Constitutional Obstacles to Organised Marketing in Australia: A Postscript*

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> "The efficacy of the scheme depends upon the delivery of the whole wheat crop to the Wheat Board . . . a comprehensive scheme is the only practical and reasonable manner of regulating the wheat industry . . ."
>
> Justices Mason and Jacobs in the *Clark King* case

> ". . . it is not established that the Government monopoly in trading in wheat is the only possible and reasonable manner of regulating trade and commerce in the commodity . . . the material does not even establish that the prohibition of interstate trade in wheat is indispensable to the stabilising effectiveness of the legislation."
>
> Chief Justice Barwick in the *Clark King* case

> "(The Wheat Board) fails positively to establish that (a stabilisation scheme is) either desirable or necessary and there thus remains little if anything which can justify the monopoly position which the legislative scheme accords to the Board."
>
> Mr. Justice Stephen in the *Clark King* case

That the above views are diametrically opposed is unsurprising. What is surprising is that they should be expressed not by some commission of enquiry with special expertise in wheat marketing, or by a legislative body representing the various interests at stake, but by the High Court of Australia.

Readers of the *Review* will recall that in my article in the August issue I referred, in my discussion of the constitutional guarantee of freedom of interstate trade,[1] to an important case concerning the wheat stabilisation scheme which was then awaiting decision. The case was decided on September 8, 1978,[2] and is now the subject of this postscript.[3]

The current comprehensive Australia-wide wheat marketing scheme exists under complementary (and virtually identical) Commonwealth and State legislation.[4] The Australian Wheat Board was set up under the Commonwealth legislation and is empowered under the various Acts to

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*See Michael Coper, "Constitutional Obstacles to Organised Marketing in Australia", this *Review*, Volume 46, Number 2, August 1978, pp. 71-102. This article is hereinafter referred to as "Constitutional Obstacles".

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[1] "Constitutional Obstacles" pp. 88-96.

[2] *Clark King & Co. Pty. Ltd.* v. *Australian Wheat Board* (1978) (as yet unreported).

[3] This postscript has been written on the assumption that readers will be familiar with the previous article and a deliberate effort has been made not to be repetitive.

[4] The relevant Act for New South Wales is the *Wheat Industry Stabilisation Act* 1974.

undertake the marketing of wheat in Australia and overseas. The key feature of the scheme, of course, is that the Board is constituted as the *sole* authority for the marketing of wheat. This is done by empowering the Board to require wheat to be delivered to it, whereupon the wheat becomes the property of the Board,[5] and by prohibiting any dealing with wheat without the Board's consent.[6] The legislation makes no exemption for interstate trade in wheat but purports to apply to all dealings in wheat throughout Australia.

It would be rather audacious of me in the context of this *Review* to even attempt to explain how the scheme works, as readers will undoubtedly know and understand its details better than I. It will be sufficient to say that the stated purpose of the scheme is to stabilise and equalise prices and returns to growers, and that this is implemented by requiring the Board to pay a certain fixed price for the wheat it compulsorily acquires, determined by the Board in accordance with a formula set out in the legislation.[7] Domestic sales are made at the home consumption price which is based on costs of production. In more recent schemes export prices have been stabilized about market trends using payments from both Government and growers. Returns from both markets have then been equalized. Wheat stabilisation plans began, in their present form in 1948, in order to overcome the problems caused by fluctuating international prices for Australia's large surplus of wheat over local demand and compounded by seasonal irregularity.

Marketing schemes such as this, in which the governmental authority has considerable discretion in the use of its powers, do not normally provoke any legal or constitutional challenge until the authority decides to exercise its powers to their full extent. So it happened when the Wheat Board decided in 1977 to compulsorily acquire wheat which was in the course of interstate trade, having apparently permitted such trading for a considerable time. Although this fact seems highly relevant in judging the necessity for a comprehensive scheme, the High Court did not pursue the reasons for it and they remain outside the public record.

In any event, the scheme was challenged by four separate Victorian companies which bought wheat from New South Wales growers for gristing at the companies' mills in Victoria. The millers all maintained bulk stores; in three instances they were in New South Wales and in the fourth Victoria. The growers delivered the wheat to the bulk stores and were paid on delivery. Because wheat was gristed at the mills more or less continuously throughout the year but was available only at harvest time, and because of the limited storage capacity of the mills, the wheat was frequently held at the bulk stores for considerable periods and transported to the mills only as needed. When the Wheat Board served notices on the millers requiring them to deliver to the Board all of the wheat lying in their bulk stores, the millers went to the High Court and claimed that the scheme infringed section 92 of the Constitution and therefore could not apply to their wheat, which was asserted to be in the course of interstate trade.

