (Mowbray) Pty Ltd v. Mead* (1972) 124 C.L.R. 529, 575. *Deacon v. Mitchell* (1965) 112 C.L.R. 353, 371-372.

same time developed, by Murphy J. in *Ansett Transport Industries Pty Ltd v. Commonwealth*. In that case his Honour stated:

> This does not mean that there is no guarantee of freedom of intercourse in the Constitution. Perhaps I should explain this briefly, even though it is not necessary for this case. In my opinion the concept of the Commonwealth and the freedom required for the proper operation of the legislative executive and judicial branches in the democratic society contemplated by the Constitution necessitate the implication of such a guarantee (see *Crandall v. State of Nevada* (1867) 6 Wall 35; *Slaughter-House Cases* (1872) 16 Wall 36; *R. v. Smithers; Ex parte Benson* (1912) 16 C.L.R. 99; *Buck v. Bavone*, at p. 658).
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> Elections of Federal Parliament provided for in the Constitution require freedom of movement, speech and other communication, not only between the States, but in and between every part of the Commonwealth.[12]

More recently, in *McGraw-Hinds (Aust.) Pty Ltd v. Smith*[13] his Honour held that the last limb of s. 8(3) of the Unordered Goods and Services Act 1973 (Qld) was contrary to the freedom of communication which is implicitly protected under the Constitution. The last limb of s. 8(3) forbade the sending of a document which informed the recipient of the cost of making an entry in a directory.

The effective development of a constitutional right to interstate communications can be traced to the judgment of Dixon J. in the *Bank Nationalization* case.[14] In that case the Court was required to determine whether the business of banking came within the expression 'trade, commerce and intercourse'. It was argued by the Commonwealth that that expression was confined to the movement of tangible objects and since banking essentially involved transactions in intangibles it necessarily fell outside the protection of s. 92. In a lengthy passage Dixon J. roundly rejected such a narrow construction.

> I cannot think that the essential content of the expression 'trade, commerce and intercourse' in s. 92 is any less than is included in the conception of commerce in the modern American view of the commerce power. . . . It covers intangibles as well as the movement of goods and persons. The supply of gas and the transmission of electric current may be considered only an obvious extension of the movement of physical goods. But it covers communication. The telegraph, the telephone, the wireless may be the means employed. It includes broadcasting and, no doubt, it will take in television. In principle there is no reason to exclude visual signals. The conception covers, in the United States, the business of press agencies and the transmission of all intelligence, whether for gain or not. Transportation, traffic, movement, transfer, interchange, communication, are words which perhaps together embrace an idea which is dominant in the conception of what the commerce clause requires.[15]

A little further on he stated:

> The words 'trade, commerce and intercourse' are not naturally susceptible of such a reactionary interpretation. The very manner in which they are combined would carry, even to a mind unfamiliar with their background, an intention to include all forms and variety of inter-State transaction whether by way of commercial dealing or of personal converse or passage.[16]

The case went on to appeal to the Privy Council[17] and, naturally enough,

[12] (1978) 52 A.L.J.R. 254, 267.
[13] (1979) 24 A.L.R. 175, 200.
[14] *Bank of N.S.W. v. Commonwealth* (1948) 76 C.L.R. 1.
[15] *Ibid.* 381-382.
[16] *Ibid.* 382. See also p. 306 *per* Starke J.
[17] *Commonwealth v. Bank of N.S.W.* (1949) 79 C.L.R. 497.

the same question arose. Lord Porter, in delivering the judgment of the Judicial Committee, concluded that banking did come within the scope of s. 92. He then went on to say:

> Upon this part of the case they (their Lordships) respectfully adopt the language and reasoning of Dixon J. to which they can add nothing.[18]

Further authority for the proposition that interstate communications come within the protection of s. 92 can be found in the following cases: *R. v. Martin: Ex parte Wawn;*[19] *Carter v. The Potato Marketing Board;*[20] *Hospital Provident Fund Pty Ltd v. Victoria;*[21] *Williams v. Metropolitan and Export Abattoirs Board;*[22] *Mansell v. Beck;*[23] *H.C. Sleigh Ltd v. South Australia;*[24] *Ansett Transport Industries Pty Ltd v. The Commonwealth;*[25] *McGraw-Hinds v. Smith.*[26]

The right to make interstate communications free from unreasonable interference by legislative or executive action is a very expansive constitutional guarantee. The right to freedom of expression and freedom of association would receive a measure of protection where the exercise of these freedoms took place on an interstate scale. A national organization of any description having an internal system of communications which was interstate in character would similarly be protected to some extent by s. 92. The right to engage in an interstate strike would arguably come within the scope of s. 92. The central mechanism of a strike is the communication entered into between workers, when agreeing to withdraw their labour. It is interesting to observe that religious freedom could find a more effective protection under s. 92 than it does under s. 116 of the Constitution. Certainly the outright banning of any religious cult, which operated on at least an interstate level, would *prima facie* offend s. 92. In the same way, political and industrial organizations would be protected. The freedom of the press and the freedom to broadcast would likewise obtain a measure of security under the Constitution.

Section 92 is normally seen as providing a charter of economic rights which vest exclusively in favour of the business community. However, as the author has attempted to show, this constitutional provision may also be a charter of political, industrial, social and religious rights which, naturally enough, accrue for the benefit of a much broader section of Australian society than just business. Section 92 is in fact a national charter of civil rights which is theoretically exercisable by a broad cross-section of the

[18] *Ibid.* 632-633.
[19] (1939) 62 C.L.R. 457, 462.
[20] (1951) 84 C.L.R. 460, 479.
[21] (1953) 87 C.L.R. 1, 15, 39.
[22] (1953) 89 C.L.R. 66, 74.
[23] (1956) 95 C.L.R. 550, 564, 600-602.
[24] (1977) 12 A.L.R. 449, 452, 457, 467.
[25] (1978) 52 A.L.J.R. 254, 267-268.
[26] (1979) 24 A.L.R. 175.

national community. It is interesting, however, to observe how, in practical terms, only the economic rights are in fact effectively protected. Equality before the law would require that an equal opportunity be given to every individual to exercise and enforce those rights which the law confers on him or her. Despite this, however, it will be seen that the case law on s. 92 operates so as to distribute quite unevenly the ability to exercise and enjoy those rights granted by s. 92.

The Direct/Indirect Distinction

Although, unhappily, one can rarely escape the quagmire of confusion arising out of the High Court's penchant for drawing difficult, if not impossible, distinctions between what is an integral part of interstate commerce and what is merely incidental thereto; this tendency of the Court should be recognized as essentially an analytical device intended to limit the application of s. 92. Having created a constitutional protection in s. 92 the range of which, as has been shown, is surprisingly expansive, the Court has found it necessary to use mechanisms designed to filter out those cases where the legislation or executive act is easily accommodated within the underlying philosophy of s. 92, but which is nevertheless caught by the broad sweep of that provision. Refining the distinction between legislative and executive acts which have a direct as opposed to an indirect impact on interstate trade, commerce and intercourse is one such distinction. Treating the legislative or executive burden imposed on interstate trade, commerce or intercourse as a justifiable limitation on the freedom guaranteed by s. 92 is another such mechanism.

