

The AgLaw Papers

BOOK 1

ON RURAL INDUSTRY REGULATION

High Court chews the grass!

A story of Australian realities, law and judges -
as witnessed in agricultural cases during the first century of our lead court.

Dr Sandra J Welsman

ALSO AVAILABLE

BOOK 2

ON AGRICULTURE AND BIOTECHNOLOGY

GM crops - science, agriculture and potential legal issues

Andrew Clarke

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What Australian Courts might say about "damage" from cross-pollination by a GMO

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Dr Sandra J Welsman

The Australian Centre for Agriculture and Law

UNE's AgLaw Centre started in June 2003. The Centre, a unique initiative for Australia and likely world-wide, is a joint venture of the Faculty of Economics, Business and Law, the Faculty of The Sciences and the School of Law. Dr Sandra Welsman was commissioned as Founding Director to establish the Centre over six months.

AgLaw's reason for being is to bring together skills from across these disciplines to achieve a range of outputs that will contribute to the progress of Australia's agricultural industries and businesses in the context of the domestic economy and global marketplaces.

Priorities during 2003 included the development of the new Bachelor of Agriculture/ Bachelor of Laws (BAgr/LLB) double degree – the only such course in Australia. Enrolments for the BAgr/LLB commenced late 2003 for start-up in February 2004. In addition, over 2004 the Centre will be looking to develop postgraduate courses and practical seminars at the key working interfaces of agricultural business, science and law.

The series of AgLaw Papers has been a parallel priority. Our aim has been to achieve a series of original and useful publications that examine key agri-law issues from first principles and from a 'for Agriculture' perspective'– initially in the four linked areas identified through an AgLaw marketplace scoping study late in 2002:

- **Farming and environmental rules**
- **Rural industry regulation**
- **Agricultural supply chains**
- **Agriculture and biotechnology**

This series of AgLaw Papers has been developed for a wide readership, with a particular eye to interested farm and agri-business managers, researchers and agri-industry and government leaders. Within the University, our aim has been to start building cross-disciplinary investigative teams harnessing and enhancing current skills, and opening up ag-law research areas. We are looking to position our work with key audiences and to indicate University and AgLaw Centre capacities through interesting, informative papers.

The first set variously achieves these aims. Styles and communication approaches vary but the intent of each is consistent with the AgLaw aims.

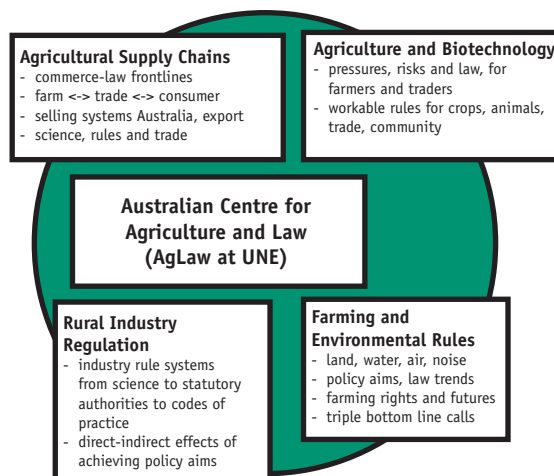
Looking forward

Coming decades will see Australian rural enterprises and scientists aiming for substantial long-term productivity increases even as world marketplace, economic, social and environmental expectations become more complex.

Laws, policies and rules of many types define the basics of rural business and hover at scientific and economic frontiers of production and supply chain innovation. Regulatory regimes affecting Australian agricultural businesses from farms through processing, transport, export and sale of products to consumers are unlikely to get simpler – or at least not without considerable effort.

Challenges facing agribusinesses in dealing with law and policy changes have been recognised by the University with the formation of the unique Australian Centre for Agriculture and Law, as a cross-faculty venture. The UNE Faculty of The Sciences is recognised for research and teaching, is leading or involved in six Co-operative Research Centres. The new BAgri/LLB double degree will have the highest entry requirements for Bachelor of Agriculture or similar studies in NSW. The Faculty of Economics, Business and Law has a long-standing reputation for courses and research in economics, agricultural economics and agribusiness. The UNE Law School is one of the largest enterprises in the University with growing demand for places.

Now ‘founded’, the AgLaw Centre will continue to work with interested academics and researchers across these disciplines to achieve outputs that contribute to Australian agricultural industries.



The AgLaw Papers 2004

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High Court chews the Grass!

Dr Sandra J Welsman

This paper unfolds a tale of Australian realities, policy, regulation and judicial responsiveness as seen in agricultural cases during the first century of our leading court. The analysis is in four parts:

- **Down-to-earthiness**
- **Free-trade, protection and a long agricultural about turn**
- **Control, resistance and responsibility**
- **Stories told as the High Court chews the grass.**

Five key messages emerge from the facts and fights of rural enterprise as recorded in cases pursued to the end, and in judicial decisions:

- the law is an enduring frontier for agricultural industries and people
- entrepreneurs and those who see their product or process as superior actively resist central controls
- tenuous positioning of entrepreneurs at the end of the 1st century contrasts with early decades
- judges, legalistic or activist, are influenced by factors wider than the law; facts and circumstances could explain much variation among decisions
- litigants can be devastated by the time and cost involved in garbing a 'favoured result'.

