

Chapter 1

The Section 92 Revolution

The Hon Stephen Gageler

Nothing could be more disappointing to a legal scholar than to labour over the production of a treatise on an area of law only to see that treatise almost immediately rendered redundant by a revolutionary decision of an ultimate court. Equally and oppositely, nothing could be more satisfying to a young, ambitious and energetic legal scholar than to take part in the litigation which produces a revolutionary decision of an ultimate court on a topic squarely within his or her field of expertise. Michael Coper experienced the disappointment and the satisfaction. As a junior academic at the University of New South Wales, he turned his doctoral thesis entitled *The Judicial Interpretation of Section 92 of the Australian Constitution* into a 400-page book, which he published in 1983 as *Freedom of Interstate Trade under the Australian Constitution*. Just four years later, he accepted a brief to appear with Ron Sackville as junior counsel to the Solicitor-General for New South Wales, Keith Mason QC, on behalf of the Attorney-General for New South Wales intervening in the hearing before the High Court of *Cole v Whitfield*.¹ When *Cole v Whitfield* was decided in 1988, his academic thesis was largely vindicated, the complexities of the case law which he had sought to tease apart and critique were largely swept away. As the result of the publication of that single judgment, his detailed, insightful and colourfully written book was destined immediately to be remaindered. *Cole v Whitfield* was Michael Coper's yin and his yang. The case he would go on to call the curious case of the callow crayfish² became in the fullness of time his Penge Bungalow murders.³

Fully to appreciate the significance of the event Michael Coper has described as the s 92 revolution,⁴ you need to be an Australian public lawyer and you need to be over 50 years old. By that I mean you need to have trodden the constitutional landscape before 1988 in that epoch Michael Coper likes to describe as 'pre-crayfish'.⁵ You need have set out to navigate the constitutional badlands of s 92 in the years before *Cole v Whitfield* guided only by your Constitution and your Commonwealth Law Reports. Those who are young, or perhaps foreign-born, who have a neo-conservative hankering to see a

1 (1988) 165 CLR 360.

2 Michael Coper, 'The Curious Case of the Callow Crayfish: The New Law relating to Section 92 of the *Australian Constitution*' (Discussion Paper No 1, Parliamentary Library, Parliament of Australia, 1989-90).

3 Cf John Mortimer, *Rumpole and the Penge Bungalow Murders* (Viking, 2004).

4 Michael Coper, 'Section 92 of the *Australian Constitution* since *Cole v Whitfield*' in HP Lee and George Winterton (eds), *Australian Constitutional Perspectives* (Law Book, 1992) 131.

5 Coper, above n 2, 4.

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return to the supposed certainties of Dixonian legalism, would do well to reflect on what the experience was like.

{[T]rade, commerce, and intercourse among the States ... shall be absolutely free.⁶ That 'little bit of layman's language', the responsibility for the introduction of which was substantially borne by Sir Henry Parkes,⁷ caused more anxiety to lawyers than any other words in the Constitution. To adopt a relatively short and roughly chronological account of the case law in the pre-crayfish epoch given by Professor Patrick Lane, s 92 had:

been 'interpreted' from time to time to mean freedom from State, but not Commonwealth, law and action; freedom only from a law directed against, or aimed at interstate trade, or freedom only from a law having the object of interference with interstate trade; freedom as at the frontier, the point of entry into a State; freedom for a particular trader, not just for the general flow of interstate trade; ... freedom by reference to the criterion of operation of a challenged law (that is, whether the law itself operates on interstate trade, or on an essential attribute of this trade, and so on), freedom by reference to the direct effect of the law, as long as this is not also the regulatory effect of the law; freedom by reference to what the law does in the circumstances in which it is intended to operate or by reference to the practical effect of the law.⁸

Professor Lane's list was indicative, not definitive or exhaustive. There were subtle variations within each of the interpretations he mentioned and there were still other competing interpretations.