As Professor Howard has observed:

> The problem here is whether the commercial activity has the characteristic of interstateness which exempts it from the operation of the legislation. In each type of case a distinction is to be drawn between marketing and road transport because as between the two the general principles which have been established require refinement in different ways.[27]

Marketing

In the marketing situation the High Court has tightly circumscribed the area of activity protected by s. 92. In the area of transport, compared with that of marketing, the Court has adopted a quite liberal approach in defining the range of protection provided by s. 92. It has been held that for an executory contract for the sale of goods to come within the scope of s. 92 it must contain a term requiring delivery of the goods to be effected interstate.[28] It is not enough to show that the parties to the contract reside in different States.[29] Essential acts which are preparatory to an interstate sale, such as the production of the goods which are intended to constitute the

[27] Howard C., *Australian Federal Constitutional Law* (1972) 2nd ed., 287.
[28] See *McArthur (W. & A.) Ltd v. Queensland* (1920) 28 C.L.R. 530.
[29] See *Williams v. Metropolitan and Export Abattoirs Board* (1953) 89 C.L.R. 66.

subject-matter of the sale, are not protected by s. 92.[30] On the one hand there seemingly exists a distinction between growing agricultural produce for the purpose of interstate trade and manufacturing a product which is intended to be sold interstate.[31] Similarly the importation of goods for the purpose of interstate trade and commerce is not protected by s. 92.[32] On the other hand, preparatory acts more immediately associated with the act of interstate trade, such as the packaging of goods which are destined to be sold interstate, are protected by s. 92.[33]

The other side of interstate commerce, those acts following consequentially upon an act of interstate trade, appear to fall into a somewhat confused classification. If a number of separate transactions intervene between an interstate importation and an intrastate sale of the imported goods, that intrastate sale will be treated as something merely incidental to the interstate transaction.[34] If, on the other hand, the intrastate sale should follow immediately after the interstate importation, then it may[35] or may not[36] receive protection under s. 92. In addition to all this, further qualifications need to be made. If a transaction, which is incidental to interstate trade, is burdened by legislative or executive action in an attempt to discriminate against interstate trade, commerce or intercourse, despite the fact that the burden has only an indirect impact on interstate trade, it may nevertheless infringe s. 92.[37]

Transport

Although there existed for nearly twenty years a similar degree of confusion concerning road transportation,[38] the position has become considerably clarified by the decision in *Pilkington v. Frank Hammond Pty Ltd.*[39] The confusion began in 1955 with the decision of *Hughes v. Tasmania,*[40] wherein the High Court adopted a narrow view of the extent

[30] See *Grannall v. Marrickville Margarine Pty Ltd* (1955) 93 C.L.R. 55, and *Beal v. Marrickville Margarine Pty Ltd* (1966) 114 C.L.R. 283.

[31] Compare *Peanut Board v. Rockhampton Harbour Board* (1933) 48 C.L.R. 266, and *James v. Cowan* (1932) 47 C.L.R. 386, with *Beal v. Marrickville Margarine Pty Ltd* (1966) 114 C.L.R. 283.

[32] See *R. v. Anderson; Ex parte Ipec-Air Pty Ltd* (1965) 113 C.L.R. 177, and *Ansett Transport Industries Pty Ltd v. The Commonwealth* (1978) 52 A.L.J.R. 254.

[33] See *Perre v. Pollitt* (1976) 9 A.L.R. 387.

[34] See *Wragg v. New South Wales* (1953) 88 C.L.R. 353.

[35] See *Fish Board v. Paradiso* (1956) 95 C.L.R. 443, and *O'Sullivan v. Miracle Foods (S.A.) Pty Ltd* (1966) 115 C.L.R. 177.

[36] See *S.O.S. (Mowbray) Pty Ltd v. Mead* (1972) 124 C.L.R. 529 *per* Menzies and Gibbs JJ., and *Williams v. Metropolitan and Export Abattoirs Board* (1953) 89 C.L.R. 66.

[37] See *Wragg v. New South Wales* (1953) 88 C.L.R. 353, 387-388, 399 *per* Dixon C.J., and Taylor J. Recently his Honour Mason J. expressed a contrary view; see *Ansett Transport Industries Pty Ltd v. Commonwealth* (1978) 52 A.L.J.R. 254, 265.

[38] See Howard *supra* n. 27 at pp. 350-357.

[39] (1974) 48 A.L.J.R. 61. For a general comment see Coper M., 'The Impact of Section 92 of the Commonwealth Constitution upon Intrastate Segments of Interstate Transportation' (1974) 48 *Australian Law Journal* 563.

[40] (1955) 93 C.L.R. 113.

to which s. 92 protected intrastate segments of an interstate journey. Since then the Court has been largely concerned with qualifying and distinguishing *Hughes*, until finally in *Pilkington* the Court by a majority of five to two overruled *Hughes*.[41] The facts of *Pilkington* and its result provide a good illustration of the differences in the approach taken by the Court to road transportation compared with marketing. In that case the respondent Frank Hammond Pty Ltd was engaged to transport processed lamb in refrigerated containers from St. Leonards in Tasmania to Bell Bay, also in Tasmania. From there the containers were to be taken by sea to Melbourne where they were to be transferred to another ship which would in turn transport them to London. The exporter of the lamb, J.C. Huttons Pty Ltd, acting as agent for the grazier, engaged A.C.T.A. to transport the containers from Huttons' processing works to London. A.C.T.A. in turn engaged Frank Hammond to take the containers to Bell Bay, whereupon Frank Hammond arranged with A.N.L. to have them shipped to Melbourne. Although it was unclear whether Frank Hammond was under a contractual obligation to deliver the containers to Melbourne, no member of the majority regarded the existence or absence of that fact an essential prerequisite in attracting the protection of s. 92.[42] The majority held that the intrastate road journey came within the protection of s. 92.

With the exception of Stephen J. the majority rested their decision on the proposition that if:

> when all the facts and circumstances have been considered, it is seen that the carriage of goods between two places within one State formed part of what was in truth one larger operation of an interstate character, that carriage must itself be regarded as having been done in the course of interstate trade and commerce and as being within the protection of s. 92, notwithstanding that the carrier himself had no responsibility to carry the goods, or to arrange for them to be carried, across the border of the State.[43]

Mason J. expressed a similar view when he said:

> It may be said that the same conclusion may readily be reached by pursuing a different route and acknowledging that the intra-State carrier in the illustration given is himself engaged in interstate trade, notwithstanding that he does not deliver or contract to deliver across a State boundary, because the activity which he undertakes is itself an integral part of interstate trade. To say that the carrier is engaged in interstate trade in these circumstances is merely to say that he is participating in an operation of interstate trade, although he may be entirely unaware that he is participating in such an operation and that the goods which he is carrying are bound for an interstate destination.[44]

Communications

Thus it can be seen that there exists a significant contrast between the approach of the High Court in the transport and the marketing situations. The refined reasoning which distinguishes interstate trade from intrastate trade in the area of marketing has no equivalent in the area of transport.

[41] They were Barwick C.J., Gibbs, Stephen, Mason and Jacobs JJ.
[42] (1974) 48 A.L.J.R. 61, 68, 78, 89, 90-91.
[43] *Ibid.* 81 *per* Gibbs J.
[44] *Ibid.* 85. See also *ibid.* 65 and 91 *per* Barwick C.J. and Jacobs J.

What is demonstrably an intrastate activity is nevertheless protected when it forms an integral part of a continuous interstate journey. This variation in approach deprives s. 92 of a meaningful and coherent principle under which the various cases on the distinction between direct and indirect burdens can be subsumed. It is thus difficult to identify the extent to which and the way in which the direct/indirect distinction is likely to be applied to interstate communications.

