rate and the nominal interest rate, and while neither is very dogmatic in this respect, the approach of Stephen J. is the less so of the two, making reference as it does to considerations which have most meaning in the short term. If in the 'normal case', the majority view continued to suggest a discount rate of two per cent, there is little that can be said which would support one view above the other. Recognizing that, in consequence of the need to calculate the award on a lump sum basis, the difficulties created by future price movements cannot possibly be overcome with any degree of certainty, the issue seems to reduce to one of deciding whether to err on the side of the plaintiff or the defendant. On the other hand, it might be said that the view of Stephen J. is to be preferred on the basis that the two per cent difference can justifiably be put on the plaintiff's side in order to account for future wage increases due to productivity gains, an aspect of wage movements not otherwise accounted for in assessing damages. A figure of two per cent would probably be apt to serve this task. This reasoning would not apply to future payments cases which did not involve the payment of wages, but it is probably true that many future payments in personal injuries cases would involve the payment of wages in respect of nursing and similar services. Whether this consideration forms part of the reasoning of the undiscounted approach is not entirely clear. Stephen J. makes brief reference to the point but does not develop it.

If, as the Victorian case suggests, the majority view is consistent with a higher discount rate in the normal case, then the argument may be stronger in favour of the view of Stephen J. This is simply on the basis that it is more flexible in its application and is adequate to deal with circumstances in which the court can observe as a matter of fact the tendency under prevailing economic conditions for the income from damages awards to be substantially or completely offset by the declining value of money.

One point does appear to be clear from the case and is evident equally in other recent decisions.[46] This is that the courts do not regard the means they presently have available to them as capable of dealing in anything near a satisfactory way with the problem of changes in the value of money. Stephen J. makes the point in the following way:

> A defect inherent in common law awards of lump sum damages . . . is due to the once and for all nature of such awards. Their assessment necessarily involves some prediction of the future and, once awarded, they remain unalterable however wrong that prediction may prove to be. No existing method of assessment can overcome this; only radical legislative intervention will suffice.[47]

PAUL KENNY*

UEBERGANG AND OTHERS v. AUSTRALIAN WHEAT BOARD†

Constitutional law — Section 92 of the Constitution — Freedom of Interstate Trade, Commerce and Intercourse — Individual Right Theory — Public Character Theory — Government marketing schemes — Definition of reasonable regulation — Relevance of factual evidence.

The Australian Wheat Board is set up by complementary Commonwealth and State legislation in all States and Territories. The Board's function is to regulate the

[46] See especially *Lim Poh Choo v. Camden and Islington Area Health Authority* [1980] A.C. 174.
[47] (1981) 34 A.L.R. 162.
* B.A., a student in Law at the University of Melbourne.
† (1980) 54 A.L.J.R. 581.

marketing of wheat by compulsory acquisition from producers and subsequent resale.

A wheat producer in New South Wales entered into a contract for the sale of wheat to a manufacturer of poultry feed in Queensland in December 1978. The contract of sale was clearly in breach of the Wheat Industry Stabilization Acts of New South Wales and Queensland. Pursuant to this legislation the Board published notices in the *Commonwealth Gazette* requiring delivery to itself of the wheat which was the subject of the contract of sale. Both the producer and the manufacturer were admittedly engaged in interstate trade. Accordingly they invoked the protection of s. 92 of the Constitution, which declares *inter alia* that interstate trade, commerce and intercourse shall be 'absolutely free'. They sued the Board for a declaration that the legislation was invalid in so far as it affected interstate trade and commerce. The Attorneys-General of the Commonwealth and all the States intervened in the action; the Commonwealth, New South Wales and Queensland were joined as parties and the Australian Wheatgrowers' Federation was granted leave to intervene.

At the original hearing the High Court gave directions to the parties that it would allow argument on the validity of the Acts and that the decision of the Court in *Clark King and Co. Pty Ltd v. Australian Wheat Board*[1] did not preclude examination of the facts in the instant proceedings.

The parties returned to the Court for further directions on the relevance of factual evidence to the validity of the legislation. Barwick C.J. referred the matter to the Full Court, seeking answers to three questions:

1. Does the validity of the Wheat Industry Stabilization Act 1974 (New South Wales) and the Wheat Industry Stabilization Act 1974 (Queensland) depend on establishing any fact to the satisfaction of the Court? If so, what fact?

