Cole v. Whitfield — The Repeal of Section 92 of the Constitution?

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It has been estimated that more paper and ink have been consumed by cases on s. 92 than any other provision of the Constitution of Australia. Nonetheless, while being a distinct thorn in the side of politicians both Federal and State and, of course, of their bureaucracies, it is a provision which has played a significant if not vital part in the constitutional history of Australia. It played a central role in denying to the Commonwealth the right to nationalize the banking system of the country. It has prevented, to a large extent, the bringing into existence of centralized marketing schemes whether by the State, or the Commonwealth or by the combined efforts of both. It has been regarded since 1915 as conferring a personal right on the citizen to conduct interstate trade free of governmental control except such control as may fairly be regarded a regulatory. On 2nd May, 1988 this state of the law, which, despite dissent on points of detail, had commanded the support of substantial majorities of the High Court since federation, was held to be misconceived in the case of *Cole* v. *Whitfield*[1] The army of judges who have occupied seats on the High Court since it was first constituted was held, after three or four days of argument, to have been out of step, the only ones capable of marching to the band being the present members of the court (other than McHugh J. who had not then been appointed) and Wilson J. who had not yet retired. It may fairly be said that the conclusion to which the court came was supported by the Attorneys-General of the Commonwealth and of each State. This is perhaps not surprising in political terms for the result almost wholly frees the Commonwealth of the possibility of its legislation being invalidated by s. 92. That possibility continues so far as the States are concerned, but to a limited extent for the operation of s.92 is now held to be confined to legislation, or, presumably executive action, which discriminates against interstate trade for the purpose of protecting the domestice trade of a State. The fact is that the result leads to a massive enlargement of the authority of all seven parliaments and their attendant executive governments and bureaucracies. The greatest beneficiary is of course the Commonwealth for, while almost anything is conceivable in politics, the likelihood of the Commonwealth desiring to discriminate against interstate trade in order to advantage the domestic trade of a particular State may fairly be regarded as remote. It is, I hope, not unfair to say that the prospect of the Commonwealth being freed from the constraints of s. 92 is unlikely to cause any great pain on the bench of the High Court.

As will be seen, the personal right which the citizen was held to enjoy during more than 80 years has been taken from him. One lone interest spoke for the citizens of Australia although there was a clearly established body of judicial decision which had long substantially rejected the doctrine which has now been adopted by the court. I shall be pointing out later

1 (1988) 165 CLR 360.

that this decision has profound implications for the fundamental constitutional relationship, not on this occasion between the High Court and the Parliament but between the High Court and the people. We assert proudly that we live under the rule of law. The parliaments and executive governments must accept the implications of this grand principle. They must in this federal system accept the decision of the court when it is held that an Act of Parliament is invalid for want of legislative power or by reason of conflict with some overriding provision of the Constitution but it is not merely the parliaments and governments of the country which are so constrained and not merely the governed. The courts themselves must accept the law and they are not entitled to depart from settled law merely because they are disenchanted with some aspect of it.

The facts of *Cole* v. *Whitfield* may be shortly stated. By regulation under the *Sea Fisheries Act* of Tasmania the possession or sale of crayfish less than a prescribed size was unlawful. The regulation applied whether the crayfish were taken in Tasmanian waters or not. The prescribed size under the regulations for males was 11 cm. and for females 10.5 cm. Crayfish were imported from South Australia which were less than the minimum size under the Tasmanian regulations. The importer was charged with possession. It was held by the Court that the legislation was not discriminatory against interstate trade and commerce; that the object of the prohibition against catching under-sized crayfish was to assist in the protection and conservation of the natural resource in question and that the legislation did not give Tasmanian crayfish production or domestic trade a competitive or market advantage over imported crayfish. One would have thought that this was a simple case of a regulatory provision which did not offend s. 92 on any view of the proper ambit of that section. Indeed much of the evidence and argument went to whether the size prescribed was appropriate if the object was the conservation of the resource.