High Court chews the Grass!

*A story of Australian realities, policy, regulation and judges
–as witnessed in agricultural cases during the
first century of our lead court.*

*Dr Sandra J Welsman
Founding Director
Australian Centre for Agriculture and Law
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Surely if anything matters in our attempts to understand law, it matters how judges ... decide cases and that we have an account which adequately explains ... their activities.¹

How classic! Three early 20th century legal actions. In the USA, UK and Australia. Based in turn on a Buick motor car, shopkeeping and on underwear made of wool. Three pivotal judgments reflecting the three cultures and economies of the time, and the positioning of their leading courts and judges.

In 1916, in the New York Court of Appeals, Judge Cardozo and colleagues considered the plight of a Mr McPherson who had been thrown from his car as it 'suddenly collapsed'. The Buick Motor Company and its suppliers, pointing to long-established common law, said their contracts were with intermediaries not end-users, so they carried no liability for McPherson's injury.² Facing stalemate in a new industrialised economy, Judge Cardozo, 'wielding a mighty axe ... burst over the ramparts' of contract law tradition,³ to start the great sweep of modern negligence law through US courts and the common law world.

For Australia, focused as it was then on a 'nation of shopkeepers', contract law turned in the 1930s – when a corner store in Scotland sold a bottle of ginger beer hiding a slushy snail. In 1932, Miss Donoghue appealed to the House of Lords for compensation from the 'maker of aerated waters' for distress on seeing the slime. 'I do not think a more important problem has occupied your Lordships in your judicial capacity,' Lord Atkin argued, referring to public health issues and to the practical testing of new manufacturing and distributed supply systems.⁴ The majority decided, referring to USA cases, that manufacturers should owe a duty of reasonable care to buyers and users for injury caused by their products, even with a string of go-betweens.

Donoghue was a pinnacle in judicial (common) law development. Notably, Lord Atkin stressed that the House of Lords was properly exercising its appeal jurisdiction by reviewing 'questions of law' (not deciding facts).⁵ However, it was the compelling fact situation that had driven the matter through the courts and then motivated the new and responsive judicial reasoning that led in a 'legal revolution'.⁶

As Lord Atkin explained, he for one, did not see the principles of common law as 'so remote from the ordinary needs of civilised society and the ordinary claims it makes upon its members as to deny a legal remedy where there is so obviously a social wrong'.⁷

In 1933 a similar issue reached the High Court of Australia in its 30th year.⁸ Dr Grant of Adelaide claimed that Australian Knitting Mills and a retail store had both breached implied warranties of 'reasonable fitness for purpose' of woollen underwear. He alleged that processing chemicals left negligently in the wool, had caused his skin rashes.

Could a manufacturer of Australian wool garments be liable for rashes on a wearer? No, or at least not on these facts, said the High Court, three judges to one.⁹ With a series of key decisions now behind it, the High Court majority indicated that of course they would follow The Lords in *Donoghue* if it applied – but on these facts they did not need to.

On facts, wool and science 1933

"It was a most exhaustive trial and distinguished medical and chemical experts were called on both sides, but unfortunately they differed considerably in opinion. This Court must draw its own independent conclusions on questions of fact. ... This evidence ... clearly establishes that the process used by the Knitting Mills is, in the hands of careful manufacturers, a prudent and reasonable method ... [and] experience in the use of woollen under-garments has not suggested any danger from the presence in them of small quantities of sulphur compounds ... I cannot think that Dr Grant has established any breach of this [Donoghue] duty."

Justice Starke

"A very different view of the case might be taken, if it were right to conclude from the medical evidence that his condition was the consequence of contact with a chemical irritant in a strength or amount that underwear ought not to contain. ... [Dr Grant's] case depends on ambiguous circumstances and speculative conjectures and at some points is opposed to arguments of probability which have weight."

Justice Owen Dixon

Why would three High Court judges in an appeal case, so starkly re-determine facts decided by the South Australian Chief Justice after he had heard and seen all the evidence? Little explanation is to be found within the case report. On wider reading however, it seems *Australian Knitting Mills Ltd v Grant* may demonstrate what many contend – that judges even in our highest courts routinely regard events around them and have regard to social and economic issues and expectations when interpreting the law.

To the many citizens this would be an unsurprising and even expected reality. But to lawyers, the ‘why’ and ‘how much’ of judicial activity has been a rich arena for debate and academic writing – although rather theoretically and perhaps wastefully so, the analyses in this paper suggest.

Over the century, some High Courts and some judges have been described as ‘too legalistic’, while others have been accused of over-responding to the times rather than the law. Analysts often refer to Sir Owen Dixon who was three decades on the High Court. ‘There is no other safe guide to judicial decisions in great conflicts than strict and complete legalism’, Dixon stressed in 1952 on appointment as Chief Justice.¹⁰ Under legalism, legal principles ‘rule’ and political, economic or social factors are not supposed to influence judgments. However, Dixon also recognised (in theory and in practice as this agricultural case story shows) that this policy could not always operate.