Furthermore these difficulties are compounded when it is recognized that interstate communications fall into sub-categories. Firstly there exists the simple case of an interstate communication made by A in one State to one or more persons situated in another State. Secondly there is the case of an organization of either a business, industrial, political, social or religious nature whose internal communications are either rarely or frequently, interstate in nature. The extent to which the organization's internal communications are interstate will depend on its size.

Two examples of cases coming within the first sub-category are *Hospital Provident Fund Pty Ltd v. Victoria*[45] and *Mansell v. Beck*.[46] In the *Hospital Provident Fund* case the Benefits Association Act 1951 (Vic.) required that all medical and hospital benefit associations be registered under the Act before they could conduct business in Victoria as a 'benefit association'. The two plaintiff companies in this case applied for registration under the Act and were refused. They took proceedings against Victoria challenging the validity of the Act under s. 92. The case turned on whether the burden created by the Act applied directly to interstate commerce.

In the judgment of Dixon C.J. there appears a passage which has frequently been approved in subsequent cases:

> If a law takes a fact or an event or a thing itself forming part of trade commerce or intercourse, or forming 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, and the law proceeds, by reference thereto or in consequence thereof, to impose a restriction, a burden or a liability, then that appears to me to be direct or immediate in its operation or application to inter-State trade commerce or intercourse, and, if it creates a real prejudice or impediment to inter-State transactions, it will accordingly be a law impairing the freedom which s. 92 says shall exist. But if the fact or event or thing with reference to which or in consequence of which the law imposes its restriction or burden or liability is in itself no part of inter-State trade and commerce and supplies no element or attribute essential to the conception, then the fact that some secondary effect or consequence upon trade or commerce is produced is not enough for the purposes of s. 92.[47]

Although the plaintiff companies were able to show that they conducted the business of health insurance in a number of States, and that offices of the companies situated in one State provided health insurance for persons residing in another State, they were unable to succeed under s. 92. The legislation was viewed by the majority[48] as forbidding persons or associ-

[45] (1953) 87 C.L.R. 1.
[46] (1956) 95 C.L.R. 550.
[47] 87 C.L.R. 1, 17-18.
[48] Williams J. was the only dissentient.

ations from providing health insurance unless registered. Health insurance was a contract in which the insured made periodical payments in return for a promise for lump sum payments to be made on the occurrence of certain contingencies contemplated in the contract. If the insured resided in one State and the insurer resided in another State that did not make it an interstate contract, unless, of course, the contract contained a term requiring the performance of an interstate act, such as the interstate payment of money.[49] Those communications between the two contracting parties which formed part of the making and the performance of the contract do clearly come within interstate commerce or intercourse. However, the burden imposed by the legislation did not operate directly against such interstate communications; rather, it operated directly against the provision of health insurance and the entering into health insurance contracts as an insured party. Thus the legislation chose to burden 'a fact or an event or a thing' which was not part of nor essential to interstate trade, commerce or intercourse. The validity of the legislation was not affected merely because certain interstate communications were incidentally interfered with or, more aptly, were rendered pointless.

In *Mansell v. Beck* a newsagent in Sydney was charged with selling tickets in a lottery, being a lottery conducted in Tasmania, contrary to s. 3(4) of the Lotteries and Art Unions Act 1901-1944 (N.S.W.). He was also charged with advertising the lottery by placing a notice in his shop window contrary to s. 20 of the Act. He was convicted and appealed to the High Court. His appeal was heard in conjunction with an appeal brought by Consolidated Press Ltd which had been charged and convicted for publishing an advertisement of the same lottery in its newspaper, *The Daily Telegraph*. It was argued that the publication of the advertisements constituted an act of interstate communication between the organizers of the lottery in Tasmania and prospective customers who resided in New South Wales. This interstate communication could not be made the subject of an offence under New South Wales law by virtue of s. 92. In both cases the appeals failed.

With respect to the advertisements published by Consolidated Press Ltd,[50] their Honours, Dixon C.J. and Webb, Kitto and Taylor JJ., in a joint judgment, stated:

> . . . and s. 92 says that they shall be free to communicate across State boundaries. If s. 20 had anything to say against the use by the persons concerned of communications or of the facilities for the transmission of funds it is by no means clear that its validity would be saved by the fact that the business to which the communications and the transmission of funds are incidental is that of conducting a lottery. But s. 20 . . . has nothing to say at all about any subject concerned with the transmission of funds. It takes two things, the lottery and the publication of advertisements, notifications and information. These it makes the basis of its

[49] *McArthur (W. & A.) Ltd v. Queensland* (1920) 28 C.L.R. 530.
[50] *Consolidated Press Ltd v. Lewis*. This case is reported with *Mansell v. Beck* (1956) 95 C.L.R. 550, 599.

operation. Neither of these things constitutes or forms part of inter-State commerce or intercourse.[51]

Presumably what their Honours were saying was that the authorization to publish the advertisement made by the organizers of the lottery in Tasmania to the newspaper was the only act of interstate communication. The actual advertisement constitutes a purely intrastate communication made between the newspaper and the N.S.W. public. Fullagar J. seemingly arrived at the same conclusion.[52] Although his Honour treated an intrastate advertisement placed by an out of State party as not forming a part of interstate commerce or intercourse, his Honour nevertheless conceded the possibility that such an advertisement may constitute 'an essential attribute' of interstate commerce, if it was necessary for increasing the market in the interstate trade of a product.[53]

This appears to be a highly artificial line of reasoning which introduces a somewhat false characterization of a communication made by the lottery organizers in Tasmania to the N.S.W. public via the medium of the advertising columns of a Sydney newspaper. Almost invariably interstate communications are going to be made via intermediate agents or media. If the Court is going to treat each link in the chain of communication as a distinct and independent act of communication, it will be difficult to discover a truly interstate communication. Furthermore there will be no difficulty in legislatively prohibiting interstate communications, in so far as the legislature need only attach liability to one of the intrastate links which forms part of the chain of interstate communication. Surely an intrastate communication link is as much an integral part of an interstate communication as is an intrastate journey which forms a part of interstate transportation.

The second sub-category of interstate communications, internal communications within an organization whose size outstrips the boundaries of any one State, has been subjected to a somewhat different approach. One of the most fundamental attributes of an organization is its internal system of communication. If an organization is large enough to make, from time to time, internal communications of an interstate nature, one would have thought that any legislative proscription directed against such an organization would contravene s. 92. Indeed the *Bank Nationalization* case provides some authority for that conclusion. However subsequent decisions of the High Court have qualified the above proposition. Once again the Court has resorted to making further refinements to the direct/indirect distinction. In the *Communist Party Dissolution* case[54] it was argued that as the Australian Communist Party was a national organization, an integral

[51] 95 C.L.R. 550, 601.

[52] 95 C.L.R. 550, 603. See also *Jackson v. McLeer* [1964] V.R. 374 where it was held that the printing of a notice, which was subsequently sent interstate, was an act preparatory to interstate communications and was not protected by s. 92.

[53] 95 C.L.R. 550.