The fact that the case could have been decided as it was without the embracing of any new doctrine did not deter the Court from doing just that. It is indeed remarkable that the argument for both the Commonwealth and all six States largely tended in the same direction. In the result the court concluded that s. 92 should be construed as requiring that interstate trade and commerce be immune only from discriminatory burdens of a protectionist kind. This conclusion was reached largely by an examination of the history of the provision in the course of the constitutional conventions. Now it may be accepted that this may indeed have been the object sought to be attained when the provision was drafted and when it was included in the Constitution as passed by the imperial parliament. It must also be conceded however that there is not a word in the text of s. 92 which would encourage the view that, whatever the motive for its enactment, its language permits any such restriction. The High Court faced the fact that two features of s. 92 militate against the view which the court has adopted. The first is that the freedom accorded to interstate trade commerce and intercourse was to be absolute. The Court's answer, which was consistent with the existing body of decisions, was that absolutely free did not mean that there was a guarantee of anarchy. This had really never been doubted. A lawyer prior to *Cole* v. *Whitfield* however would have said, in broad terms, that the section means what it says, conceding that interstate trade and commerce may be absolutely free while still subject to proper regulation. The confining of the section's operation to discriminatory pro-

tectionism really means substituting a short settlement of the motive which lead to the incorporation of s. 92 for the text of the section.

One asks oneself where all this leaves the *Engineer*'s case. It if be permissible to confine the language of s. 92 to what may be perceived from the convention debates as being the object which the founders sought to achieve, what was so wrong about the first High Court's view that the apparent plenitude of grants of power to the Commonwealth was, where necessary, to be restricted to accommodate the overriding object of federation which was to divide power to interfere with the governmental functions of the other. It will be interesting to see whether, when a head of Commonwealth power is next sought to be extended, the Court will listen with pleasure to the suggestion that the convention debates should be examined to see just what was intended.

The second feature of s. 92 which stands in the way of the construction which has been adopted is the word "intercourse". Grammatically, trade and commerce on the one hand and intercourse on the other are part of the same sentence and the phrase "absolutely free" is applied to both. The answer to this was said to be that intercourse and trade and commerce are different as indeed they are. The Court was of the view that the absolute freedom which *must* (my emphasis) be accorded to intercourse of any sort between the States was so wide that it really ought not to be accorded to trade and commerce. But, again as a broad proposition, if absolute freedom is to be conceded to mean what it says but to be consistent with proper regulation, then intercourse as well as trade and commerce may properly be regarded as calling for regulation which is consistent with absolute freedom. The construction which has been adopted entails giving to the same word "absolutely" one meaning (and that its natural one) in relation to intercourse and a highly artificial one (for which there is no warrant in the text) in relation to trade and commerce.

Moreover the court's historical examination is inconclusive. It shows that a purpose of s. 92 was to create a free trade area, the enemies of free trade being perceived to be border taxes, discrimination (especially in railway freights) and preferences. It was also perceived that the section as drafted might create other immunities from government control.[2] So conscious was Mr Barton of this danger that he undertook to limit the provision to restriction or interference with trade by "any taxes, charges or imposts". However this was never done. Yet the court is able to say that the principal goals of the movement towards federation included the elimination of intercolonial border duties and discriminatory burdens and preferences and the achievement of inter-colonial free trade. So far so good. The language of the court itself shows acceptance of the view that the object which they ultimately treated as exclusive was in fact merely *included in* the goals of the federal movement. Finally we are told that all of this is enshrined in s. 92. If this be so, the shrine has hanging before it a curtain which cannot be penetrated by the gaze of mortal men.

In truth the idea of discrimination against interstate trade as a critical feature of s. 92 is not a novel idea.[3] But it has not to date been the exclus-

2 *Cole* v. *Whitfield* (1988) 165 CLR 360, 391.
3 *Hughes* v. *Vale* (No.2) (1955) 93 CLR 127, 160, 188, 190.

ive test. Absence of discrimination was a condition not a guarantee of validity.[4]

Nor was the object of s. 92 unknown to the judges who have graced the High Court prior to its present members.[5] The simple fact however is that until 1988 the court had never accepted the view that a potted version of the objects of the section could be substituted for its text. Acceptance of *Cole* v. *Whitfield* will surely mean that for the future the language of s. 92 will not be adverted to in argument but rather the gloss which is placed upon it by the court in that decision. This, with respect, is surely contrary to the method of the law, to the fundamental approach of lawyers in our tradition to the interpretation of statutes and above all, to that great charter of Commonwealth pre-eminence, the *Engineer*'s case.