2. Is that fact to be determined solely upon material which is within judicial knowledge?

3. Does s. 92 prevent the application of the Wheat Industry Stabilization Act 1974 (New South Wales) and the Wheat Industry Stabilization Act 1974 (Queensland) or either of them to the contract of sale?

The order of the Court was written by Gibbs and Wilson JJ., Stephen, Mason and Aickin JJ. agreeing in the result, as follows:

Answer to Question 1: There may be facts whose existence is relevant to the validity of the Acts but the admissibility of evidence to establish any such facts will be subject to any amendment of the pleadings.

It is not appropriate to answer the second part of the question.

Answer to Question 2: No.

Answer to Question 3: Not appropriate to answer.

Barwick C.J. answered 'No' to the first question; 'Not applicable' to the second (but 'No' should a majority answer 'Yes' to the first question), and 'Yes' to the third question.

Murphy J. answered 'No' to the first question, held that the second question did not arise and that the answer to the third question was also 'No'.

Underlying this cryptic question-and-answer procedure is the fundamental issue of the operation of s. 92 on government marketing schemes regulating interstate trade and commerce. More specifically the Court was asked to consider the definition of the concept of 'reasonable regulation' consistent with s. 92 and whether there is any practical operation for the proviso to the decision of the Privy Council in the *Commonwealth v. Bank of New South Wales*[2] (the *Banks' Case*). In that case the Privy Council upheld a High Court decision disallowing legislation for the nationaliz-

[1] (1978) 140 C.L.R. 120; (1978) 21 A.L.R. 1; discussion below.
[2] (1949) 79 C.L.R. 497.

ation of private banks. The case has been regarded as deciding generally that no government monopoly in interstate trade can avoid invalidity as a result of s. 92. However to this general proposition the Privy Council expressed the following qualification:

> . . . it may be that in regard to some economic activities and at some stage of social development it might be maintained that prohibition with a view to State monopoly was the only practical and reasonable manner of regulation and that interstate trade, commerce, and intercourse thus prohibited and thus monopolized remained absolutely free.[3]

The issue in the instant proceedings was whether the Board should be permitted to lead evidence to establish that such circumstances currently existed in the wheat industry.

The *Banks' Case* was the 'high-water mark' of the Dixonian approach to the interpretation of s. 92 and its application to government regulatory schemes. This approach, developed by Sir Owen Dixon in the 1930s and 1940s, gave s. 92 a wide application and frustrated attempts by State and Commonwealth governments to control or regulate interstate trade and commerce. Underpinning this approach was the so-called 'Individual Right Theory'. According to this theory, s. 92 confers rights on individuals to engage in interstate trade, commerce, and intercourse subject only to the reasonable regulation by government necessary for an ordered society. Total prohibition on individuals to engage in interstate trade or commerce (for example by compulsory acquisition of produce or by an unfettered executive discretion to refuse a licence to engage in interstate trade or commerce) necessarily exceeds the limits of reasonable regulation. Any government monopoly in an area of interstate trade or commerce, including, as it must, an element of prohibition, is therefore unconstitutional.

This approach remained doctrine for three decades with only marginal refinements relating to the definitional question of what constitutes interstate trade or commerce. Despite academic criticism and statements of unease from jurists[4] the doctrine was unchallenged in the early 1970s. However, in *S.O.S. (Mowbray) Pty Ltd v. Mead*[5] Windeyer J. heralded the possibility of a revision:

> What does cause me anxiety is . . . the danger of putting more and more matters outside the authority of the parliaments of Australia, Commonwealth and State. I think that we should be careful not to do this, except when the Constitution clearly demands it, and that the denotation of the concept that is embodied in the words of s. 92 as now interpreted must be accordingly confined. If in doubt whether a particular matter was within the scope of the freedom that s. 92 proclaims, I would resolve that doubt in favour of the Parliaments.[6]

What the Court needed was an intellectually acceptable alternative to the Dixonian approach and a coherent and effective strategy for its implementation.

In his first judgment dealing with s. 92 (*Pilkington v. Frank Hammond Pty Ltd*[7]), Mason J. said:

> . . . the section protects the rights of individuals to engage in interstate trade commerce and intercourse *but it needs to be recognized that this protection is incidental to, and in a sense consequential upon, the protection which is given to the entire concept of interstate trade commerce and intercourse*, including the various acts and transactions by which it is constituted.[8]

In the same case Jacobs J. said:

> Since trade and commerce and intercourse ordinarily involve the activities of individuals, corporate or incorporate, it is convenient and necessary to examine

[3] *Ibid.* 641.

