CASE NOTES

THE AUSTRALIAN COARSE GRAINS POOL PTY LTD v. THE BARLEY MARKETING BOARD (QLD)*

The five years which have elapsed since Mr. Colin Uebergang's unfinished symphony on section 92 of the Australian Constitution[1] have seen an unusual lull in litigation involving that deceptively simple but infuriatingly cryptic guarantee that '. . . trade, commerce, and intercourse among the States . . . shall be absolutely free . . .'. The storm has broken, however, with the decision of the High Court in *The Australian Coarse Grains Pool Pty Ltd v The Barley Marketing Board (Qld)*.[2] This case concerned not the fundamental question of what 'absolute freedom' means in section 92 but rather the subsidiary question of just what is included in the concept of 'interstate trade': a divertimento, perhaps, rather than another full section 92 symphony, but one of considerable importance to agricultural marketing.

Two distinct issues

A brief reminder of the distinction between these two questions may be useful in putting the *Barley* case into context. Just because a trader is engaged in interstate trade, or because the law in question applies to interstate trade, does not mean that section 92 is necessarily infringed. The law may, for example, be merely 'regulatory', to use the current catch-phrase for laws which are said not to detract from the freedom guaranteed by section 92. Thus, an interstate trader cannot complain that prior to sale he must submit his eggs to a marketing board for grading and testing,[3] nor that he is prevented from engaging in certain undesirable business practices such as resale price maintenance.[4]

On the other hand, if a trader is not engaged in interstate trade, or if the law in question does not apply to interstate trade, then the larger question of whether that law is one of a kind which does or would infringe section 92 may be avoided. The trader may not have standing to raise the issue, the question may be dismissed as hypothetical, or the law may be regarded, because of its primary application to the trader's intra-State trade, as only 'indirectly' affecting whatever interstate trade the trader may have in addition to his intra-State trade. Thus, a finding that the trader is engaged in interstate trade, and that the law in question applies to that interstate trade, is likely to be necessary,[5] but not sufficient, for an infringement of section 92.

Statutory exemptions and reading down

The larger question of infringement of section 92 may also be avoided by the legislative technique of exempting interstate traders from the operation of the marketing scheme. This may be done in a

* (1985) 59 A.L.R. 641, 59 A.L.J.R. 516.
1 *Uebergang v. Australian Wheat Board* (1980) 145 C.L.R. 266.
2 (1985) 59 A.L.R. 641, 59 A.L.J.R. 516.
3 *Permewan Wright Consolidated Pty Ltd v. Trewhitt* (1979) 145 C.L.R. 1.
4 *Mikasa (New South Wales) Pty Ltd v. Festival Stores* (1972) 127 C.L.R. 617.
5 But see further *infra* n.13.

variety of ways, the precise effect of which will depend on the wording of the exemption.[6] Two kinds of exemptions were at issue in the *Barley* case. First, the compulsory acquisition of the barley was said not to prejudice any 'interstate contract' entered into prior to the acquisition; and secondly, the Act included the familiar direction that it be read subject to the Constitution, to the intent that where the Act would but for this direction have been interpreted as exceeding the legislative power of the State, it shall nevertheless be valid to the extent to which it does not exceed that power.[7] The short point of this rather stilted and wordy reading down clause is that in any case where the Act would have been held to infringe section 92, it will be interpreted not to apply in those circumstances. The advantage of achieving this result by legislative direction rather than directly by force of the Constitution is that it enhances the prospect (though it does not guarantee it) that the Act can continue to operate to the extent that it does not infringe section 92; a direct infringement of the Constitution runs the risk of invalidating the entire Act, and will do so unless the Act is capable of being read down, or the bad parts severed from the good, and there is some indication that this reading down or severance was intended. But in either case, the question for the court is essentially the same: is there a breach of section 92? If the answer is yes, then the Act, or the relevant part of it, is either invalid, or, as a result of a reading down clause of the kind in the *Barley* case, is to be interpreted as not being intended to apply to the circumstances of the case.

The decision in the Barley case

A majority of the High Court (Gibbs C.J., Mason, Wilson and Dawson JJ.; Brennan J. not deciding) held that but for the reading down clause Queensland's barley marketing scheme would have infringed section 92. The scheme therefore did not apply to interstate trade in barley. Just why section 92 was infringed was scarcely discussed, and it will be necessary to return to the question of infringement later. But given this holding, the crucial question and main point of the case was whether the Victorian company which bought barley from Queensland growers with the intention of taking the barley back to Victoria in order to re-sell it was engaged in interstate trade at the time when the Act purported to vest the barley in the Barley Board. The same majority (Brennan J. dissenting) held that the purchase of the barley was a part of interstate trade. Consequently, the barley was the subject of interstate trade at the time of the purported compulsory acquisition by the Board, and the Act therefore did not apply to it. A different majority held, however, that the buyer's contracts with the growers were not 'interstate contracts' within the meaning of the exemption in the Act (Mason, Wilson and Brennan JJ.; Dawson J. dissenting and Gibbs C.J. not deciding). An understanding of these conclusions requires a closer look at the facts.