In *Bath* v. *Austin Holdings*[6] an *ad valorem* tax was imposed on the sale of tobacco by Victorian wholesalers. If the retailer had not bought in Victoria from a Victorian wholesaler, the retailer was required to pay the tax. Plainly the tax was imposed on interstate trade. The majority of the court held that the inquiry must be limited to the retail tobacco market and, so understood, it discriminated against the interstate trader in tobacco as it did not apply to the retailer who had bought in Victoria. The court regarded the fact that the same tax had already been paid and incorporated in the Victorian wholesale price as irrelevant. It was stated that a protectionist discriminatory burden offends s. 92 even if it is merely equalising. So much for the "practical operation" doctrine which was heavily relied on in *Cole* v. *Whitfield.* The tax would of course had been wholly immune from s. 92 if it had been imposed at the retail level and irrespective of the wholesale source. Moreover the cost to the retailer and to the public would have been the same as in the case under consideration. The minority thought that the practical operation of the legislation was that the Victorian tax was incorporated in the retail sale price whatever the origin of the tobacco so that there was no basis on which to discern any element of protectionism, merely an alternative way of collecting the same tax. Life was not meant to be easy and new doctrines can have a rough passage. It must be conceded that this legislative scheme would have been struck down by s. 92 on the previous decisions.

Next came *Castlemaine Toohey's Ltd.* v. *South Australia*[7] In that case South Australian legislation was seen to be protectionist in circumstances in which South Australian brewers sold their beer in refillable bottles upon which no deposit was required to be paid by the purchaser. Bond Brewery sold beer in South Australia which had been brewed in other States and sold it in non-refillable bottles upon which a 15 cent deposit was required to be paid and, in addition, Bond was obliged to set up a system to collect the bottles from the users. This legislation was held to be discriminatory against the interstate breweries and protectionist in favour of the South

4 *Clark King* v. *Australian Wheat Board* (1978) 140 CLR 120, 147-50, 178; *Commonwealth* v. *Bank of NSW* (1949) 79 CLR 497, 634-5, 636, 637; *James* v. *Commonwealth* (1936) 55 CLR 1, 56; *W. & A. McArthur* v. *Queensland* (1920) 28 CLR 530, 552; *Duncan* v. *Queensland* (1916) 22 CLR 556, 585 per Barton J.

5 See references collected in P.H. Lane, *Commentary on the Australian Constitution* (1986) 502.

6 (1988) 165 CLR 411.

7 (1990) 169 CLR 436.

Australian breweries. South Australia had justified the law on the grounds of litter control and reduction of the carbon dioxide emissions in the manufacture of glass for the containers. The court was not satisfied that the disparity in treatment of the interstate breweries could be satisfactorily explained on this basis. It is obvious that the legislation discriminated against inter-state trade and under the pre-existing law it would have been held that the legislation placed an impermissible burden on the interstate trader.

Finally we come to *Barley Marketing Board (N.S.W.)* v. *Norman*[8] The cases after *Cole* v. *Whitfield* to which I have already referred were, as it seems to me, blatant examples of protectionist discrimination and the fact that they were struck down by s. 92 would have surprised no-one in the history of the federation. *Norman's* case however reveals starkly how s. 92 has been emasculated. The legislation there under consideration was standard organised marketing legislation which had been regularly struck down by s. 92 in the past. It vested all barley grown in New South Wales in a marketing board and avoided contracts for the sale of barley by the producers. The growers who were parties to the case had sold their growing crop of barley to Victorian maltsters. In denying the protection of s. 92 to the growers the court denied what it described as the "so-called individual rights theory of s. 92", namely that the section guarantees the right of the individual to engage in interstate trade and commerce. It was recognised that decisions based on that view of s. 92 in the field of organised marketing went back to *James* v. *South Australia*[9] and that the case was directly covered by *Peanut Board* v. *Rockhampton Harbour Board.*[10] It is true that inherent in the doctrine was the principle that restraints and impediments are forbidden although they do not discriminate between interstate and intrastate commerce but affect trade commerce and intercourse uniformly.[11] In *Norman's* case the legislation did not affect interstate trade in barley so there was no discrimination. The court, in effect, overruled the earlier decisions of the court on this subject going back more than 50 years and, as it is now entitled to do, declined to follow the decisions of the Privy Council in this area. Its reason for so doing was, as was said at p. 55, that the "individual rights theory" had the effect of transforming s. 92 into a source of discriminatory protectionism in reverse. This was because in some cases it had been held that s. 92 denied the validity of a burden placed uniformly on interstate trade and intrastate trade insofar as it related to interstate trade. The Court cited *Finemore's Transport* v. *N.S.W.*[12] In that case the requirement to pay a motor vehicle registration fee was struck down in relation to vehicles used in interstate trade. Some might have thought that a better approach to that problem was to adopt a more realistic view of what is permissible regulation of interstate trade. The fact however is that what for more than half a century have been the rights of Australians who choose to engage in interstate trade free of the invasion of governmental agencies which are set up for the express purpose of denying them those rights have now been relegated to the