[54] *Australian Communist Party v. The Commonwealth* (1951) 83 C.L.R. 1.

segment of its internal communications were of an interstate nature, which therefore attracted the protection of s. 92, not only in favour of those interstate communications, but also for the benefit of the organization of which such communications constituted an inseparable part. Latham C.J., in his dissenting judgment, was the only judge to consider the argument. His Honour held that the prohibitions against the Communist Party, contained in the legislation under attack, were too remote from those interstate communications.[55] And, in any event, the prohibitions constituted reasonable regulation of a 'traitorous and subversive' organization.[56]

In the *Hospital Provident Fund Pty Ltd v. Victoria*, Fullagar J. referred to Latham C.J.'s judgment in the *Communist Party Dissolution* case with approval, describing the cessation of interstate journeys and communications that would follow the legislative prohibition of the Communist Party as the 'merest accidental consequence of legislation'.[57] In other words, the thing which was prohibited was too remote from the acts of interstate intercourse. In that case the Hospital Provident Fund Pty Ltd argued that it was an interstate business organization, whose internal communications were at times interstate. Thus any legislative prohibition against it operating a health insurance business in Victoria prevented it from engaging in some of those interstate internal communications. Apart from the dissent of Williams J. this argument failed to win any support. The majority regarded the effect of the legislative prohibition on those interstate communications as a merely accidental consequence. However, during the course of his judgment, Dixon C.J. conceded that these interstate communications, transmission of funds etc. may grow 'to such dimensions as to form an essential part of the conduct of the business'.[58] In which case the business would come within the scope of interstate commerce,[59] and presumably also would come within the meaning of interstate intercourse. Thus the suggestion is that the organization must reach a certain size or scale before it can come within the protection of s. 92.

One would have thought that any organization, whose membership and activities extended beyond any one State, meant that the people involved in the organization were engaged in a particular form of interstate intercourse. Organizations are mechanisms or media for the internal communications made between the members of the organization. Nothing could be more an integral part of an organization than its internal system of communication. To destroy one is to destroy both. Admittedly the *Hospital Provident Fund* case did not directly raise this issue. The organization in question in that case was not prevented from existing in Victoria, nor were its internal interstate communications exposed to any direct

[55] *Ibid.* 169.
[56] *Ibid.* 170.
[57] 87 C.L.R. 1, 37.
[58] *Ibid.* 15.
[59] *Ibid.* 15.

legislative burden. However, in the author's opinion, the *Communist Party Dissolution* case squarely raises the issue. It was a national organization, maintaining an internal system of interstate communications, which would have been legislatively destroyed by the same blow which attempted to destroy the organization itself. In the absence of any meaningful distinction between an organization and its internal system of communications it is difficult to see how a burden imposed on the organization is not also a burden on its internal communications.

Analogies and Criticisms

The marketing situation is easily distinguishable from the transport situation. The first essentially involves the making of a contract of sale between a vendor and a purchaser. Marketing is thus readily reduced to this single contractual transaction. Some of the authorities have gone so far as to suggest that in order to attract the protection of s. 92 the contract must specify that delivery between vendor and purchaser be effected interstate.[60] Limiting the protection of s. 92 to the single transaction of interstate sale stands in marked contrast to the developments which have taken place in the area of transport. In this context, any transaction which forms a necessary part of the continuous movement of goods or persons across State boundaries comes within the protection of s. 92. The number of transactions which are protected depends upon the mode or modes of transport which are adopted by the parties.

As a factual matter communication bears a strong similarity with transport and is only remotely like marketing. There is little difference between A leaving a message with B to be passed on to C, and A leaving a package with B to be delivered to C. In the first instance A communicates with C via B, and in the second instance A transports goods to C via B. However as the authorities stand at the moment communication seems to be strongly analogous to marketing but very weakly analogous to transport. Thus where intermediate agents are concerned in what would normally be regarded as a communication between A and C, this is not seen by the High Court as one continuous flow of information or ideas beginning with A and terminating with C. Rather it is seen as a series of independent communications, beginning with a communication from A to the first agent and ending with a communication from the last agent to C. Before a communication is protected under s. 92 one agent must be on one side of a State boundary and the other agent must be positioned on the other side. As in the case of marketing the constitutional protection tends to be limited to one single transaction.[61]

[60] *McArthur (W. & A.) Ltd v. Queensland* (1920) 28 C.L.R. 530; *Williams v. Metropolitan and Export Abattoirs* (1953) 89 C.L.R. 66; *Grannall v. Geo. Kellaway and Sons Pty Ltd* (1955) 93 C.L.R. 36; *Simms v. West* (1961) 107 C.L.R. 157.

[61] *Mansell v. Beck* (1956) 95 C.L.R. 550, 601.

The sharp contrast which has been developed by the High Court between transport and communications is seen in a comparison between the border-hopping cases in the transport field and those cases concerning the internal communications of an organization. Thus, as has already been illustrated, if a legislative burden is imposed on an organization, thereby interfering with the interstate elements of its internal system of communications, the interference is described as merely an accidental consequence and as such is unaffected by s. 92. However, if a burden is imposed on the transportation for reward of goods, or persons, beginning and ending in the same State, and which, as a matter of necessity or convenience, crosses a State border, it is regarded as an interference in the course of interstate trade.[62] No matter how minor the interstate element may be as a genuine feature of a journey, for constitutional purposes the journey takes its character from that interstate element.[63] The equivalent interstate element in the area of the internal communications of an organization must be so large as to constitute an essential part of that organization, before that organization and its internal system of communications takes on the character of interstate commerce or intercourse.[64] Thus it seems clear that the High Court has both failed to develop a proper analogy with transport and has developed a false analogy with marketing.

Furthermore, the approach taken by the Court in the field of communications[65] shares with a number of marketing cases[66] what appears to be a common error. If legislation imposes a criminal liability on an intrastate act, s. 92 has not been infringed even if that intrastate act immediately precedes or succeeds the performance of an interstate act of trade, commerce or intercourse. The burden is said to have had only a consequential effect on the act of interstate trade. This has been held in cases where the interstate act was either immediately preparatory to or consequent upon the intrastate transaction being the subject of the offence. The difficulty which these cases raise is best seen by two illustrations.

In the case of *S.O.S. (Mowbray) Pty Ltd v. Mead*[67] the appellant/defendant sold margarine containing certain prohibited substances in contravention of the Dairy Produce Act 1969 (Tas.). The margarine had been imported by the appellant from N.S.W. It was held by Menzies and Gibbs JJ., two of the four judges constituting the majority in that case, that the sale proscribed under the Act was an intrastate act and hence was not protected by s. 92 even though it immediately followed an interstate

[62] *Naracoorte Transport Co. Pty Ltd v. Butler* (1956) 95 C.L.R. 455.
[63] *Pilkington v. Frank Hammond Pty Ltd* (1974) 48 A.L.J.R. 61.
[64] *Hospital Provident Fund Pty Ltd v. Victoria* (1953) 87 C.L.R. 1, 15 *per* Dixon C.J.
[65] *Mansell v Beck* (1956) 95 C.L.R. 550, 601.
[66] *S.O.S. (Mowbray) Pty Ltd v. Mead* (1972) 124 C.L.R. 529; *Williams v. Metropolitan and Export Abattoirs Board* (1953) 89 C.L.R. 66; *Beal v. Marrickville Margarine Pty Ltd* (1966) 114 C.L.R. 283.
[67] (1972) 124 C.L.R. 529.

act of importation. This approach would seem to overlook one factor. If the intrastate act of sale was an offence then the act immediately preparatory to it, namely the interstate importation, was also an offence, in so far as it constituted both an attempt to commit a crime and a conspiracy to commit a crime. The burden imposed by the Act on the intrastate act carried with it a consequential legal burden which is imposed on the preparatory interstate transaction.