On his retirement in 1952, Sir John Latham said that, when he died, s 92 would be found written on his heart. Something had to be done about s 92, Sir John then said, and by 'something' he meant something other than submitting to a series of judgments and endeavouring to work out a proposition which would be consistent with all of them.⁹ Writing in his retirement in 1957, he described s 92 as 'the curse of the Constitution' and as a 'boon to lawyers and to road hauliers and to people who want to sell skins of protected animals or to trade in possibly diseased potatoes.'¹⁰ In his memoirs published posthumously in 1958, Sir Robert Garran said that he yielded to no one in admiration for the High Court and the Privy Council, but that s 92 was 'not one of their successes – and, unlike doctors, they cannot bury their failures.'¹¹ After studying in chronological sequence all that had been written on s 92, Sir Robert said, '[t]he student closes his notebook, sells his law books, and resolves to take up some easy study, like nuclear physics or higher mathematics.'¹² Writing in 1977, Professor Geoffrey Sawer described the subject of s 92 as one of 'gothic horrors and theological complexities.'¹³

6 Australian Constitution s 92.

7 JA La Nauze, 'A Little Bit of Lawyer's Language: The History of "Absolutely Free" 1890-1900' in AW Martin (ed), *Essays in Australian Federation* (Melbourne University Press, 1969) 57.

8 PH Lane, 'The Present Test for Invalidity under Section 92 of the Constitution' (1988) 62 *Australian Law Journal* 604, 604.

9 'The Chief Justice of the High Court: Retirement of Sir John Latham' (1952) 26 *Australian Law Journal* 2, 2-3.

10 Sir JG Latham, 'Book Review' (1957) 1 *Melbourne University Law Review* 266, 271-2.

11 Sir Robert Randolph Garran, *Prosper the Commonwealth* (Angus and Robertson, 1958) 413.

12 *Ibid* 415.

13 Geoffrey Sawer, 'Book Review' (1977) 8 *Federal Law Review* 376, 377.

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When I studied constitutional law with Professor Leslie Zines in 1981, we devoted an entire term – a third of the year-long course – to teasing out the intricacies of s 92. That was by no means disproportionate to the case law it had generated. Between 1903, when the High Court was established, and 1987, when *Cole v Whitfield* was argued, the High Court and the Privy Council had heard and determined 139 s 92 cases, comprising at least a third of all cases to have arisen after the Constitution.

Were s 92 to have been nothing more than a stress-trigger for judges, a source of income for legal practitioners, and a form of torture of law students, we might be permitted to look back on its interpretation and reinterpretation from time to time in the pre-crayfish epoch with mild amusement. Unfortunately, it was destructive of much more than the mental health of lawyers.

Section 92 was the rock on which dozens of vessels of legislative policy foundered. Fear of it must have caused dozens more never to be launched. As variously interpreted by the High Court and the Privy Council over the years before *Cole v Whitfield*, s 92 was a major constraint on legislative choice and had a dramatic impact on the national economy. At the Commonwealth level, it stopped the regulation of the interstate sale of dried fruit in 1935.¹⁴ It stopped the establishment of Australian National Airways as a monopolist provider of interstate airline services in 1945.¹⁵ It stopped the nationalisation of the banks in 1948.¹⁶ It threatened the domestic monopsony of the Australian Wheat Board in the early 1980s.¹⁷ At the State level, it created havoc in the 1950s and 1960s with road transport licensing schemes. From the 1930s and going through to the 1980s, it poked holes in any number of primary production marketing regimes. Through those holes renegade producers of fruit, grains, legumes, eggs, animal skins and dairy products drove their produce-laden vehicles across State lines in search of more lucrative and less regulated markets. Border-hopping before *Cole v Whitfield* was a legal term of art.

Since 1988, when *Cole v Whitfield* and its companion case *Bath v Alston Holdings Pty Ltd*¹⁸ were decided, the High Court has heard and determined just 10 s 92 cases. The decrease in the rate of s 92 cases in this post-crayfish era is no doubt attributable in part to sweeping nationwide microeconomic reforms which occurred in the 1990s. They resulted in the phasing-out of much of the State-based regulation which had provided the stimulus for the bulk of the earlier cases. But undoubtedly the decrease is attributable in at least as great a measure to the fact that the decision in *Cole v Whitfield* produced a clear, sensible and workable principle that confined the operation of s 92 within acceptable limits and replaced disorder with order. *Cole v Whitfield* provided the much-needed solution to what had previously seemed an insoluble problem.

With the possible exception of *Australian Capital Television Pty Ltd v Commonwealth*,¹⁹ decided four years later, *Cole v Whitfield* is to be ranked as the most important constitutional achievement of the High Court in the important period in which it was led by Sir Anthony Mason.

14 *James v Commonwealth* (1935) 52 CLR 570, affd *James v Commonwealth* (1936) 55 CLR 1.

15 *Australian National Airways Pty Ltd v Commonwealth* (1945) 71 CLR 29.