The Queensland barley marketing scheme vests 'forthwith' in the Barley Marketing Board 'all barley the produce of the soil within any part of the State of Queensland'.[8] Growers must deal only with and deliver only to the Board, and inspectors may seize any barley suspected of being carried or stored otherwise than in accordance with these requirements.[9]

The plaintiff, a Victorian company which regularly supplied customers in Victoria with malting barley, looked to Queensland as a source of supply when malting barley was in short supply in Victoria in 1982. Through local agents, the plaintiff entered into a number of contracts to buy Queensland barley from Queensland barley growers. At the time the contracts were entered into, the barley was ready for harvest but had not yet been harvested. Under the contracts, the growers were obliged to deliver the barley to premises which the plaintiff had acquired in Queensland (at Warwick), which they did, and the plaintiff was obliged to remove the barley from Queensland and deliver it to a buyer in another State. Apart from the contractual obligation to remove the barley

[6] The exemption will not necessarily be co-extensive with the ambit of the protection given by section 92. For an example of an exemption that was probably wider than the freedom conferred by section 92, see *Wilcox Mofflin Ltd v. New South Wales* (1952) 85 C.L.R. 488, 520. For an example of one which was narrower, see the majority view of the 'interstate contracts' exemption in the *Barley* case itself, discussed below.

[7] Primary Producers' Organisation and Marketing Act 1926 (Qld) (hereinafter 'the Act'), sections 9(2) and 1A respectively.

[8] Order in Council, 24 April 1930 (as amended), made under section 9(2) of the Act.

[9] Section 15 and sections 21A-21H respectively.

from Queensland, the plaintiff's actual intention was in fact to take the barley out of Queensland and to deliver it to buyers in Victoria, and the barley was eventually taken out of Queensland. However, when an amount of barley was seized by an inspector of the Board from the plaintiff's premises in Warwick, the plaintiff had not at that stage entered into any contracts to re-sell the barley.

When is an interstate contract not an interstate contract?

If the plaintiff's contracts with the growers had been 'interstate contracts' within the meaning of the statutory exemption, as Dawson J. thought in dissent, then the case could have been disposed of on that ground. According to Dawson J., the contracts were 'interstate' contracts simply because they were effective to launch the barley into interstate trade.[10] The majority took a narrower view, but unfortunately did not, except for Wilson J., really explain what that view was, preferring instead simply to refer to an earlier decision in which (in rather different circumstances) a narrow view had been taken; Wilson J., at least, made it clear that in his opinion an 'interstate contract' was one which stipulated delivery from one State to another.[11] In the *Barley* case, the sale and delivery of the barley from the growers to the plaintiff was wholly intra-State. The plaintiff, it is true, was obliged under the contract to then remove the barley from Queensland, but according to Wilson J. it was only the delivery from seller to buyer which could give the contract its interstate character.

This narrow view of the concept of an 'interstate contract' did not mean that the plaintiff's purchase of the barley was not protected by section 92. As already stated, Gibbs C.J., Mason, Wilson and Dawson JJ. all held that the plaintiff was engaged in interstate trade at the time of purported acquisition, so that, by virtue of the combined operation of section 92 and the reading down clause, the Act did not apply to the barley in question. In the result, therefore, the plaintiff's contracts were a part of interstate trade, but were not interstate contracts.[12] Once this distinction is grasped some of the flavour will have been conveyed of the idea of 'thinking like a lawyer', once whimsically defined by an American jurist as the taking of a positive delight in applying strict logical reasoning to compel a conclusion which offends one's natural instincts or common sense!

The moment of acquisition

Putting aside the abstruse question of the statutory meaning of 'interstate contract', the more important issue was whether the plaintiff was engaged in interstate trade (or, to use a slightly different perspective, whether the barley was in the course of interstate trade) at the time of purported

[10] (1985) 59 A.L.R. 641, 682. This conclusion appeared to be drawn independently of the contractual obligation on the part of the plaintiff to remove the barley from Queensland.

