

CASE NOTES

CONSTITUTIONAL LAW (AUSTRALIA)

S. 92—RECENT CASES

THE current volume of the Argus Law Reports contains a number of decisions involving that most famous of all Constitutional provisions, s. 92.

Of these cases, the most significant is *Hughes and Vale Pty. Ltd. v. New South Wales* [1953] A.L.R. 333. Here the N.S.W. State Transport (Co-ordination) Act 1931-1951, which the Court regarded as identical in all relevant aspects with the Victorian legislation upheld in *McCarter v. Brodie* (1950) 80 C.L.R. 432, was held to be valid notwithstanding s. 92 by a majority of the High Court—Dixon C.J., McTiernan, Williams and Webb JJ., with Fullagar, Kitto and Taylor JJ. dissenting. But of the majority, Dixon C.J. decided as he did solely because he did not think himself entitled to overrule what he described as the “recent” and “fully considered” decision in *McCarter v. Brodie*; he had dissented in *McCarter v. Brodie*, and, in principle, he maintained his dissent in the present case. Webb J. also dissented in principle, as he had dissented in principle in *McCarter v. Brodie*, but he was with the majority because he believed himself to be bound by the decisions in *R. v. Vizzard* (1933) 50 C.L.R. 30 and the other earlier transport cases, decisions which he believed the *Banking* case [1950] A.C. 235, still left effective. Only McTiernan and Williams JJ. upheld the legislation with any conviction, repeating reasoning found in the majority judgments in *McCarter v. Brodie*. As a decision, the case rests upon the correctness of *McCarter v. Brodie*, which in turn depends upon the present standing of the earlier transport cases. The Privy Council has granted leave to appeal, and a full review of the constitutionality of transport co-ordination legislation can be expected. For this reason, the present High Court decision will not be noted further.

In *Hospital Provident Fund Ltd. v. Victoria* [1953] A.L.R. 258, the High Court held that the Victorian Benefit Associations Act 1951 did not contravene s. 92. This Act provided that only registered associations should carry on sickness, hospital, medical or funeral benefit businesses, and set out certain requirements with which associations were to comply before registration would be granted; existing associations still unregistered at the end of six months were to be wound up. The appellant company, which was ordered to be wound up, carried on sickness benefit business in Victoria, but in

the course of its business maintained offices in other States, transmitted and received money and communications over State borders, and sent officers interstate. It sought a declaration that the Act and regulations contravened s. 92.

The High Court upheld the legislation on an application of the first "arm" of the Privy Council formula in the *Banking* case—it imposed no *direct* burden upon interstate trade, commerce or intercourse. As Dixon C.J. put it, "the legislation is not concerned with any of the incidents or accidents of the plaintiff company's business which by nature are capable of taking on the character of interstate commerce or intercourse. It fixes entirely on the character of the benefits which the association to be registered contracts to provide."¹ Interstate commerce or intercourse might be burdened in so far as the effect of the legislation on associations in turn affected the incidental interstate aspects of their activities, but this was an "indirect" result of the legislation, which therefore was consistent with s. 92.

Dixon C.J. again² attempted to formulate the distinction between "direct" and "indirect" effects, a task declined by the Privy Council in the *Banking* case:³ in substance, he suggests that if the law controls or operates upon or in reference to an activity which is part of interstate trade, commerce or intercourse, or an essential attribute thereof, the burden it imposes is direct; but if it controls or operates upon or in reference to an activity which is *not* part or an essential attribute of interstate trade, commerce or intercourse, but the regulation of which produces secondary effects (physical, social or economic) on interstate trade, commerce or intercourse, then the burden it imposes is remote.

A majority of the Court rejected the contention that benefit association business was *itself* part of trade and commerce, distinguishing the U.S. decision which finally held U.S. insurance to be commerce;⁴ the interstate activities of Australian benefit associations were still very much "accidental" features of their business, said Dixon C.J., and there was no real analogy with insurance business in the U.S., which had fallen under the commerce power because it was *based upon* communications and interstate financial organizations and facilities.