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[5] See, for example, section 10 of the New South Wales Act.

[6] Section 12.

[7] Section 13.

A court of five of the seven High Court Justices heard the case: the Chief Justice, Sir Garfield Barwick, and Justices Stephen, Mason, Jacobs and Murphy. The Court was unanimous that the wheat was indeed in the course of interstate trade, with the possible exception of Justices Mason and Jacobs who suggested in a joint judgment that in the case of the miller whose bulk store was in Victoria the interstate character of the transaction might have ended with the transportation of the wheat from New South Wales. The Court held that the interim storage of the wheat was an integral part of the millers' interstate trade in the purchase and transportation of wheat for their gristing business.[8]

This preliminary holding disposed of the easy part of the case. Its significance was twofold: first, it gave the millers "standing" to raise the issue of constitutionality,[9] and second, it put beyond doubt that the effect of the scheme on their trade was "direct", even on the narrow Dixonian meaning of that concept.[10]

The hard part of the case was whether the scheme could be regarded as merely "regulatory".[11] If so, it would be valid; if not, it would infringe section 92 and be invalid. Justices Mason and Jacobs held that it could; Chief Justice Barwick and Mr. Justice Stephen held that it could not. Mr. Justice Murphy would have nothing to do with this kind of enquiry but stuck to his view that the operation of section 92 is confined to prohibiting customs duties or similar taxes which discriminate against interstate trade.[12] The result therefore was that the wheat stabilisation scheme was held to be valid by a majority of three (Mason, Jacobs and Murphy) to two (Barwick and Stephen). Yet because of the diversity of reasoning, the case exhibited the bemusing (though common) feature of decision making by multi-judge courts that there was no majority support for any single reason or proposition.

The issue of whether the scheme could be regarded as merely "regulatory" goes to the very heart of the difficult problems involved in the interpretation of section 92. In my article in the August issue of the *Review,* I suggested that what the Court was really doing when it invoked the nebulous concept of reasonable regulation was that it was making a legislative judgment about the desirability of the challenged law.[13] Even so, the cases abound with relatively easy examples — health laws and traffic laws are the obvious ones — where the major difficulty is the question of degree. As these examples suggest, laws which have been upheld as merely regulatory since the Privy Council laid down that test in the *Bank*

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[8] In the case of one of the millers, the wheat was held to be in the course of interstate trade because the grower was *contractually* responsible for the ultimate delivery of the wheat to the mill in Victoria. However, the conclusion in the other three cases was based simply on the millers' ordinary course of business. The case does not decide that the gristing itself was a part of interstate trade; indeed, Justices Mason and Jacobs thought it was not.

[9] "Constitutional Obstacles" p. 95.

[10] *Ibid.* pp. 90-91, 93.

[11] *Ibid.* pp. 91-92, 93, 94.

[12] *Ibid.* p. 89.

[13] *Ibid.* p. 92.

Nationalisation case in 1949[14] have fallen into a general category of rules prescribing certain conduct for those engaged in trade or excluding classes of persons or things from trade because of the characteristics of those persons or things. The wheat stabilisation scheme, however, neither prescribed rules for the conduct of traders in wheat nor was it concerned with the qualities of those who may be permitted to trade or the quality of the wheat traded; it rather brought to a halt all private trading in wheat and put it in the hands of a monopolist, the Australian Wheat Board.

The very starting point for the Privy Council's explanation of the concept of regulation in the *Bank* case was to contrast it with and distinguish it from outright prohibition. Moreover, the actual decision in the case drove the point home: the outright prohibition of private banking was not mere regulation. But even within the confines of a single joint opinion of all the judges, the Privy Council proved itself to be just as adroit as the High Court in speaking with many voices. In a delightful example of what I referred to in my article as the tension in the judicial process between the pursuit of doctrinal consistency and the result-oriented desire to preserve an escape hatch, [15] the Privy Council said:[16]

> "Yet about this, as about every other proposition in this field, a reservation must be made. For their Lordships do not intend to lay it down that in no circumstances could the exclusion of competition so as to create a monopoly either in a State or Commonwealth agency or in some other body be justified. Every case must be judged on its own facts and in its own setting of time and circumstance, and it may be that in regard to some economic activities and at some stage of social development it might be maintained that prohibition with a view to State monopoly was the only practical and reasonable manner of regulation and that inter-State trade commerce and intercourse thus prohibited and thus monopolized remained absolutely free."

And so, the central issue in the *Clark King* case became whether the wheat stabilisation scheme was "the only practical and reasonable manner of regulation" of the industry.

