# COMMENT

## S.O.S. (MOWBRAY) PTY. LTD. v. MEAD (1972) 46 A.L.J.R. 192

### CONSTITUTIONAL LAW — SECTION 92 — SALE SUBSEQUENT TO INTERSTATE MOVEMENT

The appellant in *S.O.S. (Mowbray) Pty. Ltd.*, v. *Mead*[1] was a Launceston grocery retailer who imported margarine (from New South Wales), to which had been added some colour and flavouring additives, with a view to retailing it in his supermarket chain. He was convicted of an offence against s.6 of the Tasmanian Dairy Produce Act (1969) which provided:

> "No person shall, within the State, manufacture or sell cooking margarine to which there is or has been added any (a) prohibited colouring substance, or (b) prohibited flavouring substance."

His appeal to the High Court, based mainly on the ground that s.6 constituted an infringement of the protection afforded by s.92, provided an opportunity for the High Court to consider again the issue of whether a sale subsequent to the interestate movement can still attract the protection of s.92 and for further light to be thrown on the conflict in techniques used by the current High Court in solving cases involving s.92.

The problem of sale subsequent to interstate movement had previously been considered by the High Court in a number of cases, notably *Wragg's Case*[2], where it was held, mainly on the simple "act-severance" ground, that, notwithstanding s.92, a New South Wales company which had imported potatoes from Tasmania would be bound by New South Wales legislation fixing the maximum prices at whch potatoes generally could be sold in New South Wales; and *Fish Board* v. *Paradiso*[3], where it was held by an identically constituted Court that Queensland legislation requiring all fish brought into Queensland for subsequent sale to be brought first to the Fish Board's Markets for sale *did* infringe s.92 in its application to the importation of fish from New South Wales as it was thought that the relevant legislation "operated to prohibit the sale by the defendant of the fish ordered by him as from the moment of its entry into Queensland and the event which attracted the prohibition was its entry into that State"[4].

Faced with these two seemingly irreconcilable decisions, the High Court split 4:3 in favour of the decision in *Wragg's Case* but a variety of techniques were used to achieve this result. The three dissentient judges, Barwick C. J., Owen and Walsh J. J., were all at pains to deny the "act-severance" approach enunciated by Dixon C. J. in a number of cases in the terms that "if the fact or event or thing with reference to which, or in consequence of which, the law imposes its restriction or burden or liability is in itself no part of interstate trade and commerce and supplies no element or attribute essential to the conception, then the fact that some secondary effect or consequence upon trade or commerce is produced is not enough for the purposes of s.92"[5].

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1. (1972) 46 A.L.J.R. 192.
2. *Wragg* v. *N.S.W.* (1953-54) 88 C.L.R. 353.
3. (1956-57) 95 C.L.R. 443.
4. *Id.*, at 452.
5. *Hospital Provident Fund Pty. Ltd.* v. *Vic.* (1952-53) 87 C.L.R. 1, at 17-18.

The approach is well illustrated in the *Margarine Cases*[6] in which the law impugned was one which limited the amount of margarine which could be manufactured under a N.S.W. licence, the margarine company claiming an infringement of s.92 insofar as the production of margarine for interstate trade was concerned. The High Court used the "act-severance" approach to reject this contention. The whole process was divided up into manufacture on the one hand and "transportation, movement, transfer, interchange and communication between one state and another"[7] on the other. A restriction on the latter would infringe s.92 (unless reasonably regulatory), whereas a restriction on the former involved no invasion of the freedom of interstate commerce because manufacture is an entirely interstate matter. The right or liberty being restricted was the right or liberty to produce certain quantities of margarine, not the freedom to engage in interstate trade and commerce in margarine.

This technique was abandoned in favour of the Barwick formulation, developed in a number of cases, particularly the *Readers Digest Case*[8], that any legislation which directly as distinct from indirectly inhibits or burdens trade or commerce between the State at any stage of that trade or commerce will infringe s.92 unless the legislation can be described as reasonably regulating that trade or commerce. Barwick C. J. in the present case thought that the relevant trade and commerce "did not consist merely in the movement of goods from State to State. It essentially includes the element of purchase at one end and sale at the other end of the goods imported for sale"[9].