16 *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1, affd *Commonwealth v Bank of New South Wales* (1949) 79 CLR 497.

17 *Uebergang v Australian Wheat Board* (1980) 145 CLR 266.

18 (1988) 165 CLR 411.

19 (1992) 177 CLR 106.

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The argument in *Cole v Whitfield* proceeded over just four days, a period to be favourably compared with the argument in the *Bank Nationalisation Case*, which in the Privy Council proceeded over 37 days during which two of their Lordships died.²⁰ The High Court proceeded immediately to hear *Bath v Alston Holdings Ltd* over the next two days, reserving both decisions for 11 months.

What the High Court then produced in *Cole v Whitfield*, having allowed itself time for mature reflection, was a unanimous judgment magisterial in its scope and admirably direct and succinct in its style.

Of the cases which had gone before, the High Court said in *Cole v Whitfield*:

Over the years the Court has moved uneasily between one interpretation and another in its endeavours to solve the problems thrown up by the necessity to apply the very general language of the section to a wide variety of legislative and factual situations. Indeed, these shifts have been such as to make it difficult to speak of the section as having achieved a settled or accepted interpretation at any time since federation.²¹

Looking at the whole subject afresh, the High Court turned to pre-federation history for the purpose, it said, 'of identifying the contemporary meaning of language used, the subject to which that language was directed and the nature and objectives of the movement towards federation from which the compact of the Constitution finally emerged.'²² Understood in its historical context, the free trade of which s 92 spoke was an absence of protectionism.²³ Free intercourse might involve other considerations of personal liberty to travel or communicate throughout the Commonwealth, which for the purpose of deciding a case about the possession of crayfish could be, and was deftly, put to one side.²⁴ The freedom of interstate trade guaranteed by s 92 needed to be read in the context of the whole of the Constitution, the High Court said, including in particular the conferral by s 51(i) of legislative power on the Commonwealth Parliament with respect to interstate trade and commerce, a plenary power on a topic of fundamental importance.²⁵ The provision conferring legislative power (s 51(i)) and the provision restricting the exercise of legislative power (s 92) would obviously sit more easily together if the latter were to be construed as concerned only with precluding particular types of burdens.²⁶

Departing from the doctrine which had failed to retain general acceptance and adopting an interpretation favoured by history and context, the High Court announced that s 92 was henceforth to be understood as requiring that interstate trade and commerce be immune only from discriminatory burdens of a protectionist kind.²⁷ The new understanding was not announced in declaratory terms. It was announced as a choice which the current members of the High Court – writing in first person and

20 Susan Priest and George Williams, 'Bank Nationalisation Case' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (Oxford University Press, 2001) 52-3.

21 (1988) 165 CLR 360, 384.

22 Ibid 385.

23 Ibid 392.

24 Ibid 393-4.

25 Ibid 398.

26 Ibid.

27 Ibid 407.

referring to themselves as ‘we’ – were then collectively making. Injecting a further dose of realism into their analysis, they openly acknowledged that the new interpretation would not solve all problems but they said that it would permit the identification of the relevant questions and a belated acknowledgment of the implications of the long-accepted perception that ‘although the decision [whether an impugned law infringes s 92] was one for a court of law the problems were likely to be largely political, social or economic’.²⁸

Sir Garfield Barwick thought the reasoning in *Cole v Whitfield* was ‘really laughable’ and ‘terrible tosh’.²⁹ Dennis Rose QC, bringing his customary uncompromising intellectual rigour to bear on it, thought that the reasoning was ‘misconceived, or at least highly questionable, in some major respects’.³⁰ Theirs, however, were minority opinions.

The decision was greeted in 1988 with general acclaim and considerable relief. Its framework for analysis has since proved robust in a variety of settings and is certainly far superior to anything that had come before. Questions have arisen and will continue to arise in its outworking.³¹ Adjustments have been made and will continue to be made. But its essential holding that s 92 immunises interstate trade and commerce only from discriminatory and protectionist burdens remains firmly intact. Nearly 30 years on, it can be said to have stood the test of time.

My present interest lies less with the aftermath of the s 92 revolution than with the revolution itself. *Cole v Whitfield* was not only a case well decided, but a case well litigated. It is impossible to think that those two observations are unconnected.

Looking back on the *Cole v Whitfield* litigation, aspects of it stand out as exemplary and in some respects ground-breaking. One was the clarity of the definition of the issues. Another was the meticulous preparation and coordination of the argument. Another was the attention given to constitutional history. Another was the attention given to constitutional fact.