Whatever the merits of the scheme, when stated in this extreme form the proposition puts a heavy onus on those who would affirm it. Indeed, Chief Justice Barwick regarded counsel for the Wheat Board as having resiled from the proposition during argument and as content to submit that the scheme was *a* practical and reasonable manner of regulation, a submission which, even if accepted, was clearly insufficient to save the scheme from invalidity if the *Bank* case was to be followed. It was not difficult for the Chief Justice and Mr. Justice Stephen to state compelling reasons why the wheat scheme was not the *only* practical and reasonable manner of regulation of the industry: other forms of assistance were possible which did not prohibit interstate trade, other analogous schemes appeared to be satisfactory without extending to interstate trade, the wheat scheme itself had apparently operated for a considerable period without extending to

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[14] *Ibid.* p. 90.

[15] *Ibid.* p. 85.

[16] *Commonwealth* v. *Bank of New South Wales* (1949) 79 CLR 497, at 640-641.

interstate trade, and a responsible body of opinion was in fact critical of the scheme and doubted its efficacy. On the last point, Mr. Justice Stephen relied particularly on the 1978 report on wheat stabilisation by the Industries Assistance Commission, which recommended that private trading be reintroduced into the domestic wheat market and the stabilisation scheme discontinued.[17]

The opinion of Justices Mason and Jacobs upholding the validity of the scheme would have been more persuasive if they had either attempted to meet these points or if they had not accepted in the first place the necessity of demonstrating that the scheme was the *only* reasonable way. Instead, they eschewed any dialogue with the Chief Justice and Mr. Justice Stephen and were content to conclude, after a detailed discussion of the purpose and background of the scheme, that it *was* the only reasonable way. One may doubt whether a sufficient bridge was built between reasoning and conclusion.[18]

However, emphasis on the extreme form of the proposition suggested by the *Bank* case is something of a red herring. Even if Justices Mason and Jacobs could not convince us that the wheat scheme was "regulatory" within the strict framework of the *Bank* case, the broader and more fundamental question still remains of whether the scheme ought to be regarded as an infringement of section 92. It was in this broader and more fundamental sense that I anticipated their judgment when I said in my article that the Court may eventually come to regard the advantages of organised marketing as sufficient to overcome a challenge under section 92, at least in relation to Australia-wide schemes.[19] For this is precisely the thrust of their opinion,[20] even though it has majority status only in the result and not in the reasoning. Yet the result is important, since the decision will now have a momentum of its own; in view of the way the law develops, it will be more important in the course of time that the wheat scheme was held not to infringe section 92 than that the reasons were diverse.

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[17] Note that Mr. Justice Stephen was not accepting that the Industries Assistance Commission was *right*, but was rather relying on the *existence* of that opinion to *deny* that the background material submitted by the Wheat Board established the absolute necessity for the scheme.

[18] This criticism, of course, goes to the persuasiveness of the reasoning, not to the truth or otherwise of the conclusion.

[19] "Constitutional Obstacles" pp. 94-95.

[20] The opinion is complex and difficult, perhaps exhibiting the loss of clarity to which joint opinions are subject. Their reasoning on the broader issue is intertwined with what I have referred to above as the Privy Council's red herring, but it seems to be as follows: the gristing of wheat is not itself a part of interstate trade, so that acquisition at that point would not infringe section 92 (any effect on interstate purchase and transportation being merely economic and therefore indirect), and if that is so, then since under the scheme the wheat can be acquired throughout Australia, it doesn't make much difference if it is acquired when actually in the course of interstate trade. Not only does this rekindle the spark of the Dixonian doctrine, but also it seems to deny the relevance of economic or practical effect for the purpose of the premise but rely on it for the purpose of the conclusion — a case of having one's constitutional cake and eating it too. The point is also made that because government monopoly control over the whole wheat crop is the only reasonable and practical manner of regulation, then it is permissible for the scheme to apply to all *dealings* in wheat, including interstate trade. The extent of interdependence of these arguments is unclear, but the Australia-wide nature of the scheme was of critical importance to both.

Of course, the question of whether the scheme ought to be regarded as an infringement of section 92 cannot be entirely separated, for reasons I shall discuss shortly, from the question of what result is demanded by consistency with earlier doctrine. But put aside for a moment the High Court's proper role in the decision-making process and consider the bare question of the necessity for and desirability of the wheat marketing stabilisation scheme.

Few questions in law or life command unanimous answers. The whole point of our political process is to resolve conflicts of opinion and to embody the majority viewpoint in law. In a federal system, a national majority must sometimes yield to regional interests but the basic principle is the same: whether legislation ultimately fulfils the wishes of a majority or of particular interests and pressure groups, the opportunity to pass it is given, subject to the vagaries of the electoral system, to those who command majority support in the community.