Our common law system ... [applies] to new combinations of circumstances those rules of law which we derive from legal principles and judicial precedents; and for the sake of attaining uniformity, consistency, and certainty, we must apply those rules, where they are not plainly unreasonable and inconvenient, to all cases which arise.

Dixon 1955¹¹

Returning to *Australian Knitting Mills v Grant*, the political, economic and social realities of the Great Depression appears to provide stronger explanation for the approach taken by Dixon, McTiernan and Starke JJ than legal principle or precedent.

Australia 1933 – the ‘mean decade’

“For over a century [Australia] had excelled in providing the good life for the ordinary man and woman ... But in a few bleak years of economic catastrophe this trend was reversed: there was a net migration from Australia in the early 1930s. ... Though with unemployment running at 25 per cent, Australia was scarcely out of the depression, 1933 was a significant turning point for the psychology of the nation. ... *Factory gates had begun to reopen*, and the dole queues began to shorten ... [still] the great depression had made its impact on the Australian

community.... [In 1929] the prices of her main exports fell. *Wool had accounted for nearly one-half and wheat for nearly one-quarter of Australia's merchandise ... The average price of one pound of greasy wool [more than halved as did wheat prices]. ... Australia's financial position in London, where she had run up large debts, was critical."*

Frank Crowley (ed.), *A New History of Australia*¹²

Today, the 1933 *Knitting Mills* case receives little mention. Other dynamics overtook the High Court decision, harking back to pre-Federation drama about appeals from the new nation's courts to mother Britain. In 1897, a delegation sailed to London to advance the draft Australian Constitution through the British Parliament. After much local debate, the draft had restricted appeals from Australian courts to Britain, mainly for cost and delay reasons. The colonial delegation met at the end of their journey, a British Government determined to keep a general line of appeal to the Judicial Committee of the Privy Council (PC) from non-constitutional decisions of the High Court and from State Supreme Courts, and had little choice but to accede.¹³

Cost notwithstanding, Dr Grant decided to take this remote appeal pathway. In 1935 (in quite different socio-economic circumstances), the Privy Council sharply reversed its colonial colleagues' ruling. The Law Lords preferred the trial judge's assessment that the woollen garments did cause the rash. They then applied the *Donoghue* 'duty of care principle' and decided that Australian Knitting Mills had been negligent in its manufacturing. At the same time, the PC observed, like Cardozo,¹⁴ that 'complications of fact' – would drive evolution of negligence law.

... many difficult problems will arise before the precise limits of the principle are defined: many qualifying conditions and many complications of fact may in the future come before the Courts for decision.¹⁵

Or put another way, it is problematic facts and distressed people – not elegant law – that bring matters into courts and before judges worldwide.

Down-to-earthiness

Matter of fact 1904. "It is no doubt just as dangerous to shoot sheep and pigs in the streets as to shoot bullocks: but if the legislature has not thought it proper to provide against the former danger ...".

High Court Chief Justice Griffiths in Mackay v Davies (1904)

Criminal matters aside, there seems little so real, so earthy, as cases revolving around agriculture. Cargoes decay, people go hungry, animals are born and die, families leave farms, groups fight over land, heritage and wealth. Production and market vagaries, financial pressures and hard-fought commercial advantage sit behind much policy and many interactions with the law, but so too do heart-felt connections to the land and its industries.

The Commonwealth of Australia, a Federation of States linked to the USA model, came into being on 1 January 1901. Although support for a national court of appeal had been growing since the mid 1800s, the High Court of Australia was not established until 1903.¹⁶ Sir Samuel Griffith, a former premier and then Chief Justice of Queensland, became first Chief Justice and continued to 1919. He was joined on the bench by Sir Edmund Barton, the first Prime Minister, and Richard O'Connor, government leader in the Senate. Sir Isaac Isaacs and Mr Henry Bourne Higgins were appointed in 1906. All five men have been identified as 'Founding Fathers'.¹²

The Court has 'original jurisdiction' to hear issues arising under any treaty, between States, or among residents of different States, and matters involving the Constitution, the Commonwealth or its officers. In addition, under *Constitution* s73, the High Court was made a general court of appeal from Federal or State Supreme Courts (in contrast to the US Supreme Court focus on constitutional and federal law).

Numerically, general appeals from State courts, that is 'ordinary private and criminal law' matters, have dominated High Court activity since its start,¹⁷ and continue to do so even though special leave to appeal is now required.¹⁸ This weighting of the High Court role toward day-to-day issues has, it is said, long influenced the selection of judges, their outlook and their propensity to apply common law principles to interpretation of *The Constitution*.¹⁹

Such 'down-to-earthiness', or at the least the need for it in a fledging nation so dependent on agriculture and on luck, was clear from the Court's first year. Amid challenges to new Constitutional structures, Mr Mackay's appeal against Mr Davies reached the High Court – the first of many cases centred on the basic human activity of processing livestock for meal consumption – and the rules that surround it.