[11] *Ibid.*, 653 (Mason J.), 670-1 (Brennan J.) and 665 (Wilson J.). The earlier decision was *Peanut Board v. Rockhampton Harbour Board* (1933) 48 C.L.R. 266. However, as Wilson J. correctly pointed out, the peanuts with which that case was concerned were not (or were not shown to be) the subject of any contract at all. Thus, McTiernan J.'s observation in the *Peanut* case that the exemption for interstate contracts was insufficient to protect the right given by section 92 (48 C.L.R. at 314) did not shed any light on the precise meaning of 'interstate contract', nor on whether the exemption did or did not apply in the *Barley* case. Mason and Brennan JJ. plainly rejected the plaintiff's rather vague contention that an interstate contract was one 'with any interstate element', or alternatively one 'made across State boundaries' (see (1985) 59 A.L.R. at 682 *per* Dawson J.), and must be taken to have rejected Dawson J.'s view that interstate contract meant a contract which 'launched the product into interstate trade'. However, neither offered any positive definition; we can only speculate on whether they were in agreement with Wilson J.'s definition.

[12] It is emphasised that this distinction emerges from the combined holdings of different majorities. As far as the individual justices are concerned, Gibbs C.J. left open the question of whether the contracts were interstate contracts, Dawson J. found that they were both interstate contracts and a part of interstate trade, and Brennan J. found that they were neither. Wilson J. drew a *further* distinction, holding that the contracts, not being interstate contracts, were therefore not a *part* of interstate trade — but the obligation to export the barley was effective to *commit* the barley to interstate trade: (1985) 59 A.L.R. at 665.

acquisition,[13] as held by the majority. Here, the reasoning differed considerably from one justice to another. But a preliminary issue also required a decision: at what time did the purported acquisition occur?

On this point, the Court was unanimous that barley vested in the Board at the time it was harvested, not at any earlier time such as the 'shot blade' stage or when the barley was ready for harvest.[14] The Board evidently felt compelled to argue that vesting occurred prior to harvest, so that it could be further argued that when the contracts were entered into, the barley was already the property of the Board; the Board was probably quite pessimistic (and rightly so as it turned out) about its prospects of success if the contracts pre-dated the acquisition. But the Court took the view that there were so many difficulties with the Board's argument (for example, the uncertainty of the precise time of acquisition, and the possible consequence that a sale of land on which barley was growing could amount to a disposition of the barley in breach of the Act), that the case for regarding harvest as the moment of acquisition was compelling. This was, however, merely a matter of interpretation of the existing legislation. That legislation could at any time be amended to spell out a different moment of acquisition, a point to which it will be necessary to return.

The concept of interstate trade: physics and metaphysics

Thus, the contracts pre-dated the acquisition. But this did not, of itself, mean that the acquisition could not take effect. That depended, as we have seen, on whether, at the time of acquisition, the barley was properly regarded as in the course of interstate trade. This brings us to the major point of the case.

The concept of *interstate* trade requires a little reflection. The idea of *intra*-State trade is easy: it is essentially a physical or geographical concept; it connotes the occurrence of an event such as purchase, sale or delivery, or a sequence of such events, wholly within the boundaries of a single State. Interstate trade, however, is not a physical or geographical concept. Interstate trade connotes the idea of a transaction, or series of transactions, which involve more than one State: some elements will occur in one State and some in another. Physically or geographically, each element of the trade must occur within one State or another; there is no such 'place' as 'interstate'. Thus, the question of whether a transaction is a part of interstate trade will generally involve an examination of whether that geographically intra-State transaction is an integral part of a larger chain of events, some of which occur, or will occur, in another State. To put it another way, to what extent do the interstate elements colour the sequence of events as a whole and entitle that whole sequence to be described as 'interstate' trade? This is really more a metaphysical than a physical concept. But however it is described, one thing must be kept steadily in mind: the fact that a transaction occurs wholly within the boundaries of a single State clearly does not disqualify it from being a part of interstate trade. The transaction *must* occur within one State or another, and its geographical location, of itself, tells us nothing about whether or not the transaction is a part of interstate trade.

[13] It was clearly assumed that if the purchase was *not* a part of interstate trade, then the plaintiff must fail to get the protection of section 92. It should not be assumed, however, that a law which operates on intra-State trade can never 'directly' affect interstate trade and thereby, if the law is not 'regulatory', infringe section 92: see, for example, the respective judgments of Walsh J. in *S.O.S. (Mowbray) Pty Ltd v. Mead* (1972) 124 C.L.R. 529 and of Jacobs J. in *North Eastern Dairy Co. Ltd v. Dairy Industry Authority (New South Wales)* (1975) 134 C.L.R. 559. The assumption in the *Barley* case probably stemmed particularly from the line of cases dealing with laws which operated on things *antecedent* to interstate trade, as to which see later.