The mere fact of litigation is sufficient evidence that there is no unanimity about the desirability of the wheat scheme. Moreover, the 1978 IAC report indicates that dissent is not confined to a handful of mavericks. Indeed, all that Chief Justice Barwick was prepared to concede in the *Clark King* case was that "the Parliament has thought this legislative scheme desirable, no doubt satisfying as it does the pressures of one section of the community". Yet it is rather more than this; the scheme has operated for many years with the support of *all* the Australian legislatures, in which the major political parties have had varying support from State to State and from time to time. Even if the truth of the situation is that the scheme is essentially directed to satisfying the demands of the wheatgrowers, or a majority of them, without giving explicit attention to the possibly divergent interests of consumers, say, or the community as a whole, the extent of bipartisan support is strong evidence for the existence of some consensus about the desirability of a stabilisation scheme.

The short point is that whether or not such a scheme is desirable depends on your point of view. It boils down to a fundamental issue of political philosophy and personal temperament. Some will always wish to take the benefit of good times, accept the risk of bad times and resent any government interference; others will always wish to have their long-term security guaranteed and hold values other than the survival of the fittest. Chief Justice Barwick gave a hint of the former philosophy when he observed that "some, probably the majority, still value the ability to do what they may with their own as of incalculable value"; Justices Mason and Jacobs gave a hint of the latter when they described the wheat scheme as achieving "fairness to all".

If I am correct that there are no "objective" or "value-free" criteria for judging the necessity for or desirability of the wheat scheme, the real issue, and the only issue, is *who* should have the power to decide? This makes the enquiry an *institutional* one, not a substantive one. If one accepts the right of the majority to embody its beliefs in law, the answer is relatively straightforward, even though our form of democratic government is rather more complex and subtle than a system of simple majority rule. Moreover, the force of this viewpoint is considerably strengthened by the further element of consensus, if one is entitled to take into account the history of bipartisan support for the wheat scheme. Even if one believes that the

desirability of the scheme should be determined by a body of "experts", the question ultimately remains a political one; whatever the nature of the relevant expertise, it can scarcely touch on the policy issues of which interests should be catered for and which demands satisfied.

The really intriguing aspect of this institutional question is, how does the High Court of Australia come to have the final say? How is it that a *judicial* body, with expertise in *legal* matters, has the power to finally decide these policy issues?

This takes us directly back to the Constitution. In my article, I sketched some of the difficulties inherent in the interpretation of section 92 and some of the differing solutions which the judges have supplied from time to time. The central problem is that unless judicial review is abandoned altogether, the High Court has to determine in what circumstances the judgment of the elected representatives of the people must yield to principles embodied in the Constitution. Because these principles are far from self-evident, any assessment of whether the Court is doing a good job or a bad job requires careful explication of the criteria on which the assessment should be made.

In my opinion, there are three such criteria. In the first place (though not necessarily first in importance), we expect a court to achieve a measure of *certainty* in the law it produces. Yet we expect this of legislation also.[21] In the second place, we inevitably evaluate a judicial decision by reference to the *result*. Yet what justification can a court have for merely substituting its own opinion on the desirability of the wheat scheme, say, for that of a legislature? The legislature justifies its position in a pluralist society by vindicating a majority viewpoint, but a court has no popular base to support its choice of values. There must be a further criterion appropriate to the distinctive nature of a court as a judicial body, one which pertains to the differences rather than the similarities between the courts and our other institutions of government.

Thus, there is a third criterion, which I think is best expressed as the extent of a court's *fidelity to external sources* in its determination of the law. We expect more than an *ad hoc,* personal value judgment; we expect that decisions will be made with reference to the text of a statute or the Constitution and with regard to the doctrine espoused in earlier decisions. When, therefore, we ask whether the High Court's decision in the *Clark King* case was a good one, we have to be concerned not only with whether we agree with the result but also whether the Court did its job well *as a court.*

The intractable dilemma of the judicial process is that the external sources are as inconclusive as mere result-orientation is insufficient. I noted more than once in my article that a court has a considerable leeway of choice in making its decisions, and this is nowhere more evident than in relation to section 92 of the Constitution. The inadequacy of result-orientation, with nothing more, compels attention to an external standard, but in a vicious and inescapable circle the inconclusiveness of that standard demands consideration of the most appropriate result. What is more, emphasis on one criterion provokes criticism for failure to attend to the other. When the

[21] In the sense, however, of clarity rather than stability.