What are cattle? 1904

At issue was the term 'cattle' in the NSW *Cattle Slaughtering and Diseased Animals and Meat Act* 1902 under which Mackay was a licenced slaughter-house operator.

Davies, a licenced Inspector, had billed Mackay for inspecting Mackay's cattle (3d a head), and for inspecting sheep (1/4d) and pigs (1d).²⁰ Griffith CJ, revealing

some mastery of realities of animal handling and processing, alongside logical rather than strict statutory interpretation, overturned the NSW decision that Mackay should pay Davies:

“In this very Act ... there are several variations of the sense in which the word ‘cattle’ is used by the legislature. ... [Some] sections ... plainly apply only to animals such as it is possible and usual to brand upon the skin ... [I]f the word ‘cattle’ is to be construed in its wider sense, the result will be that, for all these different kinds of animals, bullocks, calves, lambs, sheep, pigs and even sucking pigs, a uniform threepence per head is to be charged, which it is very improbable the legislature intended.”

Many such earthy cases have passed through the High Court over 10 decades. A number provoked industrial, business and legal turning points, built on judicial grappling with agribusiness practicalities. The pivotal 1986 *Queensland Wire v BHP* decision, for instance, stood for near two decades as the High Court’s only statement on the vital ‘misuse of market power’ prohibition in the *Trade Practices Act* 1974. It started with an argument about supply of fencing posts and wire to service vast pastoral stations.

Star pickets in 1986

“Since the 1920s BHP has manufactured Y-bar ... used in the manufacture of “star picket posts”. The manufacturing process is quite simple. ... These posts are then used in what is by far the most popular kind of rural fencing in Australia. ... BHP places great importance on the fact that it is the only source that can supply “the total package of products”. In its advertising it emphasizes that it can supply “every part of the fence – not just the wire” and it sends complete truckloads of assembled fencing incorporating star picket posts directly to end users.”

Mason & Wilson JJ ²¹

The *Queensland Wire* decision spurred many scholarly papers. A surprising number of academics queried the capacity of judges to understand technicalities of industries and markets and realities of business. Critics sought ‘commercial certainty’ and argued that the judiciary should not, by orders, be setting terms of dealings in an ‘expert’ field (ie commercial marketplaces). Yet, looking closely, we see the judges in *Queensland Wire*, dealing astutely with technical questions, and applying statutory law in a realistic manner – with a responsive eye to the facts, the policy and the times.

The High Court has created an elegant and responsive 'backstop' to the 'use' of market power in an increasingly competitive Australian market-place. That the ... Court has not spelt out the pathway ... to the 'backstop' or what will precisely occur when it is reached, sets a fitting level of market-place tension and is consistent with a pro-competition, pro-innovation business regulation framework for Australia now, and looking forward. Competition policy and competitive initiative by businesses of all sizes, are well-served by the enigmatic dimensions of *Queensland Wire* as a backstop to 'use' of market power.

*Welsman 1995*²²

One hundred years of High Court decisions include many instances of judges dealing skilfully with 'technical facts' including agriculture; at times to the chagrin of governments, litigating parties and their clever lawyers. Judges more often than not show the order of commonsense and intellect the general citizenry would expect of its top judiciary, as we see in an early intellectual property dispute.

Inventiveness in cane fields and patents 1904

"The object of [Mr Willmann's 'improved cane-truck dray'] inventions was to facilitate the carriage of sugar cane from the field to the mill. Cane, as we all know, is grown in large fields [and] conveyed to mills where juice is extracted. The weight of the cane is considerable ... handling ... involves a large expense for labour, ... [to transport] heavy cane over the soft and often uneven surfaces of the fields without the advantage of formed roads. ... Upon a fair construction of the specification as a whole, we think the invention claimed is a mechanical contrivance for rendering a section of the tram line portable so that it can be connected with or detached from a corresponding tram line laid on the ground ... a combination of the ordinary mechanical appliance of a cart running on tired wheels with the mechanical appliance of flanged wheels running on rails. [It] is, perhaps, not a new use or purpose ... but ... it serves that purpose with greater efficiency and economy than any previously known combination. Effecting, indeed, a saving of from sixpence to one shilling a ton in the costs of handling cane."

*Griffith CJ & Barton J*²³

Nothing is more difficult than to determine, even roughly, the extent to which inventive faculty has been exercised in attaining a result such as this. ... the one further step which makes all the difference between the old cumbrous method and the new. ... for years the old methods were followed involving unnecessary expenditure until the plaintiff developed his cane-truck dray.

O'Connor J

Yet, thematic analysis (as in this paper) of judicial decisions in the face of fact situations and changing external circumstances is rare. Often facts are summarised and surrounding events receive little mention. It is the High Court at its constitutional rather than commonsense front-line that stirs passion in law academics and students. For most judges, however, the practical impact of laws, and then of their own decisions is evidently important.