It should also be mentioned here that the different perspectives mentioned in the text (that of the plaintiff and that of the goods) could conceivably lead to different consequences in some circumstances: *cf. Field Peas Marketing Board (Tasmania) v. Clements and Marshall Pty Ltd* (1948) 76 C.L.R. 414, 429 *per* Dixon J.

[14] (1985) 59 A.L.R. at 644-5 (Gibbs C.J.), 653-5 (Mason J.), 663-4 (Wilson J.), 668 (Brennan J.), and 680-1 (Dawson J.). The 'shot blade' stage occurs when the ear of the barley has formed but is not yet visible and the sheath of the last leaf has not completely grown out: *ibid.* 680.

Three kinds of interstate trade

The sequences of events which may constitute interstate trade are probably infinite in their variety. Some typical examples may however be identified. Some may involve contractual arrangements; thus, if a seller in one State contracts with a buyer in another State to sell certain goods and to deliver them from the seller's State to the buyer's State, the sale and delivery will be a part of interstate trade.[15] Others may not involve any contractual obligation for interstate delivery; thus, a seller may bring his goods across the border in order to sell them in another State, then find a buyer in that other State and sell the goods to that buyer. Of course, the actual movement of the goods across the border is itself a part of interstate trade, though difficult questions can arise in relation to when the interstate part of the journey begins and ends, or, in other words, how much of the journey is properly regarded as interstate movement.[16] But the law which is said to infringe section 92 may not strike directly at the interstate movement itself; it may impose its restrictions only on the sale. Is the sale a part of interstate trade in these circumstances? After many fluctuations over the years, the answer now is clearly yes.[17] The reason is that the sale, as the end-point of the sequence of events, is an integral part of an entire interstate transaction.

A more difficult situation can arise where a seller in one State contracts to sell goods to a buyer in another State, and subsequently delivers the goods from the seller's State to the buyer's State, though without any contractual obligation to so deliver. That is to say, the seller could, consistently with the contract for sale, find suitable goods in the buyer's State and supply them from there, though in fact in our example he did not. Again, the actual delivery will be a part of interstate trade, but what of the prior sale? In the earlier example, the sale was *subsequent* to the interstate movement of the goods, so that the entire transaction could derive its interstate character from the prior interstate movement. Where the sale is prior to the interstate movement, and no interstate movement is stipulated, then *at the time of sale* there is no interstate element which can colour the entire transaction, and the High Court has resisted the idea that the subsequent interstate movement can give the sale an interstate character retrospectively.[18] The parties may, however, have *contemplated* that the arrangement would entail interstate delivery, even if that was not *required*. The High Court is divided on whether this contemplation of subsequent interstate movement is enough to make the sale a part of interstate trade.[19]

Purchase for interstate trade: integral part or antecedent?

The *Barley* case does not fit neatly into any of these categories. Here, it was the buyer who intended, and was obliged, to take the barley out of the State, after it had been sold and delivered in Queensland from the growers to the buyer. The sole dissenting judge, Brennan J., took the view that the plaintiff's purchase of the barley from the growers was an intra-State transaction and preliminary to rather than an integral part of the subsequent interstate trade.[20] The majority, however, saw the purchase as an essential and integral step in the plaintiff's interstate trade.[21] But just how far the decision goes is a little unclear. Gibbs C.J. and Wilson J., especially Wilson J., were content to rely on an earlier case which appeared to cover the facts of the *Barley* case,[22] and both stressed the importance of the plaintiff's contractual obligation to remove the barley from Queensland.[23] Daw-

15 See, for example, *W. and A. McArthur Ltd v. Queensland* (1920) 28 C.L.R. 530.
16 See, for example, *Tamar Timber Trading Co. Pty Ltd v. Pilkington* (1968) 117 C.L.R. 353.
17 See the *North Eastern Dairy* case, *supra* n.13; Coper, M. *Freedom of Interstate Trade Under the Australian Constitution* (1983) 236-42.
18 See, for example, *McArthur's* case, *supra* n.15; *H. C. Sleigh Ltd v. South Australia* (1977) 136 C.L.R. 475. The seller's residence in a State other than that of the buyer is not enough in itself to make the sale a part of interstate trade: *Carter v. Potato Marketing Board* (1951) 84 C.L.R. 460, 479.
19 *Smith v. Capewell* (1979) 142 C.L.R. 509.
20 (1985) 59 A.L.R. at 673-4.
21 *Ibid.* at 646-8 (Gibbs C.J.), 661-3 (Mason J.), 667 (Wilson J.), and 684 (Dawson J.).
22 *R. v. Wilkinson; Ex parte Brazell, Garlick and Coy* (1952) 85 C.L.R. 467.
23 (1985) 59 A.L.R. at 647 (Gibbs C.J.), and 667 (Wilson J.).