Cole v Whitfield came to the High Court by way of removal under s 40 of the *Judiciary Act 1903* (Cth) of an appeal to the Supreme Court of Tasmania from the dismissal by a magistrate sitting in Hobart of a complaint by a fisheries inspector, Mr Cole, that Mr Whitfield and his company had breached a Tasmanian fisheries regulation. The regulation prohibited taking or possessing crayfish of less than a prescribed minimum size. Mr Cole alleged that Mr Whitfield and his company had breached that regulation by possessing in Tasmania crayfish which they had imported from South Australia and which they had intended to export. The application for removal was made by the Attorney-General for Tasmania, which meant that the order for removal was one which was to be made as of right. The order as made on 30 March 1987 identified the case as raising a question about the compatibility of the Tasmanian regulation

28 Ibid 408, quoting *Freightlines and Construction Holding Ltd v New South Wales* (1967) 116 CLR 1.

29 Tom Molomy and Paul Donoghue, ‘Bar News Interviews Sir Garfield Barwick GCMG’ [1989] (Summer) *Bar News* 9, 17.

30 Dennis Rose, ‘*Cole v Whitfield*: “Absolutely Free” Trade?’ in HP Lee and George Winterton (eds), *Australian Constitutional Landmarks* (Cambridge University Press, 2003) 335.

31 See, eg, Amelia Simpson, ‘Grounding the High Court’s Modern Section 92 Jurisprudence: The Case for Improper Purpose as the Touchstone’ (2005) 33 *Federal Law Review* 445; Justin Gleeson, ‘What’s Left of *Cole v Whitfield*?’ (2013) 24 *Public Law Review* 97.

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with the freedom guaranteed by s 92. Prior notice of that constitutional question had formally been given in accordance with s 78B of the *Judiciary Act 1903* (Cth) to the Commonwealth Attorney-General and to the Attorney-General of each other State and Territory.

Between 30 March and the commencement of the hearing in Canberra on 2 June, the Solicitors-General for the Commonwealth and the States met in Melbourne on 27 April, and the Solicitors-General for the States met again in Melbourne on 22 May. There was a further meeting of the State Solicitors-General at University House in Canberra on 1 June. There appears to have been no doubt in anyone's mind that this was to be a significant case in which the interpretation of s 92 was to be sought to be re-opened and the High Court would be asked to go back to tors. At the April meeting, reasons were discussed for adopting an anti-protectionist approach. At the May meeting, Tasmania confirmed that it proposed to argue that the regulation did not offend s 92 because it was non-discriminatory and, if discriminatory, because it amounted to reasonable regulation. Each of the other States lined up to support a version of the non-discrimination argument. The Commonwealth later confirmed that it would adopt substantially the same approach. A common approach was in that way settled, which allowed for individual differences of emphasis.

The work of the Commonwealth and the States was divided up and a logical and efficient sequence for the presentation of argument was agreed. Tasmania would commence, arguing for re-opening of the s 92 cases and for the adoption of a discrimination test. The Commonwealth would follow, then each of the States in order of the seniority of their Solicitors-General. The Commonwealth would explain how each of the previous 139 s 92 cases would have been decided if its argument were accepted. That monumental task came in fact to be undertaken by Dennis Rose and Alan Robertson, who appeared with the Commonwealth Solicitor-General Gavan Griffith QC, and came to be presented to the Court in a succinct 39-page document accompanied by a five-page index and a two-page summary. It was, I venture to say even now, the most useful piece of legal analysis and most persuasive piece of legal writing ever to be deployed in argument in the High Court. South Australia, for its part extraordinarily well-represented by its Solicitor-General John Doyle QC and Brad Selway, would present a structural and historical analysis focusing on the mischief to which s 92 was directed as revealed by a comprehensive analysis of the Convention debates. The presentation of their argument was, to my knowledge, the first time on which the Convention debates had been openly deployed in argument before the High Court. If not the first use of the Convention debates, then it was certainly the most extensive, and it remains the most systematic and effective use of the Convention debates in any argument before the High Court. For New South Wales, Keith Mason QC, Ron Sackville and Michael Coper would give particular attention to the dormant commerce clause doctrine under the United States Constitution, a contribution downplayed in the judgment in *Cole v Whitfield* but which was to loom large in the reasoning of the High Court in the outworking of *Cole v Whitfield* two years later in *Castlemaine Tooheys Ltd v South Australia*.³² Each of the other States would play its part.

