CASE NOTES

COLE v. WHITFIELD[1]
BATH v. ALSTON HOLDINGS PTY LTD[2]

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. . . trade, commerce, and intercourse among the States . . . shall be absolutely free

The judgment handed down by a unanimous Full High Court, comprising all seven judges, on 3 May 1988 in *Cole v. Whitfield* is the most important development in the interpretation of s. 92 of the Constitution for many years. It seeks formally to change the basic principle of s. 92 interpretation by overruling what the Court calls the criterion of operation test of validity, alternatively known as the individual right theory, and substituting for it the discrimination test of validity.

The criterion of operation test requires the court, when dealing with a s. 92 challenge to the validity of a statute, to identify the precise fact or circumstance which brings the statute into operation, to decide if that fact or circumstance is part of interstate trade and, if so, whether the effect of the statute's operating upon the fact or circumstance is to impose a burden upon the interstate trade. If so, invalidity follows.

The criterion of operation test of validity has attracted two major criticisms. The first is that it is excessively formalistic, concentrating attention on the exact words of the law in question at the expense of the factual context in which it operates. The second is that it has in practice created a need for numerous exceptions. These features have in turn led, to increasing uncertainty about what s. 92 prohibits and what it does not prohibit, to inconsistent decisions in the High Court and to a serious loss of legislative power to regulate interstate trade and commerce, particularly in the case of State parliaments.

The discrimination theory, as now formulated, asks the quite different question whether, either on its face or in practical effect, the statute discriminates against interstate trade as contrasted with intrastate trade. If so, is the discrimination of a protectionist character, or alternatively does it serve a protectionist purpose? If the answer to these questions is yes, the law contravenes s. 92, but not otherwise.

There can be no doubting the authoritative character of the judgment in *Cole v. Whitfield*. The judgment is lengthy and constructed with exceptional care and was joined in by all members of the High Court. The intention to overrule the criterion of operation doctrine is explicit and the case for doing so is argued in meticulous detail. The substitution for it of the discrimination test, in the form just described, is equally carefully presented. The result is an unusually deliberate and emphatic declaration of judicial policy which must henceforth be correspondingly influential.

The major omission from the judgment, understandably enough, is any precise guidance on how much of the large body of currently operative s. 92 case law to be found in the Commonwealth Law Reports will survive the change and how much will not. It looks as if there will be much confining to own facts and explaining of results on different grounds. Much will depend also on how quickly the existing case law is challenged and to what extent the federal and state governments seek to take advantage of the new doctrine by recasting their statute law.

The facts of *Cole v. Whitfield* itself were simple. The respondents had been charged with unlawful possession of undersized crayfish contrary to the Tasmanian Sea Fisheries Regulations, 1962. They had imported the crayfish into Tasmania from South Australia with the intention of marketing them

[1] (1988) 78 A.L.R. 42. (1988) 62 A.L.J.R. 303 High Court, 3 May 1988, Mason C.J., Wilson, Brennan, Deane, Dawson, Toohey, Gaudron JJ.

[2] (1988) 78 A.L.R. 669 High Court, 7 June 1988, Mason C.J., Wilson, Brennan, Deane, Dawson, Toohey, Gaudron JJ.

variously in Tasmania, in interstate trade or internationally. In South Australia the crayfish concerned were not undersized because the corresponding South Australian regulations set a lower minimum size for crayfish which could be caught and marketed than Tasmania. There was no question that the crayfish the subject of the unlawful possession charge were undersized according to Tasmanian law.

The Magistrate however dismissed the charges on the basis that the crayfish had been lawfully bought in South Australia, that the relevant criterion of operation of the Tasmanian regulations was upon the possession of the crayfish in Tasmania, that that possession was on the facts part of the respondents' interstate trade and that the prohibition on that possession was clearly a burden on that trade. All this was impeccably in line with criterion of operation reasoning. Nevertheless the High Court held that a revised version of the discrimination test was applicable and did not invalidate the regulations in their application to interstate trade.

The prohibition on possession of the crayfish in Tasmania was unquestionably a burden on the respondents' interstate trade but it was not discriminatory in a protectionist sense against it. The object of prohibiting the catching of crayfish below a specified minimum size was to preserve the stock of crayfish in Tasmanian waters at a viable renewal level. Admittedly it could be said that to extend this to prohibiting the placing on the Tasmanian market of undersized crayfish which had been lawfully obtained in other States might be said in fact to discriminate against the interstate crayfish industry, whatever the purpose of the prohibition, but the practicalities had to be taken into account. There is nothing about a crayfish which reveals, whether dead or alive, from which State it has come. The Tasmanian authorities could not inspect every crayfish which appeared on a table in Tasmania. Random checks had to be relied upon and an undersized crayfish had to be assumed to be a local one if the minimum size limit was to be enforceable in practice. Hence there was no relevant discrimination.