son J. also saw the earlier case as sufficient authority,[24] though he observed in addition that the plaintiff's contracts were the beginning of interstate trade in the barley, both as a matter of contractual obligation and as a matter of commercial reality.[25]

Mason J., the final member of the majority, took the widest view. In his opinion, the purchase of goods by a trader for the purpose of exporting them to another State or delivering them to a buyer in another State was a part of interstate trade, even though that purpose was not in the contemplation of the seller, provided at any rate that the existence of the intention was evidenced or accompanied by overt acts indicating that the goods had been purchased for that purpose.[26] Here, the contracts 'contemplated that the barley was thereby launched into interstate trade'; presumably, in the light of his Honour's judgment as a whole, the *obligation* to export the barley was sufficient rather than necessary as an indication of the requisite intention to export. Mason J. reached his conclusion by emphasizing the symmetry of the *Barley* case, concerning the beginning of interstate trade, with the cases involving sale after importation, where the sale has now been recognized as the end-point (but nevertheless part) of the interstate trade.[27]

The symmetry argument is persuasive. It is not easy to reconcile, however, with the well-and-truly established line of decisions excluding manufacture or production from the protection of section 92.[28] Here, the Court has drawn a sharp line between laws which operate on goods after they have come into existence and laws which operate on potential goods before they come into existence. Thus, a trader may, according to the *Barley* case, obtain the protection of section 92 in relation to purchasing goods for interstate trade, but not in relation to manufacturing or producing them for that purpose. Production has been indelibly held to be antecedent to rather than a part of interstate trade; moreover, this is so as a general proposition, irrespective of the facts of the particular case. Yet the same arguments in favour of regarding purchase as an integral part of an entire transaction can of course be applied to production. The line has been drawn, however, and it constitutes one of the few elements in the interpretation of section 92 which can safely be regarded as settled — or, at least, as settled as anything is settled in the weird and wonderful world of Australian constitutional law.

But at what moment did the interstate trade in barley begin?

There is a further difficulty, however, with the *Barley* case, given the accepted rule about production. The acquisition by the Board purported to take effect at the moment when the barley was severed from the land. The contracts were made prior to harvest, but at what point of time were the contracts effective to commit the barley to interstate trade? If the contracts effectively committed the barley to interstate trade at the time they were entered into (as Gibbs C.J. and Wilson J. appeared to think),[29] then it is hard to see why in the production cases it was fatal to those seeking the protection of section 92 that the goods were not in existence at the time of the making of the contracts purporting to commit those future goods to interstate trade.[30] If, on the other hand, the contracts were effective to commit the barley to interstate trade only at the time of harvest (as

24 *Ibid.* at 684.

25 *Ibid.* at 686. *Cf. supra* n.10 in relation to the statutory exemption for interstate contracts.

26 *Ibid.* at 660-1. Mason J. also observed that 'a contract which . . . contemplates interstate transportation of the goods as a likely means of performance is a contract forming part of interstate trade, at least when the goods move interstate'. This is an important part of the thrust of his Honour's judgment in the *Barley* case, but appears to involve a change of mind (though unacknowledged) from his Honour's position in *Smith v. Capewell*, *supra* n.19, at 527-8.

27 (1985) 59 A.L.R. 657, 661. His Honour also made the sensible point that it is better to regard the sale simply as a part of, rather than as an 'inseparable concomitant' of, the interstate trade.

28 See esp. *Grannall v. Marrickville Margarine Pty Ltd* (1955) 93 C.L.R. 55; *Beal v. Marrickville Margarine Pty Ltd* (1966) 114 C.L.R. 283; *Damjanovic & Sons Pty Ltd v. Commonwealth* (1968) 117 C.L.R. 390; and *Bartter's Farms Pty Ltd v. Todd* (1978) 139 C.L.R. 499.

29 The matter is far from clear; my attribution of this view to Gibbs C.J. and Wilson J. is based on inferences from very cryptic statements in (1985) 59 A.L.R. at 646 lines 40-4; 647 lines 22-31; 664 lines 27-37; and 667 lines 11-13, 34-6.

30 See esp. *Beal's* case, *supra n.28.*

Mason and Dawson JJ. appeared to think),[31] then why should that necessarily have prevailed over the acquisition, which purported to take effect at the same moment? Mason J. stated, though without offering any reasoning in support, that the acquisition could only take effect 'if it vested the barley in the Board before it was committed to interstate trade. It is not enough that vesting purports to take place at the same time as the barley is committed to that trade'.[32] Why this should be so is not self-evident. One might just as easily transpose the ideas and say that 'the commitment of the barley to interstate trade could only be effective if it occurred before the barley was vested in the Board. It is not enough that the commitment purports to occur at the same time as the barley is acquired'.