32 (1990) 169 CLR 436.

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Mr Whitfield and his company had the coordinated legal forces of the Commonwealth and the States arrayed against him. Outgunned but not ambushed, he was well-represented by Peter Cranswick QC, who appeared with Steven Chopping. In the companion case of *Bath v Alston Holdings Pty Ltd*, the party asserting invalidity on the basis of s 92 was represented by David Jackson QC who led a well-resourced legal team which included Dyson Heydon. Their thorough argument was successful in persuading a majority of the Court that the legislation in issue in that case was invalid even on the approach which was to win favour with the Court in *Cole v Whitfield*.

This was not an occasion of which it could be said that ‘the Court was as on a darkling plain, swept with confused alarms of struggle and flight, where ignorant armies clash by night’ – there were no surprises, no ‘great *renversement des alliances*’.³³ Everyone was prepared. Everyone was fully armed. Everyone remained at his post. The battlelines were well delineated. The adversary process worked as it should, and at its best.

One further part of the story of the *Cole v Whitfield* litigation which needs to be told concerns the facts. Law matters most, but facts win cases. Before the magistrate in Hobart, certain facts had been agreed. Those facts included that the particular crayfish in question had been imported from South Australia and were destined for the United States. The week before the hearing, certain additional facts were agreed. They are summarised in the report of the case in the Commonwealth Law Reports. The transcript of the argument reveals that a document setting them out was faxed to the High Court some time in the week before the argument began.³⁴ Oddly, the document did not make its way onto the High Court file. What prompted its late preparation, I do not know and those I have spoken to who were involved in the litigation have been unable to remember. But I suspect it was prepared on the initiative of Simon Sheller QC, who appeared with the Solicitor-General for Tasmania, Bill Bale QC, and who presented the bulk of the argument for Tasmania. His forensic skills were impeccable and I suspect that he saw a gap in the evidence which needed to be plugged.

What those additional agreed facts critically showed were two things. The first was that the object of the prescription of the minimum size of crayfish that could be taken from Tasmanian waters was the protection and conservation of the stock of Tasmanian crayfish, the breeding stock in Tasmanian waters being made up almost entirely of mature crayfish below that size. The second was that the extension of the prohibition to possession of crayfish, including possession of imported crayfish, was a necessary means of enforcing the prohibition against the taking of undersized crayfish from Tasmanian waters because the State did not have the personnel to police the minimum size regulation other than by undertaking random inspections, and because Tasmanian crayfish were indistinguishable from South Australian crayfish. Those were the facts, agreed and transmitted by fax at the 11th hour, which won the case. They showed that the general prohibition on possession imposed by the impugned regulation was necessary to achieve a non-protectionist purpose.

When, at the commencement of the hearing in *Cole v Whitfield*, Mr Bale stood up at the lectern in the middle of a packed Bar table in the main court room of the High Court in Canberra, the following exchange immediately occurred:

33 *Williams v Commonwealth* (2012) 248 CLR 156, 296.

34 Transcript of Proceedings, *Cole v Whitfield* (High Court of Australia, H1/1987, 2 June 1987) 3.

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Mason CJ: Mr Solicitor, might I ask you at the outset whether the interpretation for which you contend is an interpretation which is supported by the others on your side of the record?

Mr Bale: Substantially it is, Your Honour. There are some variations on the theme, but substantially Tasmania and all interveners will be advancing the proposition that section 92 ought to be interpreted with, what I might call, a discriminatory base. Others would say, perhaps not discrimination, it would be better were that to be called 'protectionism' or 'protectionist' rather than 'discrimination'.³⁵

The argument took its course, after which history took its course. Throughout the argument, sitting on the Bar table in a Tupperware container was a crayfish, which Mr Bale had brought with him from Tasmania. Whether it was an undersized Tasmanian crayfish or a South Australian crayfish we will never know. It was, as we know from the agreed facts, impossible to tell.

So confident was Mr Bale of the contribution of the crayfish to his forensic triumph that, when he returned to Canberra the following year to argue that a Tasmanian fishery licence fee did not infringe s 90's prohibition of a State duty of excise, he brought with him an abalone. The mollusc worked some of the same magic as the crustacean. Mr Bale was triumphant in that case too. But *Harper v Minister for Sea Fisheries*,³⁶ sound as it is, was no *Cole v Whitfield*. The s 90 revolution had not come.

35 Ibid.

36 (1989) 168 CLR 314.