A similar situation arises in *Beal v. Marrickville Margarine Pty Ltd.*[68] In that case the respondent/defendant held a licence under Dairy Industry Act 1915-1962 (N.S.W.) which permitted the company to manufacture a maximum quantity of margarine. The company was charged with an offence under the Act, namely that it had breached the terms of its licence by producing more margarine than was permitted. The exact quantity of margarine which exceeded the maximum was produced by the company so as to fill orders placed by purchasers who resided interstate. The manufacturing and packaging process undertaken for the purpose of fulfilling these interstate orders was entirely separate from the production and packaging of margarine for intrastate sale. It was held by the Court that although the manufacture of the margarine, which constituted the offence, was intended for interstate sale, the manufacturing process nevertheless did not form part of interstate trade, but rather was a set of transactions which preceded interstate trade and hence was not protected by s. 92.

The placing and acceptance of an order to manufacture margarine and deliver it interstate is a contract which is clearly a part of interstate trade and commerce.[69] If that contract contains a term requiring the commission of a crime, the contract is not only illegal and unenforceable but it also constitutes a criminal conspiracy. Thus the burden imposed on the manufacturing of margarine imposes a consequential legal burden on an act of interstate trade.

In *Consolidated Press Ltd v. Lewis*[70] the same situation arises. The intrastate act of advertising is rendered the subject of an offence with the consequence of rendering the interstate act of communication, which immediately precedes it, a criminal conspiracy. In all of these types of cases the legislative burden imposed on the intrastate act results in the imposition of a legal burden on the interstate act. Thus in this context the distinction between the imposition of a direct and indirect burden on interstate trade is meaningless.

A Category of Illusory Reference

It should be appreciated from the preceding pages that whilst the direct/indirect distinction may be logically valid as a concept, it is nevertheless

[68] (1966) 114 C.L.R. 283.
[69] *McArthur (W. & A.) Ltd v. Queensland* (1920) 28 C.L.R. 530.
[70] Reported with *Mansell v. Beck* (1956) 95 C.L.R. 550, 599.

applied in a number of cases in an apparently fallacious manner. Transactions, which are the subject of legislative burdens, and which logically appear to form part of interstate trade, commerce or intercourse, are separated out from that concept by a supposedly objective application of this dichotomy. The classification of what are truly interstate transactions as intrastate ones is undertaken not because the law of the Constitution logically demands it, but rather because political and economic reasons require it, at least in the inarticulated thinking of the High Court.

In this respect the direct/indirect distinction is, in the words of Professor Julius Stone,[71] a category of illusory reference. Whilst the distinction may be demanded by the language of s. 92 and may be validly applied in some instances, it nevertheless becomes a category of illusory reference when it is incorrectly applied. Thus the impression is created that the distinction logically demands a result, which is in fact arrived at for reasons quite unrelated to it, and which are left largely, if not entirely, unstated. The Court, in its attempt to develop, what are in political and economic terms, rational limitations on the operation of s. 92, has not only applied the direct/indirect distinction as a category of illusory reference, but it has also introduced three additional concepts which are designed to do the same thing. Thus the Court has used the notion of standing as a basis for refusing relief when the plaintiff is unable to show that he or she personally has suffered a loss of freedom to engage in interstate trade, commerce or intercourse. This will be so even if the plaintiff can demonstrate that the law in question not only affects his or her activities but also in another respect burdens interstate trade, commerce or intercourse.

Characterization

Closely related to the direct/indirect distinction is another basis for limiting the application of s. 92 which uses a 'characterization' function. Hence, if a law burdens a transaction of interstate trade, commerce or intercourse by reference to criteria, not being descriptions of activities in the nature of interstate trade, commerce or intercourse, but rather which refer to activities which are quite independent of that concept, the protection afforded by s. 92 cannot be invoked. For instance, if a law penalizes the use of commercial vehicles, the exhaust emissions of which contain heavy pollutants, s. 92 will not be infringed if that law were to penalize an interstate road haulier. In such a case the criterion, upon which the imposition of the burden depends, is quite independent of and indifferent to interstate trade, commerce or intercourse. The reasoning of Dixon C.J. and Fullagar J. in *Hospital Provident Fund Pty Ltd v. Victoria*[72] and in

[71] Stone J., *Legal Systems And Lawyers Reasonings* (1964) pp. 235-300.

[72] See *supra* n. 47. See also Davies G. J., 'Section 92 and the Decisions in *Hospital Provident Fund Pty Ltd v. State of Victoria* and *Mansell v. Beck*' (1966-67) 2 *Federal Law Review* 244.

Mansell v. Beck involves an application of this approach. Once again the Court has developed a concept which may be meaningful theoretically, but is extremely difficult to apply in practice.

One would have thought that the facts of *Fergusson v. Stevenson*[73] provided a good instance for the application of this principle. In that case the defendant was charged with possession of kangaroo and wallaroo skins, being an offence under the Fauna Protection Act 1948 (N.S.W.). He obtained the skins as a manager of a company which had bought them from a person in Queensland. As it happened in this case the possession of the skins was the immediate result of a delivery under an interstate contract for the sale of goods. Thus the possession could be said to be an incident or attribute of interstate trade. Dixon, Williams, Webb, Fullagar and Kitto JJ., in a joint judgment, in fact arrived at that conclusion. However, although the law in the circumstances of that case burdened an interstate commercial transaction, it nevertheless did so accidentally, in so far as the criterion upon which the law operated, namely possession, was one which did not relate to interstate trade, commerce or intercourse. Furthermore the ultimate object of the legislation was the protection of native fauna. Thus both the criterion upon which the law operated and the purpose of its operation were outside the scope of interstate trade, commerce or intercourse. Nevertheless the majority held that the Act infringed s. 92.

It would appear that this characterization approach tends to largely confuse what is already a difficult and complex area. If one takes the two examples provided by Dixon C.J. in *Hospital Provident Fund v. Victoria*,[74] as illustrations of how this approach operates, the distinct contribution made by this approach is difficult to discern. The first is a law prohibiting the entry into a State, in other words a fact situation similar to the one considered by the Court in *R. v. Smithers; Ex parte Benson.* Quite clearly such a law chooses the interstate movement of persons of a certain class as its criterion of operation. There is no doubt that s. 92 is infringed. However consider a law which imprisons a person as punishment for a crime. Such a law, at the same time, prevents that person from engaging in interstate movement, and thus burdens an activity protected by s. 92. However not only does such a law choose a criterion of operation quite unrelated to trade, commerce or intercourse but also it imposes a burden on an activity, namely the crime itself, which does not form a part of interstate trade, commerce and intercourse. Thus, in this context, the characterization approach is just another way of applying the direct/indirect distinction. Take, for instance, the example given earlier of pollution controls imposed on exhaust emissions. The burden created by such a law is directed against a form of pollution which may indirectly or consequen-

[73] (1951) 84 C.L.R. 421.
[74] (1953) 87 C.L.R. 1, 18.

tially affect interstate trade, commerce or intercourse. The introduction of this characterization analysis serves only to confuse what is essentially a much simpler inquiry. The inquiry should be, does the law choose to burden an activity conforming to the description of trade, commerce or intercourse? If so, can the person claiming the protection of s. 92 point to an activity of his or her own which is directly burdened by such a law, and which is of an interstate character? If the answer to these two questions is in the affirmative, then, subject to the law in question amounting to reasonable regulation, s. 92 will not be infringed.

Barring the Exercise of Rights to Interstate Communications

The development of the constitutional devices which have so far been canvassed, has enabled the High Court to institute mechanisms designed to frustrate the enforcement of many of the rights which s. 92 theoretically grants. These inchoate rights reflect an uneven distribution of the power to enforce the rights and liberties conferred by s. 92. Thus while the right may exist in theory, the power to enforce that right in practice is effectively dissipated in many instances by the use of fine distinctions and technical analyses, many of which lack any real logical force. This point is emphasized when one considers the measure of constitutional protection which is likely to be given to rights of interstate communication.