The way out of these difficulties may be that the barley might be regarded as coming into existence as an identifiable product at some stage prior to harvest, for example at the shot-blade stage or, perhaps more realistically, when it is ready for harvest. If the contracts committed the barley to interstate trade at the moment when the barley came into existence as an identifiable product, then on this view of that moment, the commitment to interstate trade would not only occur prior to vesting, but would also avoid any conflict with the rule that goods cannot be committed to interstate trade before they have come into existence. The time of entering into the contracts would not be critical, so long, of course, as it was prior to the time of the purported vesting. In the *Barley* case, the plaintiff agreed to buy the entire production of a specified area, though at the time of contract the barley was evidently ready, or almost ready, for harvest;[33] thus, it may be that the barley already 'existed' in the relevant sense at the time of contract, which could explain Gibbs C.J. and Wilson J.'s reference to the time of contract as the time of commitment to interstate trade. True, the 'shot-blade' stage and the 'ready for harvest' stage were rejected by the whole court as representing the time of vesting,[34] but that was a matter of interpretation of the particular legislation on this point. It may be said, however, that the reasons for that rejection — namely, the uncertainty of those earlier stages and the idea that the barley was not a 'commodity' until severed from the ground — must also weigh heavily against the idea of regarding the barley as 'coming into existence' at one of those earlier stages for any other purpose, such as the time of commitment to interstate trade.

Can crops be compulsorily acquired before interstate trade begins?

This brief excursion into agricultural existentialism is of more than passing interest, since marketing boards around Australia face the practical question, if they wish their schemes to be as comprehensive as possible, of whether crops can be compulsorily acquired before the produce is committed to interstate trade. The earliest time at which goods can be committed to interstate trade is, as we know, when they come into existence: contracts for the sale of future goods — such as eggs not yet laid or margarine not yet manufactured[35] — will not have that effect until the goods come into being. Precisely when that time is has been little explored, may well be controversial, and will certainly depend on the nature of the particular product. As noted earlier, Mason and Dawson JJ. appear to have held that, for the purpose of being committed to interstate trade, the barley came into existence as an ascertained product in an ascertained amount on harvest;[36] if that is so, then the decision in the *Barley* case may be overcome by an amendment to the legislation which provides for vesting at an earlier stage. If, on the other hand, the barley was committed to interstate trade when it was ready for harvest, as Gibbs C.J. and Wilson J. appear to have held[37] (and to have so held on the basis of that factor rather than on the basis of the time of contract independently of the readiness of the barley), then the vesting would have to occur even before that. Presumably, vesting could

31 Mason J.'s decision is clear on this: see (1985) 59 A.L.R. at 662-3. Dawson J.'s view is less clear, and is derived by the same process described above in n.29: (1985) 59 A.L.R. at 680, lines 12-13; 684, lines 27-8.

32 *Ibid.* 663.

33 *Ibid.* 644, 651.

34 *Supra* n.14.

35 *Supra* n.28.

36 *Supra* n.31.

37 *Supra* n.29.

theoretically be made to occur as far back as the earliest embryonic existence of the crop after planting, though the legislation would then require considerable adjustment and clarification in relation to the growers' obligations to the Board in relation to tending and harvesting. Also presumably, and by no means confidently, the earliest time at which the product could, consistently with the authorities, be committed to interstate trade would be when it had some kind of tangible existence, separate from — though not necessarily separated from — the soil. Thus, it may be possible for redrafted legislation to prevent a product from entering the stream of interstate trade, though that may also create some further practical difficulties. It must be kept in mind, also, that on the view of at least one justice,[38] simultaneous vesting and commitment to interstate trade will result in the latter prevailing.

Does the Barley case break new ground?

If this uncertainty is somewhat bemusing, this is of course the norm rather than the exception in the tortured history of section 92. The short point of the *Barley* case is that on the legislation as it stands, vesting occurs when the barley is severed from the soil, and the contracts in question committed the barley in question to interstate trade either before that time or simultaneously; in either case, the purported vesting was defeated. Putting aside the perplexing but unexplored question of when barley is born, the major aspect of the case was the decision that a buyer's purchase of goods for subsequent export was the beginning and therefore part of interstate trade. If the reason for this lay in the contractual obligation to export, beyond which Gibbs C.J. and Wilson J. found it unnecessary to go,[39] then the decision conforms to the earlier law laid down by the High Court.[40] If the reason lay not in strict obligation but in actual intention, 'commercial reality' and notions of 'the course of trade', as Mason and Dawson JJ. seemed to emphasize, then the decision probably expands the concept of interstate trade, though it picks up isolated elements of some earlier decisions.[41] But then, to state the lawyer's article of faith, each case depends on its own facts. Extracting an immutable proposition of law from a decision cloaked in its own facts is always a trap for the unwary.