8 (1990) 65 ALJR 49.
9 (1927) 40 CLR 1.
10 (1933) 48 CLR 266.
11 *Peanut Board case* (1933) 48 CLR 266, 286-299 per Dixon J.
12 (1978) 139 CLR 338.

status of a mere theory. This somewhat bland assertion is made although the right was recognised by Griffith C.J. in *N.S.W.* v. *Commonwealth*[13] and accepted by Barton J. in *Duncan* v. *Queensland.*[14] It may be noted that both these judges were leading participants in the constitutional conventions which led to the framing of the Constitution. Even Isaacs J., the architect of the *Engineer's* case, which permanently distorted the Constitution, recognised that s. 92 conferred individual rights.[15] He too participated actively in the Convention debates.

It can scarcely be doubted after *Norman's* case that the *Banking* case so far as it depended upon s. 92, must be regarded as wrongly decided. The implications of all this for a free enterprise economy are all too obvious. I am not aware of any serious paper which directs attention to *Cole* v. *Whitfield* and *Barley Marketing Board* v. *Norman* as raising profoundly important questions as to the extent of the authority of the courts. Had it been desired by a government of the Commonwealth, with or without the enthusiastic support of the governments of the States, to repeal the present s. 92 and replace it with a *Cole* v. *Whitfield* formulation, this could only have been done by a referendum which would have required to be carried by a majority of the electors in a majority of the States. It can scarcely be doubted that such a massive enlargement of governmental power and, in particular, of the power of the Commonwealth, would have been overwhelmingly rejected. Whether this is socially desirable or not is not for me to argue. I may perhaps be permitted to point out that, as so often happens in Australia, the way has been opened to centralised control of the marketing of the produce of the land at a time when such a system is perceived to have ruined the economy of one of the world's largest empires.

For present purposes however the question is whether it is open to seven lawyers, no matter how eminent the office which they hold, to reverse well-established law by reason of a personal preference. One of the reasons for the *Cole* v. *Whitfield* formulation was expressed to be that there was no common doctrine in the High Court on the subject of s. 92. So be it. There was, however, as Professor Lane,[16] has pointed out virtually no situation which could arise under the provision for which there was not a binding precedent.[17] Sad though it may be for the High Court to apply decisions with which they are in personal disagreement, that is the lot of judges everywhere and at all times. One asks oneself however what

13 (1915) 20 CLR 54, 68

14 (1916) 22 CLR 556, 587.

15 *James* v. *South Australia* (1927) 40 CLR 1, 32.

16 After all, what is the point of freedomif no-one has a right to it? Or, as Sir Owen Dixon put it, so much more elegantly, when this particular idea sprang from the head of Evatt J.: "Trade commerce and intercourse among the States is an expression which describes the activities of individuals. The object of s.92 is to enable individuals to conduct their commercial dealings and their personal intercourse with one another independently of State boundaries. The constitutional provision is not based on mere economic considerations. I am unable to agree with the view that trade, commerce and intercourse should, in applying s. 92, be regarded as a whole and not distributively. the Constitution is dealing with a governmental power. It is not easy to appreciate the meaning of a guarantee of freedom of trade and intercourse unless it gives protection to the individual against interference in his commercial relations and movements." (*O. Gilpin Ltd.* v. *Commissioner for Road Transport* (1935) 52 CLR 189, 211).

17 P.H. Lane, "The Present Test for Invalidity under Section 92 of the Constitution", 62 ALJ 604, 605.

a democracy is to do when it judges deliberately depart from the law so as to deprive the people of existing rights under a Constitution which, in theory, the people alone can alter.