Take, for instance, the abrogation of the right to engage in political demonstrations which has recently occurred in Queensland. Under reg. 124 of the Queensland Traffic Regulations no person can engage in a procession, other than for funeral purposes, on any street or road in Queensland, unless a permit has been granted by the District Superintendent of Police. Under s. 57A of the Traffic Act 1949-1977 (Qld) a right of appeal to the Commissioner of Police is available from a decision to refuse to grant such a permit. On September 4 1977 the Queensland Premier is reported to have said in *The Brisbane Courier Mail* that it was government policy not to grant a permit in favour of any person wishing to hold a political street march. Thus, by a combination of legislative and executive action, political demonstrations in the form of street marches were prohibited.

Suppose, nevertheless, that a street march was held for the purpose of undertaking a political protest. Let us also suppose that the substance of this political protest was communicated interstate by the print and electronic media. If a person were arrested and charged with a breach of reg. 124 could he or she rely on s. 92 in defence of the charge?

The argument would be as follows. The demonstrator was engaged in an expression of a political opinion by entering the street march. That expression of opinion was intended to be communicated as widely as possible by whatever means were at the disposal of the demonstrators. Naturally enough by holding a street march they encouraged the press to witness their march, in so far as it was an item of news, and in addition

the demonstrators took advantage of the means of communication, in the form of the print and electronic media, which were provided by the press, to communicate their political ideas to the wider Australian public. They were therefore engaged in a form of interstate communication which was unjustifiably burdened by the prohibitions contained in reg. 124 of the Queensland Traffic Regulations. Thus the regulation amounted to a *prima facie* infringement of s. 92.

In advancing this argument two difficulties immediately spring to mind. Each link in the chain of communication, beginning with the demonstrators and concluding with that section of the Australian public, resident in States other than Queensland, would, on the authority of *Mansell v. Beck*, and *Consolidated Press Ltd v. Lewis*, be treated as separate and independent acts of communication. Therefore the only act of communication undertaken by the demonstrators would be those expressions of opinion which were received by persons in the immediate vicinity of the march. Those communications which were relayed to the wider Australian public would be treated as communications which were originated by the press. Hence, according to this analysis, the demonstrators only made intrastate communications, which necessarily fell outside the scope of s. 92. To overcome this difficulty one would have to analogise with the transport cases and argue that each intrastate link in an interstate chain of communications was as much an integral part of the interstate transaction as is an intrastate journey which forms a continuous link in the course of interstate transportation.

The second difficulty would arise from an application of the characterization approach. The burden imposed by reg. 124 operates by reference to a street procession, which in essence amounts to nothing more than the movement of persons along a roadway. Thus a procession is 'a fact or an event or a thing . . . which . . . is in itself no part of inter-State trade and commerce (or intercourse) and supplies no element or attribute essential to the conception'.[75] The fact that the burden has a secondary or consequential impact on interstate communications will not be sufficient to attract the protection of s. 92. Although this argument is quite plausible it is a little too simplistic. Street processions are more than just a movement of persons, they also involve an expression or communication of an idea or opinion. On this view street processions integrate these two characteristics of movement and communication so that when that communication or intercourse extends beyond the limits of any one state the protection of s. 92 applies.

Given the fact that *Mansell v. Beck* and *Consolidated Press Pty Ltd v. Lewis* were decided twenty-five years ago, and given the difficulty in applying the characterization approach, it is hard to predict the outcome

[75] *Hospital Provident Fund Pty Ltd v. Victoria* (1953) 87 C.L.R. 1, 17.

of such a case. Nevertheless success in such a case would involve picking one's way through the various mechanisms which deny the power to enforce those rights which s. 92 theoretically grants.

The Extent of Section 92 Rights

Suppose the demonstrator has successfully overcome the difficulties foreshadowed above, and he possesses an enforceable right under s. 92. That still leaves one question open: what is the extent of his right? Can the demonstrator ignore every legislative or executive burden imposed on his or her right to interstate communications? The answer is clearly 'no', despite the language of s. 92, which states that the right to interstate communications 'shall be absolutely free'. Whatever that expression means, one thing is clear—it does not mean absolutely free. As their Honours Knox C.J., Isaacs and Starke JJ., observed in *McArthur's* case: 'Liberty is not equivalent to anarchy or licence'.[76] The exercise by a person of a right to a constitutionally guaranteed freedom can be regulated and controlled by government in order to preserve the rights and freedoms of others, without denying the individual that freedom secured by the Constitution. It is upon this basis that the reasonable regulation of interstate trade, commerce and intercourse is permissible under s. 92.

It is not the author's intention to undertake a protracted or thorough analysis of the doctrine of reasonable regulation. In this context it is only necessary to make two points. First, as a general rule, the doctrine of reasonable regulation does not validate a simple prohibition.[77] Thus, in relation to reg. 124, and the executive policy which had been adopted with respect to its administration, it would be difficult to maintain that political demonstrations on Queensland roads and streets have not been simply prohibited. Subject to the second point which shall be raised later, there would be little difficulty in concluding that, if the protection of s. 92 can be invoked in favour of political demonstrators in Queensland, the doctrine of reasonable regulation would not assist the Government in its attempt to prosecute demonstrators under the Traffic Regulations.

Before developing the second point, an initial, if somewhat tangential, observation: whether or not there has been an infringement of s. 92 is a question of fact.[78] Subsumed within this larger proposition is the conclusion that whether a specific legislative or executive burden is or is not a reasonable or permissible regulation of interstate trade, commerce or intercourse, is equally a question of fact.[79] This leads one immediately to the question

[76] *McArthur (W. & A.) Ltd v. Queensland* (1920) 28 C.L.R. 530, 550.

[77] *Australian National Airways Pty Ltd v. Commonwealth* (1945) 71 C.L.R. 29, 61; *Commonwealth v. Bank of N.S.W.* (1949) 79 C.L.R. 497, 639-641; *Clark King v. The Australian Wheat Board* (1978) 21 A.L.R. 1 *per* Mason and Jacobs JJ.

[78] *James v. The Commonwealth* (1936) 55 C.L.R. 1, 59.

[79] *Clark King & Co. Pty Ltd v. Australian Wheat Board* (1978) 52 A.L.J.R. 670, 694, 695.

of who has the burden or onus of proof of these facts? One view would be that the burden of proof is not shifted from where it would normally fall merely because the fact in question concerns an alleged infringement of s. 92. Thus the individual who claims the constitutional protection will normally carry the burden of proof: either because he is the plaintiff and proof of an infringement of s. 92 is an essential fact in his cause of action, or because he is defending in a civil action and an infringement of s. 92 is a separate ground in his defence. The second view is that since s. 92 confers a right on the individual, which will only be enforced where his freedom to engage interstate commerce is actually and genuinely being impaired, the burden, therefore, is always on the individual to prove the facts necessary to invoke the protection of s. 92. So far as the author is aware, this remains an open question before the High Court.[80] Nevertheless, in the view of the Full Court of the Supreme Courts of Victoria,[81] Queensland[82] and South Australia[83] the burden of proof always rests with the individual who seeks the protection of s. 92. On this assumption it would follow that the individual needs to prove not only that the legislative or executive act burdens some activity of his which forms part of interstate trade, commerce or intercourse, but also that the burden was a denial of the absolute freedom guaranteed by s. 92.