The definition of interstate trade was the issue with which the *Barley* case was overtly concerned, but looming in the background and casting a large shadow over the discussion of this issue was the question, considered above, of the uncertain interaction between compulsory acquisition and the commitment of goods, or future goods, to interstate trade. Compulsory acquisition has always been one of the major problem areas for section 92,[42] manifesting in particular a tension between the production cases, which appear to allow acquisition to take effect before the commencement of interstate trade, and some of the other marketing cases, which appear to deny the possibility of acquisition if goods can be effectively committed to interstate trade as soon as they come into existence.[43] Also, some cases stress that an owner of goods is not protected by section 92 just because he might at some future time commit those goods to interstate trade,[44] whereas others suggest that acquisition cannot take effect until the owner has had a reasonable opportunity to commit his goods to interstate trade.[45] Where does the *Barley* case fit in this doctrinal jigsaw puzzle?

If the commitment of the barley to interstate trade *preceded* the acquisition, then the decision to deny the effect of the acquisition was uncontroversial, so long, at any rate, as the barley is regarded as an existing product prior to harvest (and subject also to the larger question of infringement of section 92, considered below). If the two were *simultaneous*, there is some support in the cases for

38 Mason J., *supra* n.32.

39 *Supra* n.23.

40 Gibbs C.J. saw it as a marginal extension, as the *Wilkinson* case (*supra* n.22) had focused on delivery pursuant to contract rather than on the contract itself: (1985) 59 A.L.R. at 647.

41 See esp. the *Field Peas* case, *supra* n.13, and the judgments of Williams and Webb JJ. in *Wilkinson*, *supra* n.22.

42 See Coper, M., *op. cit supra* n.17, esp. at 120-2, 212 and the references therein cited.

43 See esp. the judgments of Dixon and Williams JJ. in the *Field Peas* case, *supra* n.13, and possibly, though only obliquely and in any event subject to the comment in n.54 below, the *Peanut* case, *supra* n.11.

44 See *Carter's* case, *supra* n.18.

45 See *Wilcox Mofflin*, *supra* n.6.

denying the effect of the acquisition,[46] but the issue has never been fully or satisfactorily considered. Only Mason J. unequivocally espoused the view that the acquisition fails in these circumstances, and it is doubtful that the decision as a whole, in view of its ambiguities, can be taken to have established such a principle. If such a principle does exist, it may reflect the view that a legislature should not be able to prevent interstate trade altogether by providing for the acquisition of goods as soon as they come into existence, or, in other words, that an owner of goods should have *some* opportunity to launch them into interstate trade; the policy behind this view may easily be defeated, however, by legislation aimed at the production process itself. If the commitment of the barley to interstate trade had not occurred until *after* the acquisition, the assumption appeared to be that the acquisition would take effect, despite a possible argument to the contrary.[47] We have not heard the last of these issues, and may look forward to their elaboration with the arrival on the scene of the next hapless litigant.

Is this the end for organized marketing as we know it?

The decision in the *Barley* case seems, to judge from some of the banner headlines,[48] to have created a mild panic that the validity of all State marketing schemes for primary products has been thrown into doubt. Apart from the possibility that vesting may be made to occur before the earliest time at which interstate trade is able to commence, it is important to note not only that the decision related rather to the ambit of interstate trade than to the more fundamental question of the meaning of freedom, but also that the legislation itself did not even purport to acquire all barley grown in Queensland. The legislative exemption for 'interstate contracts' must amount to some kind of concession that the scheme could operate without being completely comprehensive. Certainly, a majority held that the exemption did not apply in this case, though the plaintiff company (or other interstate buyers in general) might, if it had been otherwise unsuccessful in obtaining the protection of section 92, have endeavoured to bring itself within the exemption by obliging the grower to deliver interstate.[49] The point is that the exemption represented a legislative policy of leaving interstate trade, at least to some degree, free from the strictures of the scheme. Of course, the way the scheme operates in practice will depend on how widely or how narrowly the exemption is interpreted, and on how wide or how narrow is the ambit of interstate trade for the purpose of section 92 apart from the exemption. In the latter respect, the *Barley* case makes the barley scheme rather less comprehensive than it might have been.