Webb J. upheld the Act on a different ground: s. 2 of the Victorian Acts Interpretation Act 1930 provided that Acts were to be construed so as to be *intra vires* of the Victorian Parliament; there-

¹ [1953] A.L.R. 258, 266. ² See *Willard v. Rawson* (1933) 48 C.L.R. 316.

³ [1950] A.C. 235, 312.

⁴ *S. Eastern Underwriters' Assoc. case*, (1943) 322 U.S. 533; 88 Law. Ed. 1440.

fore the Act was to be read down so as to be limited to intra-state transactions.

Williams J. dissented. He held that the effect of the Act on interstate trade was direct, because benefit business (a form of insurance) was properly to be regarded as commerce; applying the second "arm" of the *Banking* case formula, he held further that the Act went beyond regulation. It was therefore a contravention of s. 92.

In *Wragg v. N.S.W.* [1953] A.L.R. 583, the N.S.W. Prices Regulation Act 1948-9 and the potato price orders made thereunder were upheld upon somewhat similar reasoning. Tasmanian potato growers and N.S.W. importers and dealers contended that as no allowance was made in the orders for transport costs or the superior quality of Tasmanian potatoes, they were placed at a disadvantage which amounted to a contravention of s. 92, and they asked for a declaration of invalidity. The High Court held that the economic effects of the legislation upon interstate trade were remote and not direct, and that s. 92 had not been violated. The reasoning of the Court is to be found in the judgment of Taylor J.: "both the Act and the order made thereunder deal generally with goods, whether locally produced or imported from any other country, and any effect which the prescription of a general price for intrastate sales may have on the business of importing potatoes from Tasmania is not a direct effect but an economic consequence too remote to constitute an impairment of the freedom which s. 92 assures."⁵ The validity of price-fixing legislation of this type had been affirmed in *McArthur's* case, (1920) 28 C.L.R. 533, and no subsequent decision had affected this affirmation. It was possible that some of the sales in N.S.W. by "primary wholesalers" who were importers were actually made in the course of interstate trade, but the facts were insufficient to establish this, and the Court could not make a declaration upon a mere assumption.⁶

Dixon C.J. added some interesting observations. It was true, he said, that it had become artificial to make a distinction between the interstate trade and the domestic trade of a State, but the distinction existed in the Constitution—s. 51 (i), s. 92—and must be given effect to; plaintiff had in effect argued that the "area of immunity" given by s. 92 should be extended so as to blot out this

⁵ [1953] A.L.R. 583, 593.

⁶ In *The Milk Board (N.S.W.) v. Metropolitan Cream Pty. Ltd.* (1930) 62 C.L.R. 116, 134, Latham C.J. expressed the opinion that "a State price-fixing Act applying (as a matter of construction) to trade and commerce in general may validly apply to (sales in) inter-State trade and commerce if it is not shown to be directed against such trade and commerce."

distinction—and extended by principles relevant to a *grant* of power—, but “the economic interdependence of trade and commerce among the States with the domestic trade of a State cannot lead to a weakening of the legal distinction which the Constitution itself makes.”⁷ He also gave further clarification to the “direct effect/remote effect” distinction by repeating a warning which he has made before:⁸ it must always be remembered that an Act may “directly” operate upon activities of interstate trade, commerce or intercourse although it adopts “circuitous or devious means”—i.e. although its relation to interstate trade etc. is *prima facie* indirect; the question is one of substance, not of form alone.