At this stage a slight variation is found in the reasoning of the minority judges as Walsh J. does not seem to be prepared to go as far as Barwick C. J., with whom Owen J. agreed. In his opinion, the law did not necessarily infringe against the interstate trade and commerce in margarine, but against the very act of importation. "I have come to the conclusion that the law which prohibited absolutely the sale in Tasmania of the goods which the appellant had imported for sale did affect, in the relevant sense, and in a manner forbidden by s.92, the act of importation from N.S.W. of those goods"[10]. This reasoning which is similar to that of both the Court in *Fish Board* v. *Paradiso* and Taylor, and Owen JJ. in the *Miracle Foods Case*[11], follows traditional judicial technique more closely than the approach of the other dissentients.

Walsh J. was the only Judge who attempted to distinguish *Wragg's Case*, and he did so by describing the law in question in that case as merely requiring adherence to a price-fixing scheme whereas the legislation now in issue imposed an absolute prohibition on any sale.

It then remained for these judges to find that the legislation would operate directly on the appellants' interstate trade and commerce so as to constitute a burden on that trade. All were prepared to look further than the legal effect of the law, i.e. that the retailer would be prevented from

6. *Grannall* v. *Marrickville Margarine Pty. Ltd.* (1955) 93 C.L.R. 55; *Bear* v. *Marrickville Margarine Pty. Ltd.* (1965-66) 114 C.L.R. 283.
7. *Grannall, supra* n.6, at 71.
8. *Samuels* v. *Readers Digest Assoc. Pty. Ltd.* (1967-69) 120 C.L.R. 1.
9. [1972] 46 A.L.J.R. 192, at 193-194.
10. *Id.*, at 209.
11. *O'Sullivan* v. *Miracle Foods (S.A.) Pty. Ltd.* (1966) 115 C.L.R. 177.

selling his imported margarine, but would still be at liberty to import it. But this constituted no difficulty for them. For example, Barwick C. J. said "to forbid the sale by the importer in the second State of goods so imported is in my opinion inevitably to impair that trade and commerce; indeed it would not merely burden the importers interstate trade and commerce, it would destroy it. That destruction is in my opinion directly and immediately brought about by the prohibition on sale by the importer in Tasmania of the imported goods"[12].

Windeyer J., in a development of his earlier judgement in the *Associated Steamships Case*[13], refused to support or deny the "act-severance" approach adopted by the other majority judges: "I am not prepared to say that the prohibition of the sale in Tasmania of cooking margarine that has been coloured or flavoured does not, directly and immediately, restrict importation of it. But that is far from a decisive consideration"[14]. The critical question was whether "a restriction of the quality or character of margarine that can be lawfully sold in Tasmania is an unlawful impediment to trade and commerce, or whether it is not merely a lawful regulation of trade and commerce in margarine"[15]. It was at this point that Windeyer J. differed from the minority judges in that his Honour thought the restriction was regulatory in character. He and Walsh J., were directly opposed on this point.

Both Judges saw that before one can speak of a commodity being regulated or prohibited, one must define the commodity. Walsh J. saw the relevant commodity to be margarine-with-additives, and therefore legislation restricting its sale constituted a complete prohibition which was in contravention of s.92. His Honour's justification for this was that margarine with additives had become a recognized commercial commodity, the inference being that commercial practice would determine the commodity.

On the other hand Windeyer J., saw the relevant commodity to be plain margarine, and legislation requiring that it should be artificially coloured was reasonable regulation in the same way as legislation specifying the mode of packaging and labelling the product. In his view, such aspects of producton would always be incidental to the basic product, and as the basic production was not being prohibited, the legislation merely constituted regulation of the trade in question.

The remaining majority judges, namely McTiernan, Menzies and Gibbs JJ., all followed the orthodox approach. This approach originated with the Privy Council in the *Bank Nationalization Case*[16], and is to the effect that s.92 is infringed "only when a legislative or executive act operates to restrict such trade, commerce and intercourse directly and immediately as distinct from creating some indirect or consequential impediment which may be fairly regarded as remote"[17].