The larger question

The final point to be made about the *Barley* case concerns the more fundamental issue of the infringement by the barley scheme of the freedom guaranteed by section 92, irrespective of whether any particular plaintiff was sufficiently engaged in interstate trade to take advantage of that infringement. The majority held (Brennan J. not deciding) that the scheme did infringe section 92 (or would have done so in the absence of the reading down clause), but this point was assumed rather than explained or justified. It was quite extraordinary that on the most fundamental issue of all — and an issue squarely raised for decision by the stated case — three of the four majority justices (Mason, Wilson and Dawson JJ.) did not even refer to it![50] Gibbs C.J. noted briefly that 'it cannot be doubted' that the scheme infringed section 92, because it had the 'direct effect of prohibiting' the plaintiff from trading in the barley.[51] Given the orthodox contrast between total prohibition (invalid) and lesser 'regulation' (valid), Gibbs C.J.'s view fairly and succinctly states the conven-

46 *Supra* n.43.

47 *Supra* n.45, and see also *supra* n.13.

48 See, for example, *Sydney Morning Herald* (Sydney), 19 June 1985 ('Primary product schemes in doubt'); *Weekend Australian* (Sydney), 22-3 June 1985 ('High Court throws doubt on State market schemes').

49 Cf. *Clark King & Co. Pty Ltd v. Australian Wheat Board* (1978) 140 C.L.R. 120, 139-140, 166.

50 The Board concentrated almost all its attention in argument on the proposition that vesting occurred prior to harvest.

51 (1985) 59 A.L.R. at 645.

tional wisdom. But in one of the recent marketing cases prior to the *Barley* case, the High Court *upheld* the validity of the Commonwealth-State wheat marketing scheme, notwithstanding that it totally prohibited private trading in wheat.[52] Without going into the reasons for that decision, and without speculating about whether it will survive further attack,[53] the point is that the invalidity of the barley scheme could not merely be assumed, even if counsel on both sides failed to argue the point. The High Court here failed to discharge its responsibility.[54]

There is some evidence of a trend in recent cases to narrowing the meaning of freedom in section 92 in such a way that the emphasis is on securing the freedom of interstate trade from measures which are discriminatory or protectionist by favouring the traders of one State over the traders of another, rather than on giving individuals the right to trade interstate free of certain restrictions whether those restrictions are protectionist or not.[55] Mason J. is one justice who has expressed the desire, if not the intention, to move in that direction.[56] The *Barley* case is silent on this question, but is not inconsistent with the trend, such as it is. This is because a State marketing scheme is obviously more likely to be, and has more potential to be, protectionist in its operation than a national scheme such as the wheat scheme, and so the Court found ten years ago in relation to the New South Wales milk marketing scheme.[57] Whether the barley scheme is protectionist in any relevant sense was not discussed, and no view is offered here. But it is regrettable that the validity or otherwise of the scheme should have been decided in such an offhand manner, thus leaving its place in the never-ending story of section 92 to be determined by retrospective explanation.

MICHAEL COPER

FOLEY v. PADLEY[1]

Administrative law — Delegated legislation — By-law — Validity Power to make by-laws where Council of certain opinion — Whether opinion reasonable — By-law prohibiting activity without Council permission — Whether a deferral of formation of necessary opinion — Whether an improper delegation to Council in ordinary meeting — Rundle Street Mall Act 1975 (S.A.) ss. 3, 11(1)(a), Local Government Act 1934 (S.A.) ss. 668-70.

THE FACTS

S. 11(1)(a) of the Rundle Street Mall Act 1975 (S.A.) (The Act) provides that the Council of the Corporation of the City of Adelaide (the Council) may make by-laws —

> regulating, controlling or prohibiting any activity in the Mall or any activity in the vicinity of the Mall that is in the opinion of the Council, likely to affect the role or enjoyment of the Mall.

The Council, adopting recommendations made by a Committee of the Council, and pursuant to s. 11(1)(a) and the Local Government Act (S.A.) 1934-1978 passed By-law No. 8 in the following terms:

52 The *Clark King* case, *supra* n.43.

53 See Coper, M., *op. cit. supra* n.17 at 277.

54 The same Act had been held invalid in the *Peanut* case (*supra* n.11), but the correctness of decisions prior to the *Bank Nationalisation Case* (1949) 79 C.L.R. 497, the beginning of the modern law on section 92, cannot be assumed. In any event, the point is that the court failed even to discuss the issue.

55 See Coper, M., *op. cit. supra*, n.17, ch.32; Coper, M., 'Section 92 and the Impressionistic Approach' (1984) 58 *Australian Law Journal* 92.

56 *Finemore's Transport Pty Ltd v. New South Wales* (1978) 139 C.L.R. 338, 352.

57 The *North Eastern Dairy* case, *supra* n.13.

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1 (1984) 54 A.L.R. 609, Full High Court of Australia, Gibbs C.J., Murphy, Wilson, Brennan, Dawson JJ.