On who might sell milk 1975/1939

“It is ... quite apparent that the sole purpose of any attempt by expropriation or by prohibition of sale to prevent the entry into NSW from Victoria of milk and milk products is the protection of the monopoly of supply which the producers in NSW of milk ... and the Authority itself would consequently enjoy: in other words, the grounds of the exclusion are economic. To use Sir John Latham’s phrase in ... [The Milk Case 1939] what ... is sought by the statutory provisions, so far as concerns milk produced and pasteurized outside NSW is a ‘cordon economique’. No question of a ‘cordon sanitaire’ arises ...

“Nothing in the Act ... suggests that the expropriation is designed as a means and particularly as the only practical means of protecting the public of NSW from the dangers of an impure commodity. Rather, the language used in relation to the earlier Milk Act 1931-1936 is appropriate: “This Act allows a board to give a monopoly of the sale of milk ... to NSW producers ... They alone will be permitted to earn a living by producing and selling milk”.

Barwick CJ²⁴

Whether working ‘legalistically’ or by ‘seeing the Constitution and law as a ‘living force with words taking meaning and colour from their context’,²⁵ vital cases have been decided by the High Court, and some then overturned and the law reshaped. Doctrines and principles have been derived and established – then changed in the face of compelling fact situations and wider circumstances – leaving legal analysts scrambling to explain after the event.

“The High Court has never regarded itself as bound by its own decisions”, concludes Leslie Zines noting 10 decades of judicial pro-activity – including that of judges described as conservative and legalistic. Nor, Zines says, should decisions not be changed “when new social problems arise or later experience shows those decisions to be inadequate or socially damaging”, especially when reading “a constitution intended to endure for a very long time and to serve the needs of succeeding generations”.²⁶

Logical as this seems, the level and propriety of judicial activity in interpreting the Constitution and the law generally has long been a fertile arena for debate among legal theorists in Australia, as elsewhere. Past High Courts have been variously labelled 'activist' or 'legalistic'. Individual judges have been dubbed 'originalist', 'hero-judges' or 'radically conservative', among other names.

The year 2000 saw argument about judicial activity re-emerge with gusto.²⁷ To some, the Constitution's first centenary heralded a restlessness and deterioration away from 'orthodox principles of statutory interpretation',²⁸ to a new era of judges "concerned with what changes are necessary to achieve the social and economic demands that they have identified".²⁹ Many analysts agree that Sir Owen Dixon was 'the finest common law judge of his generation', and to some, his emphasis on strict legalism made the Dixon Court 'the finest common law court in the world' – and so a model to follow. Others disagree, and suggest that Dixon's decision making "exhibits the inseparable nature of the craft tradition, politics and ideology". "One has only to read Dixon's opinions to see that he was not in fact a strict and complete legalist."³⁰

Indeed, a legalistic, non-responsive High Court would likely not have achieved its current stature in the Australian social and political economy. The Court's role and authority has rarely been questioned.³¹ Ongoing debate about 'clubby' appointments to the Court also indicates underlying expectations that judges *will* be sensitive to socio-economic change. Commentary escalated again before the 2003 appointment of Justice Dyson Heydon, said to be an arch legal conservative. Yet even as he admonishes 'judicial activists', Heydon has confirmed that legal sensitivity is expected – also referring to Dixon CJ:³²

[Dixon] contemplated change in the law as entirely legitimate. ... changes could be effected by analogical reasoning, or incremental growth in existing rules, or a rational extension of existing rules to new instances not foreseen when the existing rule was first developed.

In an ongoing tag-race, academics strive to fit past legal reasoning around new decisions made by judges with reference to the law, the facts and the circumstances of new times. Those judges develop their reasoning with links to past cases to the extent they feel necessary or interesting to support their points. Academics then try to dissect and rejoin elements of decisions to craft doctrines or formulas as a basis for teaching or debate. During this process, they define and criticise judicial types and styles – conceding just by doing so, that at least one outside factor routinely influences the law – the judge.

But appropriateness or otherwise of judicial activity is such a theoretical (or 'academic') debate. As we see here in agricultural cases reaching the High Court over 100 years, judges are routinely and realistically influenced by case facts and external circumstances, as well, of course, as the law. Much of Dixon's pro-activity, for instance, is found in the stream of s92 cases. The legal questions were constitutional, but the driving facts were mainly down-to-earth, commercial issues swayed at times by Government policies and regulations – the type of issues still crucial to viable production and selling into demanding marketplaces.

* * * * *

Free trade, protection and a long agricultural about-turn

No country has ever built an indigenous industrial base without some initial protection or state involvement [and] all major attempts at rapid development have faced hiccups along the way

PK Basu, Asia-Inc magazine 2003³³

At Federation, political unity was superficial and Australian cultural features were just emerging as a mix of mother country, climate effect and perhaps a search for a 'decent way of life for the ordinary man'. "Australia was not a 'nation-state' because its citizens had no experience of loyalty to a single government" and each State retained autonomy over most social, management and industrial matters.¹² The first Parliament was made up of 16 Labor Party members and 75 conservatives with a diversity of views on 'free trade' or 'protection'.