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12. At 194.
13. *Associated Steamships Pty. Ltd.* v. *W.A.* (1969-70) 120 C.L.R. 92.
14. *Id.*, at 207.
15. *Ibid.*
16. (1947-48) 76 C.L.R. 1.
17. *Commonwealth* v. *Bank of N.S.W.* (1949) 79 C.L.R. 497, at 639.

In determining whether the consequence is direct or remote, the Australian courts have had recourse to a refinement of Dixon C.J.'s, viz. the "act-severance" approach referred to above, and, in addition, have consistently refused to look further than the legal consequences. Thus it was possible for the majority judges in the present case to determine that the act upon which s.6 operated involved interstate trade and commerce. Furthermore s.6 left the appellant legally free to continue to import margarine with the prohibited additives. Gibbs J. said: "s.6 leaves the appellant absolutely free, as a matter of law, to continue its interstate trade in the margarine, although as a matter of practical and commercial reality, the section may have the effect of destroying that trade"[18].

The result of the present case is that *Wragg's Case* should be preferred to *Paradiso's* as authority but the validity of the judicial technique by which *Wragg* was decided is now in doubt, only three of the seven judges being prepared to rely on the "act-severance" approach. The tendency now is to look at the law in question and ask whether it has an immediate and direct operation on the interstate trade and commerce when that trade and commerce is considered as a whole.

The movement away from the "act-severance" approach seems desirable. It did provide a simple means of determining several cases and also reduced the element of subjectivity inevitable in any case involving s.92, but as is the case with many rules of simple application, arbitrary results are reached in hard cases. This is evident from a comparison of the *Miracle Foods Case* with *Mowbray* v. *Mead*.

In the former case, South Australian legislation which provided that "no person shall manufacture, sell or have in his possession for sale any margarine unless one tenth of one per centum by weight of such margarine consists of dry starch or arrowroot intimately mixed with the other constituents of the margarine" did infringe s.92 in so far as it imposed an unreasonable burden on the company's interstate trade in margarine. The words "have in his possession for sale" were deleted from the charge by agreement of the parties before the Court, but all the words of the section were considered by the Court in its judgment. The majority, Barwick C.J., Taylor and Owen JJ., concluded that the requirement did impose a direct burden on the defendants' interstate trade and commerce, as it prohibited the sale of the margarine to the consumer, this being the end point of interstate trade. This was so despite the fact that all regarded the relevant sale not to be within the actual course of the company's interstate trade (i.e. the sale to the consumer was an interstate act). Further, this burden did not constitute reasonable regulation of the trade, as it was merely for the convenience of the South Australian officials in determining whether a particular commodity was in fact margarine or butter. Of the two minority judges, Windeyer J., although admitting that the requirement directly affected the company's interstate trade, found the regulation of the trade in question to be reasonable. By contrast, Menzies J. adhered to the traditional "act-severance" approach, and found the requirement operated at the point of manufacture, which was not of itself part of the company's interstate trade.

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18. At 216.

In the *Mowbray* case, however, where the presence of certain additives was prohibited rather than mandatory, the supporters of the "act-severance" approach were in the majority. Only Menzies and Gibbs JJ. were concerned by the obvious conflict with the *Miracle Foods Case*. Gibbs J., realizing the difficulty, made some attempt to distinguish *Miracle Foods*, but finally admitted that if the attempt failed, he would refuse to follow that case in preference to the earlier authority of the *Margarine Cases* and *Wragg*.

Menzies J., however, made a more determined effort by explaining the decision as one falling within the qualification outlined by Dixon C.J. and Webb J. in *Mansell* v. *Beck:*

> "a law which imposes restrictions or burdens upon some descriptions of act, matter or thing, not of its own nature forming part of interstate trade, commerce and intercourse, and does so because of some characteristic which is independent of any element entering into that conception is very unlikely to be found to destroy, impair or detract from the freedom secured by s.92. It may conceivably do so if upon examination of the facts and scrutiny of its intended operation it appears that in spite of the prima facie absence of any but on accidental interference with interstate trade, commerce and intercourse, the law is but a circuitous means of burdening, restricting or impeding operations of a kind which s.92 protects"[19].

Even if this is valid, Menzies J. still does not explain why *Mowbray* v. *Mead*, which was similar to *Miracle Foods* on the facts, did not fall within the same exemption.