The second point mentioned above, begins with an analysis of absolute freedom. The origin of the phrase 'absolutely free' still remains obscure.[84] Similarly what was originally intended by the phrase is not entirely clear. The suggestion made by Professor La Nauze seems by far the most plausible.[85] He refers first to the fact that the perennial political debate of the second half of the nineteenth century was free trade versus protection. The mere imposition of tariffs was not decisive in terms of this debate, since a tariff could either be a protective tariff or merely a revenue tariff. The latter was simply intended to raise revenue and was not intended to obstruct the flow of imports. Such a tariff was therefore quite consistent with free trade. Thus the free trade doctrine in its narrow form advocated the removal of all burdens imposed on trade which discriminated against international or interstate trade in favour of domestic trade. By contrast the nineteenth century American doctrine guaranteeing the freedom of interstate commerce went beyond the free trade doctrine, prohibiting all

[80] *Allied Interstate (Qld) Pty Ltd v. Barnes* (1968) 42 A.L.J.R. 348. See however *Wilcox Mofflin Ltd v. N.S.W.* (1952) 85 C.L.R. 488, 507, and *Bernard v. Langley* (1980) 32 A.L.R. 57, 63 *per* Gibbs A.C.J.

[81] *Colbert v. Tocumwal Trading Co. Pty Ltd* [1964] V.R. 820, 837; *Day v. Hunter* [1964] V.R. 845, 857.

[82] *Horne v. Tweed River Pty Ltd; Ex parte Horne* (1967) 61 Q.J.P.R. 114, 117, *per* Gibbs J. who gave the opinion of the Full Court.

[83] *Ridland v. Dyson* [1959] S.A.S.R. 72, 74.

[84] For an excellent discussion of its historial derivation see La Nauze J. A., 'A little bit of Lawyers' Language: The History of "Absolutely Free", 1890-1900', *Essays in Australian Federation* (1969) 57-93.

[85] *Ibid.* 75-77.

burdens, discriminatory or otherwise, on interstate commerce.[86] Section 92 likewise was intended to go beyond the free trade doctrine by introducing the adverb 'absolutely' in describing the word 'free'.

If the purpose of s. 92 is to go beyond the free trade doctrine, what economic principle then was it intended to embrace? The question is difficult to answer because it is itself misconceived. The free trade doctrine exists in two forms: in the narrow sense and in the enlarged sense. A narrow free trade doctrine is one aimed at the imposition of discriminatory burdens on international or interstate commerce. The enlarged version of the doctrine is one which prohibits all burdens imposed on international or interstate commerce, and to the extent to which it is distinguished from the principle of *laissez-faire*, it will in effect discriminate in favour of international or interstate commerce. Whilst the narrow version of the doctrine was the one advocated in nineteenth century Australian politics, it was the enlarged version of the doctrine which became entrenched in the Constitution.

If one takes this view of the historical derivation of the expression 'absolutely free', then one must accept that it was intended primarily to describe the extent of the protection of those economic rights guaranteed under s. 92. It does not follow that the same measure of protection should be extended to those non-economic rights which s. 92 embraces. Of course, under a literal interpretation of s. 92 such a distinction could not be drawn. However it ought to be remembered that the High Court has consistently avoided a literal construction of the expression 'absolutely free'. Quite obviously the constitutional meaning of that expression can only be discovered by looking to its context and purpose, and not by taking those words at their face value.

If we assume the above distinction is correct then what is the measure of freedom which s. 92 provides for those non-economic rights? The right to make interstate communications is a right to engage in a collection of human activities. As has been argued the right to engage in those activities is not an absolute right, and those activities are not to be accorded paramount importance under our Constitution. By providing a measure of freedom for those activities it does not imply that they are to override all other socially-acceptable activities which are not protected under the Constitution. To assert the converse would be absurd. Those activities embodied in the non-economic rights guaranteed under s. 92 must co-exist with all other socially-acceptable activities. The means by which this co-existence is to be forged is not a constitutional question; it is ultimately a political question. It is a question which is left under the Constitution of

[86] See for instance *Gibbons v. Ogden* (1824) 9 Wheat. 1 and *Brown v. Houston* (1885) 114 U.S. 622. Quick and Garran's commentary on s. 92 leaves the reader in no doubt that the progenitor of s. 92 was the American doctrine of freedom of interstate commerce. See Quick J. and Garran R. R., *The Annotated Constitution of the Australian Commonwealth* (1976) 844-860.

the Commonwealth and those of the States to the elected representatives of the people.

It may be thought that allowing the Commonwealth and State Parliaments to regulate the co-existence of competing rights and interests involves abrogating the freedom, guaranteed by s. 92, to those non-economic rights encompassed within it. That, it is suggested, is too simplistic. As has been argued, the mere accommodation of competing rights and interests does not involve a denial of freedom to any of those competing rights and interests. However, if legislation or executive action should go further than to merely provide an accommodation between competing rights and interests, by burdening a right to an extent which is unnecessary in preserving some competing right or interest, then that will involve a denial of the freedom to enjoy the first-mentioned right. In other words, to burden a non-economic right, protected under s. 92, more than is reasonably necessary in all the circumstances in order to accommodate it with competing rights and interests will offend against s. 92. Thus the measure of freedom provided by s. 92 with respect to non-economic rights is freedom from an arbitrary exercise of legislative or executive power.

In determining the measure of freedom enjoyed by non-economic rights under s. 92 the author would respectfully adopt the test proposed in the joint judgment of Stephen and Mason JJ. in the recent High Court decision of *Uebergang v. Australian Wheat Board.*[87] In that case their Honours stated:

> The evidence which we would regard as relevant in determining the validity of the present legislation would be such material as would enable the court to determine whether or not the restrictions which the legislation imposes upon interstate trade are no greater than are *reasonably necessary in all the circumstances.* For example, it would be relevant to establish what are the goals sought to be attained by the restrictions; how these may be weighed against those restrictions and whether they can be attained by other means which do not involve such onerous restraints upon traders.[88]

In that case their Honours were referring to the protection of economic rights. I have argued that a distinction exists in the measure of freedom provided for economic rights as compared with non-economic rights, and that the former enjoys a higher level of protection than does the latter. That certainly has been the case historically, in that economic rights have enjoyed a greater measure of freedom than that allowed for in the recent joint judgment of Stephen and Mason JJ.[89] The fact that the measure of freedom accorded to such rights has been relatively greater in the past does not necessarily suggest that those rights will, throughout the lifetime of s. 92, continue to enjoy that same measure of freedom. As argued earlier, the meaning of 'absolutely free' is to be discovered by reference to its

[87] (1980) 32 A.L.R. 1.
[88] *Ibid.* 28 (emphasis added).
[89] See for instance *Clark King & Co. Pty Ltd v. Australian Wheat Board* (1978) 52 A.L.J.R. 670, 688 *per* Stephen J.

context and purpose. If in Australia's present economic context there is no longer the same need, as in the past, to vigorously pursue an enlarged free trade doctrine then the meaning of the above expression should consequently change. As a result the distinction which in the past existed as between the measure of freedom accorded to economic rights and non-economic rights may eventually disappear, with the former measure of freedom shrinking to the level of the latter.

Be that as it may, the view of the majority in *Uebergang* was that the time has not yet arrived for winding down the traditionally established level of protection guaranteed by s. 92 in favour of economic rights.[90] In the view of the majority the test proposed by Stephen and Mason JJ. was wrong. However, such a conclusion has no applicability in determining the level of protection afforded to non-economic rights, if a distinction can be maintained between economic and non-economic rights.