First Parliament 1901

"Thirty two members of the House of Representatives ranged themselves behind the mildly protectionist Edmund Barton of NSW and sat on the government benches. Twenty-seven formed the official opposition under George Reid, the free trader from the same State; in the Senate, there were 17 free traders against eleven protectionists and eight Laborites. ... By 1905-06 ... most Labor members had become reconciled to Protection as the continuing fiscal policy of the Commonwealth [and] realised that this policy might have some special attractions for Labor."

Alexander, Australia since Federation 1961³⁴

A century on, the free-trade or protection debate is global and the battles are still intense. September 2003 saw the collapse of the Cancun round of WTO multilateral trade discussions. Some attribute this to 'duplicity and deceit on the part of the leading trading nations', pointing to the USA forcing waivers for its rural protections, and to Australia repeatedly demanding agricultural free-trade even while 'refusing to accept binding obligations in relation to industrial goods'.³⁵

Back at the time of Federation the free-trade or protection question was Australia focussed. Free-trade among States and removal of State tariffs and Customs houses was a cornerstone of the new Constitution. Section 88 required that 'uniform duties of customs' be imposed within two years. and then the Commonwealth would gain exclusive customs and tariff powers (s90). Sections 87, 89 and 93 provided for payment to the States of most of the income from tariffs for 10 or so years. Amid these provisions s92 of the Constitution would seem to read quite clearly.

92. Trade within the Commonwealth to be free. On the imposition of uniform duties of customs, trade, commerce and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free.

The new Federal Government needed money and so did the six States. There was no disagreement on the expected source of new funds, even if there was to be argument on the size of national import tariffs and on unfolding protectionist and income making activities of the States.

Mr Edmund Barton, Prime Minister of the Australian Commonwealth, addresses a public meeting, Maitland, NSW on 18 January 1901

"The power of direct taxation of the Commonwealth, I agree is a power not to be taken lightly or rashly exercised. ... as the States will upon the passing of the uniform tariff lose the power to raise revenue by Customs or excise duties, the Commonwealth government ... ought not to cripple them by using our power of direct taxation, unless under the stress of some great emergency ...

"It would be in my opinion an act of insanity to do anything that would militate against the States who have built up industries under the principles of protection. ... [So] How, I would ask, are we to meet the costs of the Federal Government and the loss of revenue by inter-colonial free trade, unless we get it out of the Customs revenue? (Applause). What more legitimate course could we adopt, than to tax the over-sea goods for the loss we are sustaining for the abrogation of the inter-colonial and inter-state duties (Applause). ...

“The [national] tariff will not in any sense be prohibitive. It will be a moderate tariff. The Government will certainly not do anything likely to cripple industries. We will have to consider the circumstances of each State and the fact that capital has been invested in various industries ... with the view of assisting and encouraging those native industries (Applause). I am a protectionist and I will endeavour to protect as far as possible the productions of our own soil. (Cheers).”³⁶

National tariff debate continued for over a year until a compromise placed set import duties of 5% to 25% on goods and restrictions on incoming cheap labour. This satisfied the moderate protectionists and made clear to ‘international free-traders’ that they “could not have hoped to retain their membership of Parliament if they abolished industries which had become self-sufficient behind protective tariff barriers”.¹²

NSW lost its Sydney free port but also won, in theory, by achieving ‘complete interstate free trade for movement of its products’ plus a strong financial deal. After much argument, the 1908 enactment of higher national tariffs (including a unilateral 5% preference for British goods) entrenched protection as Commonwealth policy. These higher tariffs were in part to fund ‘New Protection’ mechanisms being shaped by the Federal Government with a view to transferring wealth collected at ports to Australian industries and the workers of the new nation [see below].

In his 1901 Maitland address, Edmund Barton had expounded the ideal of free interstate trade to Australia’s new, keen citizens especially farmers:

Will the wine-grower be likely to object to a policy that will break down the difficulties and differences that exist between [NSW] and other States which have the effect of preventing the excellent wines of the Hunter becoming more generally known and appreciated? Not only will these industries benefit by federation but the farmer will greatly benefit by the removal of the barriers.

At this point, intriguingly, history books move away from the interstate trade question. Those interested need to turn to legal tomes and case reports for the colourful ‘free-trade’ drama that unfolds through a multitude of High Court actions over nine decades – an action story involving:

- rural compromise and market realities
- entrepreneurs and commercial guile
- mixed motivations of lawyers and key judges
- division of Commonwealth/State powers plus

- politics and “the protection of the industries of one State against those of another ... one of the primary things ... s92 was designed to prevent”.³⁷

As the 10th year of transfer of tariff income to States approached, States found new ways to raise revenue, and the first action to test s92 reached the High Court. *Fox v Robbins* in 1909 dealt with wine trading. The West Australian Government had enacted a law that set a higher licence fee for selling wine from outside WA than for selling WA wines. Although this law only applied to intra-State activities, the High Court declared that the law resulted in discrimination against non-WA wine and so interstate trade. The State Act was in breach of Constitution s92 and therefore invalid.³⁸

This was the start of many s92 cases testing laws impacting on rural business. In addition to the logic of trying the apparent Constitutional protection of free inter-state trade, s92 provided a fast pathway to the High Court under its original jurisdiction.³⁹

While s92 cases are an abundant field for debate on reasoning, and analysts do note judicial style and ideology, they seldom link s92 judgments to external factors – such as Federal and State policy behind industry protection schemes and market-place reaction to manipulation, as we see below.