It will be noticed that in all these cases the approach suggested by the Privy Council in the *Banking* case is adopted: Is the burden which this provision or order imposes upon interstate trade, commerce or intercourse directly so imposed? If not, there is no violation of s. 92. If, however, the burden is directly imposed, is the provision or order merely regulatory (and so valid), or does it go beyond regulation? It would appear, however, from his judgment in *Hughes and Vale v. N.S.W.* read together with his judgment in *McCarter v. Brodie*, that McTiernan J. has taken a different view of this approach and has run the two questions into one. His Honour seems to argue that *because* the legislation is (on his view) regulatory, *therefore* its restriction of interstate commerce is indirect. Other members of the Court apply the questions as they have been set out above. As the judgments in *Hughes and Vale v. N.S.W.* indicate, the major difficulty in this approach lies in determining what is and what is not “regulation”.

Finally, there is a decision of Sholl J. in the Victorian Supreme Court in *Egg and Egg Pulp Marketing Board v. Robins* [1953] A.L.R. 44. Here it was held that eggs required by a producer to fulfil a “running agreement” for weekly deliveries to a N.S.W. purchaser did not at any time become vested in the Victorian Egg Board under Victorian marketing legislation, because they were required for the purpose of interstate trade, commerce or intercourse and were intended to be used for such trade, commerce or intercourse within the meaning of s. 16 (iii) of the Victorian Marketing of Primary Products Act 1935. This section is, of course, an attempt to avoid s. 92 difficulties under the Act. Sholl J. held that it was immaterial that deliveries were actually effected in Victoria—the protection of s. 16 (iii) was *not* limited to the interstate trade of the producer; he cited

⁷ [1953] A.L.R. 583, 586.

⁸ *O. Gilpin's case*, (1935) 52 C.L.R. 189, 211; see Fullagar J. in *Hospital Provident Fund case*, *supra*, at 279.

Starke J. in *Matthews v. Chicory Marketing Board* (1938) 60 C.L.R. 263, 283 (approved in *Wilcox Mofflin Ltd. v. N.S.W.* [1952] A.L.R. 281, 292), and Dixon and Williams JJ. in *Clements and Marshall Pty. Ltd. v. Field Peas Marketing Board (Tas.)* (1947) 76 C.L.R. 401, 414; he denied that the *Field Peas* case depended on the fact that a general course of business, applicable to the whole Tasmanian trade in field peas, was proved, a contention which certainly seems inconsistent with an "individualized" approach to s. 92 problems. The wide operation of such a provision as s. 16 (iii) is illustrated in his Honour's conclusion: "In my opinion—to take eggs as an example—it is at all events enough to confer upon the whole of a given quantity of eggs in the hands of their producer the second and third exemptions contained in s. 16 (iii) [i.e. goods required by the producer for interstate trade etc., or intended to be used for such trade etc.], that at the time such eggs come into existence the producer requires, or intends to use, all those eggs, or some substantial portion of them which as yet he cannot reasonably ascertain, for the purpose of putting them, by his disposition or dispositions, *into a course of dealing which, according to normal practices, will commit them to interstate trade (not necessarily his own interstate trade).*"⁹ It would have been sufficient, he said, had the purchaser here been a Victorian merchant, *himself* intending to resell interstate. He did not think the case fell under the first exemption in s. 16 (iii)—goods the subject of trade, commerce or intercourse between the States. On a parity of reasoning, he said, s. 92 itself would defeat the Board's title in the present case, and he cited the *Field Peas* case and the *Wilcox Mofflin* case.

R. L. SHARWOOD

⁹ [1953] A.L.R. 44, 49; my italics.

TORT—WHETHER INJUNCTION SHOULD HAVE BEEN GRANTED AGAINST EMPLOYEES WHO ASSISTED IN BREACH OF LICENCE—NO ACTIONABLE INTERFERENCE

THE Victorian case of *Rutherford v. Poole*¹ presents clearly the law of one sphere of tort—actionable interference with contractual relations—which until very recently was extremely confused.

In this case the plaintiff was granted an exclusive licence to manufacture steamtraps by the patentee of the process. Subsequently the patentee began to manufacture the articles himself, employing the defendants, who knew the licence had been granted. The licensee

¹ [1953] V.L.R. 130.