[4] See the judgment of Murphy J. in *Buck v. Bavone* (1976) 135 C.L.R. 110, 133-4; (1976) 9 A.L.R. 481, 498-500, for a summary of these comments.

[5] (1971) 124 C.L.R. 529.

[6] *Ibid.* 574-5.

[7] (1974) 131 C.L.R. 124; (1974) 2 A.L.R. 563.

[8] *Ibid.* 186; 611. Emphasis added.

> the impact of some legislative administrative or other act upon the freedom of the individual in his or her or its trade commerce or intercourse. *However, these individual rights are a reflection on private rights of the Constitutional injunction. Section 92 remains primarily a public declaration and injunction.*[9]

The primary issue in dispute in *Pilkington v. Frank Hammond* was whether the intrastate leg of an interstate carriage of goods should be characterized as part of interstate trade and therefore protected by s. 92. Mason and Jacobs JJ. agreed with the majority that the carrier was protected by s. 92 because the whole carriage of the goods was protected by the section although there was not necessarily any right in the particular individual to make the particular carriage.

In *North Eastern Dairy Co. Ltd v. Dairy Industry Authority of New South Wales*[10] Mason and Jacobs JJ. again found in favour of an individual trader claiming the protection of s. 92 to enable it to engage in interstate trade. However, in his judgment Mason J. referred to the 'predominant public character' of s. 92[11] and Jacobs J. said:

> Section 92 operates upon factual situations, actual or envisaged, of trade, commerce, and intercourse among the States. It is not in terms an injunction against the enactment of laws. . . .
> The court reaches the necessary conclusions of fact, largely on the basis of its knowledge of the society of which it is a part.[12]

Having thus laid the groundwork for a substantial revision of doctrine, Mason and Jacobs JJ. were able to uphold the validity of the wheat industry stabilization scheme in the *Clark King Case* by applying to the facts of that particular case the proviso from the *Banks' Case*. Concentrating not on the infringement of the right of any individual to engage in interstate trade in the particular commodity, but instead on the movement of goods interstate — the 'concept' of interstate trade — their Honours were able to hold that the scheme was the 'only practical and reasonable manner of regulation' and did not therefore infringe s. 92.[13]

The replacement of the 'Individual Right Theory' with what might be called the 'Public Character Theory' opens up a far greater scope for the concept of reasonable regulation consistent with s. 92. If it is the movement or carriage of goods or services interstate which is protected by s. 92 and not the right of individuals to engage in that trade, then the inclusion in a regulatory scheme of a prohibition on that right will not necessarily be fatal to its validity under s. 92.

In the *Clark King Case* a majority of three out of five judges upheld the validity of the scheme. Murphy J. came to the same conclusion as Mason and Jacobs JJ. but on the grounds that s. 92 should only be applied to strike down direct or indirect fiscal burdens on interstate trade which discriminate between intrastate and interstate trade.[14] Barwick C.J. and Stephen J. dissented on orthodox grounds, although Stephen J. considered the applicability of the *Banks' Case* proviso[15] while the Chief Justice would not grant it any more than academic application.[16]

By the time the instant case came to be heard an ideological split within the Court was evident. The retirement of Jacobs J. from the Court in 1979 seemed to leave Mason J. as the lone standard bearer for the 'Public Character Theory'. However, notwithstanding his dissent in the *Clark King Case*, Stephen J. had demonstrated a

[9] *Ibid.* 199; 622. Emphasis added.
[10] (1975) 134 C.L.R. 559; (1975) 7 A.L.R. 433.
[11] *Ibid.* 614; 471.
[12] *Ibid.* 620-2; 475-6.
[13] (1978) 140 C.L.R. 120, 178-93; (1978) 21 A.L.R. 1, 42-54.
[14] *Ibid.* 193-4; 54-5. See *Buck v. Bavone op. cit.* 132-8; 498-502 for Murphy J.'s leading statement of principle on s. 92.
[15] *Ibid.* 173-7; 38-41.
[16] *Ibid.* 156; 25.

reluctance to close off large areas of economic activity to government regulation. In the earlier case of *Mikasa (N.S.W.) Pty Ltd v. Festival Stores*[17] his Honour had said:

> It is one of the tasks of the legislatures of this country to create the permissible framework within which s. 92 is to operate and of this Court to adjudicate upon whether their enactments go beyond the permissible limits of that framework and entrench upon the freedom which s. 92 preserves; but it is no part of this Court's task to evaluate the merits of the component parts of that framework; its features are open to judicial examination only for the purpose of ensuring that it is a framework which is being erected and not a barrier. The distinction between the two will frequently be elusive but never illusory.[18]

In subsequent judgments in *Permewan Wright Consolidated Pty Ltd v. Trewhitt*[19] and *Boyd v. Carah Coaches Pty Ltd*,[20] and in dicta in *Clark King*,[21] Stephen J. had been developing a broadening definition of the concept of reasonable regulation. His Honour had not, however, departed from the orthodox position that a regulatory scheme including an element of prohibition necessarily fell outside that definition.

It was therefore no surprise that Stephen and Mason JJ. should join together in the instant case in a judgment that further extends the bounds of the definition of reasonable regulation. It was, however, a surprise that this judgment should expressly resile from excluding from that definition schemes with an element of prohibition.

Both judges were clearly engaged in a 'ground clearing exercise' in anticipation of a major confrontation on the substantive issue, if or when that should be argued. The starting point for the judgment is the *Banks' Case* proviso. Foreseeing the danger of attaching the whole notion of reasonable regulation to the proviso, their Honours initially disclaim its generality:

> . . . we cannot regard those observations as intended to express, or indeed, as capable of expressing in some definitive formula the circumstances in which inter-state economic activity may validly be prohibited with a view to State monopoly. . . . To adopt such a formula will be to accept its indiscriminate application, regardless of circumstance, while the prospects of certainty which its adoption may seem to offer in return will, we think, prove illusory. Both the range of its application and its operation when once applied appear to us to bear the seeds of uncertainty.[22]

However, their Honours anticipate the general adoption of the formula, in which case, 'its present terms will not do, they will require restatement'.[23] Taking the crucial phrase 'the only practical and reasonable manner of regulation', they would ignore the word 'only', or at least restrict it to governing 'practical', which they would read to mean 'practicable' in the sense of 'capable of being carried out in action, feasible' (Shorter Oxford English Dictionary) or 'adapted to actual conditions'. The issue of practicability is to be assessed from the viewpoint of those administering the scheme (that is, the government), not from the viewpoint of those traders affected by it.[24]

Reasonableness is concerned with the 'adverse effects' of the challenged law upon the traders involved. But these adverse effects must be weighed against the public interest: 'The importance of this matter of the public interest must never be lost sight of . . .'.[25]

In any challenge to the validity of a law under s. 92, those seeking to uphold its validity must prove the reasonableness of its effects, while those opposing its validity must prove its lack of practicability. But in so doing, the latter must propose an alternative and practicable scheme. Thus the validity of some type of regulatory

[17] (1972) 127 C.L.R. 617; (1972) A.A.L.R. 921.
[18] *Ibid.* 655; 943.
[19] (1979) 27 A.L.R. 182, 192-202.
[20] (1979) 27 A.L.R. 161, 167-8.
[21] *Op. cit.* 173-7; 38-42.
[22] (1980) 54 A.L.J.R. 581, 594.
[23] *Ibid.*
[24] *Ibid.*
[25] *Ibid.* 595.

scheme is automatically assumed, and the issue becomes merely the form of that scheme.[26]

In determining that form, Stephen and Mason JJ. would not be bound by orthodox doctrine which, in their opinion, has lead:

> . . . to a quite sharp distinction being drawn between regulation of trade which involves prohibition and that which does not. There seems no warrant for such a distinction; restrictions upon the freedom to trade are infinitely variable in their impact upon the trading community. Arbitrarily to divide them into two categories, those which involve prohibition and those which do not, ignores the realities of trade and commerce.[27]

This passage represents the boldest departure yet from orthodox doctrine by either judge.