By the 1920s, higher import tariffs on equipment and materials were protecting local manufacturing and new industrial awards were lifting wages. Together these were squeezing the returns of Australian farmers who had to export into more competitive world markets after WW1. Pressures translated to politics via the strengthened Country Party and prompted ‘national plans’ of varying types from soldier and closer settlement, to the 1925 Paterson dairy scheme.⁴⁰ Entrepreneurial or less protected farmers, associated agri-businesses, and some governments, challenged these statutory programs from all angles, often invoking s92.

Market and farm policy drivers 1920s

“Attitudes of producers and [the Country] party changed with market conditions. As prices tumbled in 1921 wheat growers became more interested in compulsory pools, small graziers looked back wistfully to the wartime marketing arrangements, dairy farmers lost enthusiasm for a free market, and fruit growers wanted subsidies. Farmers began to claim a right to a fair living; and freedom from government interference became a subordinate, though still necessary consideration to government’s responsibility for the farmer’s fair return. As prices levelled and then improved a little it was clear that not all industries were in difficulties. But that some of the closer settlement industries were. Orderly marketing was the policy

formulated by the Country party to deal with the situation, which in effect meant some kind of pooling arrangement or common marketing authority to regulate supplies to the market and to negotiate with shippers for freight concessions.”⁴¹

Statutory marketing and protection arrangements varied with size of production, domestic and export markets – and Australian competitiveness therein. Often, the domestic consumer, nationally or within a State would pay higher prices through levies or bans on imports in order to offset production losses on exports. The valuable domestic consumer market was the prize, to be managed and fought over.

So, in December 1914, when a few NSW wheat farmers sold loads of wheat to Victorian buyers, the NSW police seized the loads and prevented delivery into Victoria. The NSW government said it had taken possession under its *Wheat Acquisition Act 1914* which allowed notification of Government acquisition of wheat ‘provided that this ... shall not extend to wheat actually in transit to [other] States’. The Commonwealth sought a hearing from the Inter-State Commission, which declared the NSW Act to breach s92. The dispute, on a set of Constitutional fronts, reached the High Court as *The Wheat Case* in 1915.⁴²

The Chief Justice’s decision is intriguing. While pointing out that the stated purpose of the NSW Government was not relevant (‘effect’ was the s92 test), Griffiths CJ also referred to external (wartime) conditions prevailing when the *Wheat Acquisition Act* was passed, and to the “indeed admitted, intention of the Government to prevent the exportation of wheat from New South Wales”, to ensure food for its citizens. Griffiths CJ suggested this intention might be debated politically, but the legal question was whether the Act breached s92.

Even so, (and despite the words of s92), each judge in his own way concluded that the NSW *Wheat Acquisition Act 1914* ‘merely exercised a sovereign power to expropriate private property’ (with compensation) and to transfer ownership of wheat from grower to the King, who then as new owner could decide where to dispose of it.

The *Wheat Case* set the scene for decades of State Government compulsory acquisition of farm produce and statutory marketing schemes.

It is not easy to fit the s92 conclusion in the *Wheat Case*, with *Fox v Robbins* in 1909 and the 1908 *Barger* decision (see below). It does seem possible that the High Court judges were influenced by the facts and circumstances of the rising war period (but did not envision decades of acquisition schemes part-supported by the ‘doctrine of precedent’ and the *Wheat* decision). Might the High Court outcome have been different if it were not 1914-1915, and if the product under dispute had been, say, books?

Both the times and regulatory techniques had changed when a new post-war dried fruits scheme (paralleled in other products) was tested in the High Court in 1927. The program involved enactments by Victoria and South Australia to control marketing in Australia plus a Federal Act for control of exports. The aim was to pool produce and share the high-return domestic market. 'Excess' dried fruit were to be exported at lower prices. Fruit grower James challenged the allocation of Australian sales quotas under *Dried Fruits Act 1924* (SA) on the grounds that it breached s92 (s20 allowed a Board to determine where and in what quantities dried fruits could be marketed). The High Court agreed, and held that the intention of s20, in the context of the SA Act, clearly reached beyond regulating South Australian trade. So, s20 was an invalid law in relation to inter-state sales.

On dried fruits quotas 1927

"If sec. 20 is confined to South Australian markets the first difficulty is, why trouble about Victoria? What has one State to do with the purely internal trade arrangements of another State? ... if the 'marketing' contemplated by the Act is to places purely intra-State, what is meant by 'concerted' action in the marketing of dried fruits produced in Australia' [s19b] – that is, produced any-where in Australia? ...[And] how can we account for the right of the dispossessed owner of dried fruits ... to receive London price less adjustments? If sec. 20 necessarily leaves him entirely free to sell anywhere outside South Australia, why select London as the sole test of value? ... On the whole, the construction of sec. 20 of the statute seems to us overwhelmingly opposed to restricting it to control of intra-State trade."