In a somewhat oblique reference to the test proposed by Stephen and Mason JJ. in *Uebergang*, Gibbs and Wilson JJ. in the same case, suggested that 'such a test would virtually write s. 92 out of the Constitution'.[91] It is respectfully argued that such a description is too extreme, if, in fact, it refers to the Stephen/Mason test. The mutual accommodation of competing rights, both or all of which are protected under s. 92, has clearly been accepted as coming within that category of burdens which are permitted under s. 92.[92] As the author understands the Stephen/Mason test, it merely extends the power of the legislature to mutually accommodate s. 92 rights with all other competing rights and interests. In so doing the test admittedly deprives s. 92 rights of a paramount or overriding importance. In any event s. 92 rights were never paramount in an absolute sense. They always have had to give way to rights and interests in the nature of public health and protection from fraudulent, deceptive, immoral or restrictive trade practices. The absolute freedom enjoyed by s. 92 rights was never said to be compromised despite the absence of paramountcy. The Stephen/Mason test merely takes away the last vestiges of the paramountcy which s. 92 rights once enjoyed.

As argued above, paramountcy is not equivalent to freedom. The freedom to enjoy a right is lost or impaired when it is subject to a burden which goes beyond the need to accommodate it with competing rights and interests. With respect to s. 92 rights, Australian Parliaments are not sovereign, they cannot wield their power in an arbitrary or capricious manner.

One should hasten to concede that this view is mere speculation concerning a potential limitation which could be placed upon the enforce-

[90] (1980) 32 A.L.R. 1 *per* Barwick C.J., Gibbs, Wilson and Aickin JJ.
[91] *Ibid.* 22.
[92] See *Samuels v. Readers' Digest Association Pty Ltd* (1969) 120 C.L.R. 1, 16 *per* Barwick C.J. See also *Uebergang v. Australian Wheat Board* (1980) 32 A.L.R. 1 *per* Gibbs and Wilson JJ.

ment of the non-economic rights protected under s. 92. Quite obviously the broad range of rights which s. 92 theoretically protects must be subject to some stringent limitation when it comes to their practical enforcement. The direct/indirect distinction and the characterization approach have historically fulfilled the need to qualify the operation and enforcement of s. 92 rights. However, for the reasons given, the adoption of that form of limitation has been applied to an extent which is not logically justifiable and which compromises intellectual honesty. The further development and extension of the reasonable regulation doctrine, as a limitation on s. 92, is a more credible approach, and it is solving the problem in a way which is 'not so much legal as political, social or economic'.[93] Despite the encouragement of the Privy Council in the *Bank Nationalization* case[94] to pursue such an approach, the High Court has demonstrated, in the past, a marked reluctance to treat s. 92 problems as anything other than unravelling abstruse and technical issues concerning constitutional interpretation. Thus the impression is created that the enormous power of veto vested in the Court under s. 92, over legislative and executive action is being exercised under the demanding discipline of a sophisticated juridical science. The broad discretion which this juridical science in fact gives to the Court is not immediately obvious, and it hides the inarticulated political, social and economic considerations which the Court relies upon. Admittedly, in the light of three recent decisions of the Court, the two *Australian Wheat Board* cases and *Permewan Wright Consolidated Pty Ltd v. Trewhitt*,[95] this criticism has lost some of its relevance.

It is quite clear that under a Westminster parliamentary system the judiciary cannot claim a power of veto which is as sweeping as that which is potentially open under s. 92. It is equally clear that the mechanism which is adopted to limit that potential should be one which is applied in a credible and consistent manner. In so far as both the direct/indirect distinction and the characterization approach fail to fulfil either of these objectives, the author believes that they should not be applied as the most important limitation on the enforcement of those non-economic rights secured under s. 92. Rather, one should start with the premise that the absolute freedom guaranteed by s. 92 can be qualified by the need to further those legitimate and conflicting interests of groups and individuals within the community who seek to exercise socially acceptable rights and liberties. Further, it should be admitted that such an approach requires an analysis of political, social and economic considerations, about which honest and rational minds can easily disagree. By placing the burden of proof on the individual, who wishes to invoke this power of veto, the Court can avoid, to a certain extent, the need to make decisive judgments about

[93] *Commonwealth v. Bank of N.S.W.* (1949) 79 C.L.R. 497, 639.
[94] *Ibid.*
[95] (1979) 54 A.L.J.R. 98.

what are essentially political, social and economic controversies. Unless the individual can show that beyond the point of rational and honest controversy the government clearly acted unreasonably in abridging a non-economic right protected under s. 92, the legislative or executive action of the government should be allowed to stand. In short, with respect to the protection of non-economic rights, s. 92 merely requires government to account to any individual whose rights have been burdened by its actions. This accountability requirement demands that the government reasonably justify its actions, only when the individual can raise, at least, a *prima facie* case that its actions are not so justifiable.

How would these considerations apply to the situation of a Queensland demonstrator whose political message was communicated, via the media, to his fellow citizens resident in another State? Once again one returns to the question of whether in these circumstances a total prohibition on street demonstrations can be reasonably justified? Obviously the right to demonstrate in the streets can be qualified to the extent necessary to ensure an adequate flow of traffic, and to protect the interests of the ordinary citizen who wishes to pursue legitimate activities which require free access to the streets and roads of Queensland. At the same time the protection of such interests do not necessitate, even for reasons of convenience, a total prohibition on the right to demonstrate in the streets. Quite clearly a close regulation of the right to demonstrate would adequately accommodate these two conflicting interests. In short, the complete elimination of one such interest cannot, in my view, be reasonably justified in these circumstances. There is, in this instance, sufficient evidence to suggest that the threshold stage of accountability has been reached, so that the Queensland Government would logically have been required to support the extreme measures which it had taken.

Conclusion

It may be thought that the brief and vague wording of s. 92 does not render that provision capable of being regarded as a general charter of civil rights. In this respect it is worth recalling some developments which have taken place concerning the American Bill of Rights. It has now been firmly held that the 'due process' clause of the fourteenth amendment incorporates each one of those fundamental rights which are protected by the first eight amendments.[96] This includes 'freedoms of speech, press, religion, assembly, association, and petition for redress of grievances'.[97] It also includes all those rights mentioned in the fourth, fifth, sixth and eighth amendments.[98] In addition it has been held that the fundamental principles

[96] *Grosjean v. American Press Co.* (1936) 297 U.S. 233; *Gideon v. Wainwright* (1963) 372 U.S. 335.
[97] *Gideon v. Wainwright* (1963) 372 U.S. 335, 341.
[98] *Ibid.*

embodied in the 'equal protection' clause of the fourteenth amendment are incorporated in the 'due process' clause of the fifth amendment.[99] Thus most of that enormous body of jurisprudence which has developed out of the Bill of Rights can be reduced to the simple if vague proposition that no person shall be 'deprived of life, liberty or property without due process of law'.

This indicates that the extent of the judicial protection of civil rights and liberties has little to do with the number or form of words used in the appropriate constituent instrument. The protection of these rights and liberties by the judiciary primarily depends on the nature of the values which the judges are prepared to articulate and enforce through whatever vehicle seems most suitable. If the U.S. Supreme Court can erect an intricate and sophisticated superstructure of rights and privileges on those fifteen words contained within the 'due process' concept, then it is possible for the High Court to erect a more modest and less comprehensive superstructure of rights on the eleven key words which are found in s. 92.

[99] *Bolling v. Sharpe* (1954) 347 U.S. 497.