The immediate question is, how does this style of reasoning affect major areas of commercial activity which, under the criterion of operation reasoning which has held sway for some 30 years now, have remained free from legislative intervention? An outstanding instance is the substantial exemption from road maintenance charges and licence fees enjoyed by interstate road hauliers. There now seems to be no reason why interstate road hauliers should not be taxed by the States under such heads as these equally with intrastate road transport operators.

Provided that such charges are not set at levels which are clearly designed to favour an intrastate means of transport, typically the State railways, at the expense of road transport including interstate road haulage, or in some other way structured to achieve the same result, there seems to be no reason why interstate road haulage of passengers and freight should not, at long last, have to operate on the same basis as any other road transport. If this is right, and it seems to be an inevitable inference from the reasoning in *Cole v. Whitfield*, the States have just been presented with a revenue opportunity long closed to them.

If interstate road haulage ceases to enjoy any special financial advantage of this kind, the well known phenomena of border hopping and load shuffling, both of which came into existence for the sole purpose of giving intrastate journeys an interstate character, should disappear from the scene. Of course, a development like this would put up the price of sending people and goods across State borders, but s. 92 does not concern itself with that as an economic phenomenon.

Similarly the nationally coordinated marketing schemes for primary products like wheat and milk, which have been under increasing attack on s. 92 grounds, seem now to have been given an indefinite new lease of life. Whether one approves of highly regulated marketing of this kind or not, the one thing it does not seem to do is discriminate in a protectionist way against interstate trade. It simply distributes the availability of the various markets, whether intrastate, interstate or international, by means of quotas or some similar enforcement device. Such a system controls the extent of an individual's interstate trade but does not seem to do so in a relevantly protectionist way. The protection is extended to the whole of the relevant market and not to a market which ends at the State border. This fact would be significantly more difficult to establish on a State basis than on a national basis, but even so is not by any means impossible.

Similarly all kinds of regulations should now be easier to make. Provided that a regulation is not made for a protectionist purpose and does not in practice have that character, it appears now to be the law that there is no need to distinguish between interstate and intrastate trade in its range of application. One thing which does not seem likely to have changed in any context is the scope for

discretionary regulation at the executive rather than the legislative level. There is nothing in the new discrimination test as enunciated in *Cole v. Whitfield* to justify leaving an executive authority with discretion to issue a licence to carry on some activity if the person applying for the licence has satisfied all the relevant statutory criteria.

Governments have often sought to overcome the protection which s. 92 gives to interstate trade by taking advantage of the case law rule that the section does not operate upon facts or circumstances which are anterior to interstate trade and therefore not in themselves part of it. This has often made it possible to impose restrictions at the production or manufacture stage of commerce which cannot be imposed on sale once the product is in existence. Quotas on production and compulsory acquisition have been similarly used, although with variable effects over the years. In *Cole v. Whitfield* the judgment made express reference to the possibility that 'acquisition of a commodity may still involve the potential for conflict with s. 92.'[3] In other words, the discrimination doctrine as we now have it is not going to be evaded by legislative devices which turn upon an arbitrary judgement about when interstate trade begins. The intention evidently is that if the statutory scheme has the practical effect of preventing or impeding interstate trade for a protectionist purpose or consequence, it will be held to be within the protection of s. 92.

In the same paragraph the High Court guarded itself against being thought to have solved all the problems of s. 92, commenting *inter alia* that inevitably 'the adoption of a new principle of law, though facilitating the resolution of old problems, brings a new array of questions in its wake.' The most that the court claims for the doctrinal change that it has now made is that it will 'permit the identification of the relevant questions' and acknowledges that many of the real problems of s. 92 are political, social or economic rather than legal.[4] There is no reason to doubt the accuracy of these observations. The long process of adjusting the law along the new lines is now about to get under way.

The flow of s. 92 litigation does not seem likely, at all events for the foreseeable future, to be any less than it was before; but it will be flowing in a new, and hopefully more constructive, direction so far as the freedom of interstate trade and commerce is concerned. In addition to this, the Court made some interesting remarks about the hitherto almost entirely neglected concept of intercourse among the States. It seems that henceforth this is to be clearly distinguished from interstate trade and commerce and given a distinct area of operation of its own.[5] What that may be, does not yet appear.