In summary, Stephen and Mason JJ. would uphold the validity of a regulatory scheme if it is practicable from the point of view of the government and it is reasonable in its effects upon traders, such reasonableness being subject to the overriding notion of the public interest. Their Honours summarize their definition of reasonable regulation thus: 'the legislation should be no more restrictive than is reasonable in all the circumstances, due regard being had to the public interest'.[28]

On the evidentiary issue, Stephen and Mason JJ. agreed with Gibbs and Wilson JJ., adding that relevant evidence would include the goals sought to be obtained by the restrictions, and whether they could be obtained by other, more reasonable means.[29]

Murphy J. restated his well-known views on s. 92, first propounded in *Buck v. Bavone*.[30] His Honour has made it clear that he will not entertain s. 92 challenges unless the law complained of imposes direct or indirect fiscal burdens which discriminate between intrastate and interstate trade. However in a remarkably candid passage his Honour moved some way towards the Stephen-Mason position:

> . . . while adhering to my own view of s. 92, I would, as an alternative, support that which seems to be the nearest to mine in order to obtain or increase the vote for that view and to reject a more extreme alternative . . . I would, if my own view does not prevail, support the view expressed by Justices Stephen and Mason.[31]

Ironically both Murphy J. and Barwick C.J. agreed that the Board should not introduce factual evidence to establish that its scheme was the 'only practical and reasonable manner of regulation'. But the Chief Justice's reasons were very different from those of Murphy J. In an exhaustive theoretical discussion, his Honour maintained his unerring fidelity to orthodox doctrine and criticized strongly the recent challenges to it by Mason J., in league with Jacobs J.,[32] and by Murphy J.[33] But like Murphy J. the Chief Justice concluded that the operation of s. 92 depends only on the words of the Constitution and not on any question of fact. Accordingly, his Honour favoured determining the validity of the scheme then and there, a determination which on orthodox grounds must strike down the scheme.

In the *Clark King Case* Barwick C.J. had declared that the proviso to the *Banks' Case* 'strains my credulity'.[34] In the instant case his Honour attempted to consign it beyond even the realms of academic speculation:

> I believe it would be better now at least to indicate quite clearly the inapplicability of their Lordships' cautionary remarks to cases in which the government monopoly in the distribution of a commodity is sought to be justified.[35]

[26] *Ibid.* 594.
[27] *Ibid.*
[28] *Ibid.* 595.
[29] *Ibid.*
[30] (1976) 135 C.L.R. 110.
[31] (1980) 54 A.L.J.R. 581, 595-6.
[32] *Ibid.* 587-9.
[33] *Ibid.* 583.
[34] *Op. cit.* 156; 25.
[35] (1980) 54 A.L.J.R. 581, 586.

While preferring to restrict the definition of reasonable regulation only to those areas in which issues of public health or commercial dishonesty arise, his Honour nevertheless formulated a test of whether regulation was reasonable and consistent with s. 92 in the following terms:

> Is the legislative or executive scheme the only reasonable and practicable (*sic*) method of regulating interstate trade, commerce, and intercourse in the particular commodity or activity, so that the trade, commerce, and intercourse and the participation therein of individual citizens remains free: is it the only reasonable and practicable way of securing that freedom?[36]

In contrast to the Chief Justice's largely theoretical judgment, Aickin J. undertook an analysis of authority, in particular the landmark cases of *James v. Cowan*,[37] *James v. The Commonwealth*,[38] the *Banks' Case* and *Hughes & Vale Pty Ltd v. New South Wales*.[39] This analysis lead to the following conclusion:

> Regulation or partial prohibition will not contravene s. 92 if it is a necessary or a reasonable mode of enabling all traders or potential traders, private individuals as well as governments and statutory authorities, to conduct their interstate trade without excluding each other, and with due regard to the protection of the general public from danger, deceit or restrictive trading practices.[40]

Like the Chief Justice, Aickin J. reaffirmed the Individual Right Theory[41] and rejected the judgments of Stephen and Mason JJ. in the instant case,[42] Mason and Jacobs JJ. in *Clark King*,[43] and Murphy J. in *Buck v. Bavone* and subsequent cases.[44] However, unlike the Chief Justice, his Honour was not prepared to exclude the *Bank's Case* proviso altogether from any practical operation. Although the circumstances in which it might have practical effect must be 'both rare and exceptional'[45] Aickin J. was willing to allow the Board the opportunity to present factual evidence to support the contention that these circumstances currently existed.