High Court ignores the social impact of its decisions it is said to be too legalistic; when it worries about the social context it is said to be going beyond its proper role. Only the best judges, with a blend of guidance from external sources and sensitivity to a socially well-adjusted result, appear to be able to satisfy both criteria simultaneously.

Not all questions of constitutional interpretation raise the dilemma as overtly as does the interpretation of section 92. The test of reasonable regulation is embodied in earlier doctrine, yet is scarcely intelligible except in terms of desirability. And here is the vicious circle again: whether a wheat marketing scheme is desirable has no objective answer, as the issue comes down to who should have the power to make their opinion the authoritative one — yet the power is conferred under the Constitution upon the very institution whose *raison d'etre* is to give objective answers.

Surely, appraisal of the *Clark King* case is a subtle task. My first criterion, the achievement of certainty, is really more relevant to appraising a line of cases than a single decision, but I would venture the opinion that the decision in the *Clark King* case by no means secures the validity of analogous marketing schemes and even leaves the wheat scheme itself vulnerable to future attack. I say this not primarily because of the closeness of the decision and the diversity of the reasoning, but rather because I believe that if all seven justices had been sitting the decision would most likely have gone the other way.[22]

If in the task of appraisal one emphasises my second criterion, which I will refer to in a shorthand way as the achievement of the "right result", one can only fall back on the choice of values which I canvassed earlier. Of course, we are talking about an issue which is rather narrower than the desirability of a stabilisation scheme as a whole; to be precise, the issue was the desirability of a *comprehensive* scheme which gave the Board control over interstate as well as intrastate trade. However, it seems to me that whether the argument is that a comprehensive scheme is undesirable because a limited scheme is adequate, or whether it is that a comprehensive scheme is undesirable because *any* scheme is undesirable, in the end comes to a conflict between the same underlying values. In *their* particular value judgment, Justices Mason and Jacobs were clearly sensitive to the institutional problem I have outlined, and their view that the wheat scheme was necessary and desirable was as much a deference to legislative judgment as it was an opinion on the merits of the scheme.

Emphasis on my third criterion, fidelity to external sources, leaves a lot of leeway even as to the choice of the sources. I suggested earlier that Justices Mason and Jacobs could not bring themselves strictly within the test in the *Bank* case and in truth expanded the concept of regulation beyond the boundaries of earlier doctrine. Yet Mr. Justice Murphy did not even accept the *Bank* case as the starting point. His external source was the text and context of section 92 and his opinion as to the limited purpose of the section

[22] Even if I am right here, this does not mean that if the case *were* now reheard before all seven justices the decision would necessarily go the other way. As noted earlier, the *Clark King* case now constitutes a precedent for the validity of the wheat scheme, irrespective of the diversity of the reasoning, and it is open to a justice on a future occasion to accept the decision in spite of a personal belief that it was wrongly decided.

in securing "free trade" as contrasted with protection rather than the freedom accorded by the Privy Council to private enterprise as such. The Murphy view, of course, serves the same value end as Justices Mason and Jacobs' use of the concept of regulation, so that the criteria I have suggested for evaluation are very much interlocked. Moreover, the Mason-Jacobs view is also a reversion, in a sense, to the idea of "free trade", because of the strong emphasis they placed on the non-discriminatory Australia-wide nature of the wheat scheme; State boundaries were irrelevant to the scheme, so that if section 92 operated in those circumstances it was really protecting interstate enterprise not because it was interstate but because it was private.

If this postscript has been more about the judicial process than about the substance of the *Clark King* case, the reason is that it is impossible to properly understand the decision in isolation from its dynamics. One unusual feature of the decision is the relatively *open* discussion of the policy factors, partly made inevitable by the need to give some content to the Privy Council's reservation in the *Bank* case and partly the result of a more general trend in any event. Although this kind of open discussion has for years been encouraged, if not demanded, by the High Court's professional critics, on the theory that policy factors influence judicial decisions anyway[23] and should therefore do so openly rather than silently, one consequence is that it makes the Court more vulnerable to attack from those who disagree with the judicially sanctioned policy. No doubt there can be an honest difference of opinion over whether Australia should have a comprehensive wheat stabilisation scheme, but many will wonder why it is any business of the High Court of Australia. This is part of the Court's intractable dilemma.

I said in my article that the chronic diversity of opinion in the High Court corresponded with like divisions within the community.[24] The *Clark King* case is a good example. For if the Australian community could render a collective judgment, the result would very likely be the same: a majority in favour of the scheme, but for a variety of reasons and with some strong and vocal dissent.

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[23] *Cf.* "Constitutional Obstacles" p. 78.

[24] *Ibid.* p. 101..