In full accordance however with s. 92 tradition, it soon took just a month from the announcement of the new principles of interpretation made with such impressive unanimity, for a 4:3 disagreement to emerge in *Bath v. Alston Holdings Pty Ltd* on what they mean. Moreover there are passages in the majority judgment in this latest decision which are distinctly reminiscent of the so-called criterion of operation theory of s. 92 which was supposed to have just been despatched. I doubt if Sir Owen Dixon turned in his grave but he probably permitted himself a wry smile.

As so often, it was those inveterate enemies of legal theory, the facts of the case, which caused the trouble. The context in *Cole v. Whitfield* was regulation of the Tasmanian crayfish industry by Tasmania. The context in *Bath v. Alston Holdings Pty Ltd* was the taxation of Victoria tobacco retailing franchises by Victoria. Mercifully no member of the court in *Alston* took occasion to remark, as has been known to happen in the past, that the analogy between crayfish preservation and tobacco franchising escaped him or her. Both sides approached the case on a basis of principle. Unfortunately the facts led the majority to conclude that principle favoured the defendant but the minority to conclude the opposite.

The defendant ('Alston') was a company incorporated in N.S.W. which carried on business as a tobacco retailer at Dandenong and Geelong in Victoria. The Business Franchise (Tobacco) Act 1974 (Vic.) required Alston to obtain a retail licence and pay the appropriate fee for it. The Commissioner of Business Franchises (the plaintiff) appears to have had an uncertain grasp of some element in the situation. The fee was assessed originally at nearly $177,000 but reduced a week later to just over $31,000. Nothing turned on this because Alston maintained that the correct figure was $10 each for Dandenong and Geelong, which it duly tendered. The Commissioner applied for an injunction to

3 (1988) 78 A.L.R. 42, 67. (1988) 62 A.L.J.R. 303, 318.
4 (1988) 78 A.L.R. 42, 67. (1988) 62 A.L.J.R. 303, 317.
5 (1988) 78 A.L.R. 42, 51, 55-6. (1988) 62 A.L.J.R. 303, 308, 311.

prevent Alston selling tobacco retail in Victoria, it being common ground that Alston would otherwise continue in business without a licence.

The method of calculating licence fees under the Act had been carefully designed to take advantage of the decisions in *Dennis Hotels Pty Ltd v. Victoria*,[6] *Dickenson's Arcade Pty Ltd v. Tasmania*[7] and *Evda Nominees Pty Ltd v. Victoria*.[8] These cases held that a fee for a licence or franchise to carry on a business of selling goods is not an excise duty if, being a variable amount, it is calculated by reference to past actual or estimated sales and not to future sales made during the period covered by the licence. The significance of this is that power to impose excise duties is beyond State legislative power because under s. 90 of the Constitution it is a power exclusive to the Commonwealth.

On this basis the Act provided for two types of licence to sell tobacco retail in Victoria. One, which the court called a monthly licence, required payment of a flat rate fee of $10 plus 25% of the value of tobacco sold by the licensee in the month second preceding the month covered by the licence. The other, which the court called an indefinite licence, was for a calendar year, but revocable by the Commissioner at will during that year, and required payment of a flat rate fee of $50 plus 25% of the value of tobacco sold by the licensee during the year ending 30 September in the calendar year preceding the licence year.

So the licence fees were not invalid as excise duties, but now came the s. 92 point. The Act provided also for wholesale licences. If the retailer sold only tobacco which had been bought in Victoria from a licensed wholesaler, he did not have to pay the 25% but only the flat rate of $10 or $50. The effect as far as state revenues were concerned was that the 25% was paid by the wholesaler instead of the retailer, because the wholesaler similarly needed a licence to sell in Victoria and paid corresponding fees. In point of fact, although the case centred on the retail licences, this inverted the structure of the Act. Since wholesalers are few and retailers many the primary liability to pay the tax was placed on the wholesalers. The retail licence exemptions from the 25% were intended only as an incentive to prevent retailers from undermining the tax base by transferring their custom to unlicensed wholesalers in other States who could sell more cheaply because they paid no 25%.

The only other way to prevent this would have been to prohibit the retail sale of interstate tobacco in Victoria unless the wholesale supplier had taken out a Victorian wholesale licence. Under the law before *Cole v. Whitfield* this would have been an invalid burden on the retailer's interstate trade because it would have imposed a tax on his interstate tobacco supplies by reason of their interstate origin. The litigation in *Alston* was started on the basis that requiring the retailer to pay the 25% if he did not purchase his tobacco in Victoria from a wholesaler licensed in Victoria amounted to the same thing. After *Cole v. Whitfield* however the argument had to be reframed. It had to be put in the form that the effect of the 25% part of the retail licence fee was to discriminate against interstate wholesale suppliers in a protectionist way, the protectionism lying in the financial incentive to buy from Victorian suppliers.