And so the application of the "act-severance" approach leaves one with an artificial distinction between a restriction on the holding of goods for sale (which will be invalid) and a restriction on the actual selling (which will be valid). As Walsh J. stated: "if . . . there is a prohibition against having goods in one's possession for sale, which leaves the importer free to keep them in his possession for other purposes, it is not easy to see why the possession of the goods is an unseparable concomitant[20] of importing the goods for sale but the actual selling of them is not"[21]. It seems that the search for simplification and certainty has been allowed to take preference over the search for rationality.

The differences between the traditional technique in s.92 cases and the technique pursued by Barwick C.J., already have been well tabulated in an editorial note on the *Associated Steamships Case* in the Australian Law Journal[22]. However I would like to focus more attention on his Honour's approach to the very narrow field of regulation of a trade and suggest that it is out of place in a modern advanced society.

Barwick C.J.'s judgment includes the following passage from his earlier judgment in the *Readers Digest Case:*

> "On the other hand failure to observe and effectuate the limitations inherent in the concept of freedom of trade and commerce as used

19. *Mansell* v. *Beck* (1956-57) 95 C.L.R. 550, at 565.
20. *Fergusson* v. *Stevenson* (1951) 84 C.L.R. 421, at 435.
21. At 214.
22. (1970) 44 *A.L.J.* 91.

> in the section can well result in unwarranted restrictions upon the ability of the legislatures to secure the society and its members against practices and activities which are incompatible with the maintenance of freedom of trade and commerce in a civilized society. There is thus a need in each case closely to observe a nicety of balance between freedom of trade and commerce and the permissible restrictive legislation of a free and civilized society which is compatible with that freedom".

Contained in this passage are two relevant conflicting interests seen by Barwick C.J.: on the one hand, the need of the legislatures to secure the society and its members against certain practices and activities defined as hazards such as "health, nutrition, inimical and fraudulent practices in trade and the like"[23], and, on the other hand, the maintenance of trade and commerce in a civilized society.

Just as there is no criterion in s.92 to justify the "act-severance" approach, so also is there no criterion to justify this narrow approach of Barwick C.J., and indeed there are sound policy reasons for not adopting such an approach. His Honour's approach is open to criticism on two grounds: first, that the interests of the individual consumer, and those of the maintenance of free trade, should not be the only relevant factors to be taken into account, and secondly, that such an approach is incapable of providing a formula which will satisfy the demands of a twentieth century industrial society in which it is increasingly common for trade to be carried on in the national sphere rather than within the one state. Barwick C.J.'s approach is a return to the 19th Century laissez faire ideal of free trade, and is reflected in the words of the political philosopher, Thomas Paine, who held that "the best government is the government which governs least". It is an approach which one would hardly think applicable in an advanced industrial society, in which economic power, and thus real power, is becoming more and more concentrated in the hands of an elite few, responsible ultimately to no one but their own shareholders. It is a society in which governments, particularly the Federal Government, are expected not only to protect the individual and small businessman from health, nutritional, inimical, and fraudulent hazards, but also to exercise much wider reaching control and regulation over the economic and trading systems. It is inevitable therefore that governments will be required to make laws extending beyond the narrow field allowed by the Chief Justice.

Further, it seems that his Honour is prepared to allow a far wider subjective element into this area of the interpretation of a given case than any of his fellow judges. For Barwick C.J.'s approach requires one to scrutinze every piece of disputed legislation to determine whether, as a matter of judicial opinion, the legislation is reasonably regulatory. This is not so much evident from *Mowbray* v. *Mead* as from *Miracle Foods* where Barwick C.J. was not prepared to allow legislation designed for the convenience of the South Australian officials. By contrast, other judges are prepared to accept the decision of the legislature. Thus, in the *Readers Digest Case,* Menzies J. noted the "long history of legislative animadversion" to trading stamps in deciding that the regulation in question was reasonable.

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23. At 194.

In conclusion, it is submitted that in view of Barwick C.J.'s persistent refusal since joining the High Court to be bound by previous authority in relation to s.92, it is likely that further development will be seen in the law, the current trend being towards his approach. The search for the golden thread in the constitutional labryinth continues.

*Richard White**

* Final year student.