The ideological lines thus drawn between Barwick C.J. and Aickin J. on the one side, and Stephen, Mason and Murphy JJ. on the other, leave Gibbs and Wilson JJ. in occupation of the middle ground. In a lucid yet ambivalent joint judgment their Honours attempt to find some common ground between the opposing factions. They are critical of the Stephen-Mason line on the grounds that it provides no criteria by which a citizen can discern a right to protect his or her trade against legislative enactment.[46] Barwick C.J.'s refusal to acknowledge any public character to s. 92 attracts the criticism that the very notion of reasonable regulation is itself a recognition of the public aspect of s. 92.[47]

Nevertheless their Honours explicitly conclude that s. 92 is 'concerned to protect private rights',[48] although it is not made clear whether this is the primary function of the section or whether those rights are merely 'derivative'. Echoing the sentiments of Windeyer J. recorded above,[49] their Honours say:

> Absolute freedom of interstate trade commerce and intercourse requires that the citizens of this Commonwealth shall within the framework of a civilized society be free to engage in these things. The difficulty is that the trend of political theory and practice is to develop and strengthen that framework more and more and often

[36] *Ibid.* 587.
[37] [1932] A.C. 542; (1932) 47 C.L.R. 386.
[38] [1936] A.C. 578; (1936) 55 C.L.R. 1.
[39] [1955] A.C. 241; (1954) 93 C.L.R. 1.
[40] (1980) 54 A.L.J.R. 581, 601.
[41] *Ibid.* 599, 600.
[42] *Ibid.* 602.
[43] *Ibid.*
[44] *Ibid.* 597-8.
[45] *Ibid.* 602.
[46] *Ibid.* 591.
[47] *Ibid.* 591-2.
[48] *Ibid.* 592.
[49] *Supra* n. 5.

> at the cost of individual liberty; but however conservative or reactionary it may seem to some, this Court cannot write s. 92 out of the Constitution. It must therefore do its best to preserve a balance between competing interests, a balance which favours freedom of the individual citizen in the absence of compelling considerations to the contrary.[50]

Gibbs and Wilson JJ. do not share the incredulity of the Chief Justice for the practical operation of the *Banks' Case* proviso, commenting that they do not find the reservation 'at all remarkable', nor without 'contemporary relevance'.[51] The formulation offered by Gibbs and Wilson JJ. for the definition of reasonable regulation consistent with s. 92 is as follows:

> what must first be shown in order to establish validity is that a monopoly covering both intrastate and interstate trade is the only practical and reasonable course open in the present circumstances. The test remains a stringent one, not likely to be satisfied except in exceptional circumstances. If that test is satisfied, it is still necessary for the Court to consider whether the interstate trade, so regulated, is 'absolutely free' within the meaning of s. 92.[52]

What their Honours do not make clear is how that 'freedom' is to be defined. Will prohibition of the right of individuals to engage in interstate trade necessarily mean the trade is not 'free'? Or will the continued movement of goods or services across State borders be sufficient to allow the conclusion that the trade remains 'free'?

While the tenor of the joint judgment suggests that Gibbs and Wilson JJ. will resolve these questions consistently with orthodox doctrine, it contains sufficient flexibility to enable them to take another course. The retirement of the Chief Justice adds further uncertainty as to how the Court will decide the substantive issue, if or when it is argued.[53] Recent changes in the attitudes of continuing judges further complicate any speculation on the outcome of such a case.

There is nevertheless discernible in the Public Character Theory a gathering momentum which threatens eventually to overturn orthodox doctrine on the interpretation of s. 92 and its application to government regulatory schemes.

MICHAEL PEARCE*

MOORGATE TOBACCO CO. LIMITED v. PHILIP MORRIS LIMITED AND PHILIP MORRIS INC.[1]

Privy Council — Application for leave to appeal — Opposition on ground that federal jurisdiction exercised — Judiciary Act ss. 39, 40 — Whether trade mark rights depend on existence of federal statute — Trade Marks Act ss. 28, 40.

The applicant Moorgate ('MG') had sought, as against the respondents ('PML' and 'PMI', respectively), declarations and injunctions in the Supreme Court of New South Wales on the basis that MG, not PML, was the proprietor of the trade marks GOLDEN LIGHTS and KENT GOLDEN LIGHTS for 'cigarettes'. Helsham C.J.

[50] (1980) 54 A.L.J.R. 581, 592.
[51] *Ibid.* 592.
[52] *Ibid.* 593.
[53] The plaintiff has in fact announced his intention not to proceed, citing costs as the main deterrent to further proceedings, although it is reasonable to conclude that the reasons for judgment in the instant case together with recent changes on the Bench may have influenced the decision, *The Australian Financial Review*, Wednesday, 20 May 1981, 3.

* LL.B. (Hons.).

[1] (1980) 31 A.L.R. 161.