Since the Act clearly did discriminate between intrastate and interstate wholesalers in the calculation of the retail licence fee, the question was whether this discrimination was protectionist in intention or effect. Since the revenue effect was neutral whoever paid the tax, and since all the relevant taxpayers were Victorian, the main point was whether the effect of the scheme rather than its intention was protectionist.

According to the majority, Mason C.J., Brennan, Deane and Gaudron JJ., that was precisely the effect. So simply was this conclusion reached, and in a manner so closely resembling the supposedly discredited criterion of operation approach, that their Honours devote several pages of their judgment to an attempt to elaborate it in the wider context of the Act as a whole and to refute any suggestion that they were merely returning to old habits.[9]

With respect, it cannot be said that the attempt reads at all cogently. Indeed much of it wears the appearance of a repetition at more complex length of a straightforward ground of decision expressed already with simple clarity. It is all the more striking therefore that this part of the judgment includes the following arresting observation: 'If a tax is challenged on the ground that it offends s. 92, it is

6 (1960) 104 C.L.R. 529.
7 (1974) 130 C.L.R. 177.
8 (1984) 154 C.L.R. 311.
9 (1988) 78 A.L.R. 669, 676-9.

necessary first to identify what is the transaction or thing which attracts liability'.[10] That sentence might just as well have been penned by Sir Owen Dixon in 1935.

After quoting two passages from the first case ever reported on s. 92, *Fox v. Robbins*[11], and no other authority, the majority judgment concludes by invalidating the requirement that if a retailer buys his supplies from anyone other than a holder of a Victorian wholesale licence, he has to pay the 25% component of his licence fee in addition to the flat rate. Since the practical effect of this is presumably to discriminate against Victorian wholesalers instead of in favour of them, the Victorian government faces the problem of how to redress the situation. On the face of it, the way out is to impose the tax only on retailers, on the first sale in Victoria, which is not an encouraging prospect for the government. The expenses of collection would be considerable, resistance by small business vociferous, one assumes, and the revenue take much diminished.

All of which gives heightened interest to the elegantly written dissenting judgment of Wilson, Dawson and Toohey JJ.[12] It is based on the proposition that the protectionist effect of the 25% component of retail licence fees payable when the tobacco is supplied from interstate is apparent only, not real. If a retailer bought his tobacco from a Victorian licensed wholesaler, the price he paid would reflect the 25% component which the wholesaler had paid already for his own licence. Hence the retailer did not have to pay it a second time. If he bought his tobacco interstate more cheaply, that would reflect the fact that the wholesaler had not paid the 25%. Hence the retailer had to pay it if he wanted to sell the tobacco in Victoria.

It followed that the Act did not relevantly discriminate against Alston's or any other retailer's interstate trade. So far as the imposition of the tax was concerned it was immaterial where the wholesale supplies were bought. The only reason for shifting the liability to the retailer in the interstate case was the absence of legislative power in Victoria to impose a tax on an interstate supplier, or at least the impracticability of collecting it.

The dissenting judgment does not consider the situation as between Victorian and interstate wholesalers, but the argument holds good there too. Victorian suppliers would not be at risk of having to pay taxes on tobacco imposed by other States, whereas interstate suppliers would be. Such taxes might push up the interstate wholesale price to the point where Victorian retailers could buy more cheaply from Victorian wholesalers. But this would not be a protectionist result of the Victorian Act. It is no more relevant than the probability that interstate suppliers will incur higher transport costs than Victorian suppliers.

The logic of the dissenting judgment, its reliance on taking the whole economic context into account and the result at which it arrives all accord far more cogently with the apparent intention of the court in *Cole v. Whitfield* than does the reasoning of the majority. The major virtue claimed for the new departure in *Cole v. Whitfield* was that it would at least identify the right questions. The majority decision in *Alston*, reverting as it does to a mode of reasoning which distinctly resembles the criterion of operation approach, has already cast doubt on that proposition. The right questions have suddenly come to look rather familiar after all.

One awaits with interest the equalisation of interstate and intrastate road transport taxes. The first challenge to that ought to be revealing.

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10 (1988) 78 A.L.R. 669, 678.
11 (1909) 8 C.L.R. 115.
12 (1988) 78 A.L.R. 699, 680-2.

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