*Isaacs ACJ, Powers J*⁴³

In response, the SA Government turned to s28 of the same Act, which empowered the Minister to compulsorily acquire SA dried fruit production that had not been licenced for export under the Federal Act. Mr James challenged again. The High Court returned to its *Wheat* conclusion – that sovereign powers of acquisition and ownership change were not affected by s92, no matter the purpose of the enabling Act. Justice Isaacs dissented. He queried the State's actions and the *Wheat* decision including his own judgment. Isaacs was, in 1930, inclined to see s92 as giving 'a personal right attaching to the individual' rather than to the product.

James persisted and appealed on key questions to the Privy Council (PC). In 1932, their Lordships reversed the High Court's decision. The PC agreed with Mr James and with Isaacs J – the purpose and effect of the SA acquisition power was to limit inter-state commerce by

preventing producers selling above their quota in any State and to 'force the surplus off the Australian market' and to export. The PC also identified that factors beyond the wording of Constitution s92 could be influential by indicating that acquisition for a purpose such as defence or prevention of famine would not breach s92 (so distinguishing *The Wheat Case* decision).⁴⁴

Thus the only question in this case appears to be whether the minister did exercise his powers so as to restrict the absolute freedom of inter-state trade. It may be conceded that even with powers granted in this form, if the Minister exercised them for a primary object which was not directed to trade or commerce, but to matters such as defence against the enemy, prevention of famine, disease and the like, he would not be open to attack because incidentally inter-State trade was affected.

Privy Council 1932

Legal academics have long sought to 'doctrinise' and explain the s92 decisions of the 30s and 40s, almost without regard to facts and circumstances. Zines, for instance, identifies an 'individual rights' line in Dixon's judgments and a 'free-trade' basis to Justice HV Evatt's decisions. Zines comments that "either doctrine – laissez faire or free trade – taken as a starting point in reasoning, results in problems of translation into legal formula and application to practical situations",⁴⁵ and that the Privy Council in 1932 'gave heart to each approach'. Each was built upon by Australian judges in later cases, with the 'individual rights' line starting to override 'free-trade' from the 1935 *Milk Board* decision. In the *Bank Nationalisation Case 1948*,⁴⁶ Dixon J persuasively reinforced his rights analysis and tried to organise judicial assessment of s92 claims – although Dixon was also, Zines says, "prepared where necessary to depart from the formula he had enunciated".

In looking for an 'adequate explanation of how judges decide law', it is pragmatic (if not lawyerly) at this point to suggest a further basis for diversity in s92 judgments. As we see in these agricultural cases (above and below), linkages of case facts with external factors provide a strong sub-plot to judicial volatility on s92 law, right up to 1988 when the Mason High Court overturned all that went before.

Indeed, that problematic facts will override legal theory (and precedent), has been confirmed by the judges themselves in various s92 cases. As the Privy Council observed in a further (1939) James appeal against Commonwealth controls, there ...

... cannot fail to be differences of opinion. The problem to be solved will often be not so much legal as political, social or economic. Yet it must be solved by a court of law.

Their Lordships went on to state that in some situations, 'prohibited and monopolised trade could still be absolutely free' (and so demonstrating the legal dexterity that confounds citizens even while instilling confidence, and entrenches the peak judiciary as gatekeepers of all manner of civil activity).

Every case must be judged on its own facts and in its own setting and 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 interstate trade commerce and intercourse thus prohibited and monopolized remained absolutely free.⁴⁷

As the decades passed, facts and circumstances (political, social and economic) influenced judicial decisions and the ingenuity of regulations grew in response to judicial fluctuation. Various statutory schemes developed, demonstrating a laissez-faire, market driven approach at least to statutory and judicial law evolution even where the aim of each scheme was to intervene in and organise natural agricultural market-places, some major and some niche.

Queensland, Peanuts and the Primary Producers' Organization and Marketing Act 1926-1930

Under this Act, 50 or more growers of any grain, fruit or produce (dairy, eggs) could petition the Government to declare their product a commodity and to establish a Board to manage the acquisition, marketing and payment to growers for that product. In 1932, the Rockhampton Harbour Board refused to hand over 3,000 bags of peanuts that had been delivered to it for shipping to Sydney and elsewhere. The Peanut Board claimed ownership of the Peanuts under the 1926 Act and a 1930 Order empowering acquisition of peanuts. The Peanut Board took the matter to the Queensland Supreme Court. Among other findings, Justice Webb decided the Act and Order contravened s92.

The Peanut Board appeal was heard by the Full High Court in 1932.⁴⁸ Notably, the States of NSW, Victoria, SA and Queensland were given leave to intervene in the case. They supported the Peanut Board's main line of argument – that the only object of the Act was better organisation of the peanut industry, and that, as in the *Wheat* case (which was unaffected by the Privy Council in *James v Cowan*), 'the commodity could be the subject of inter-state trade just as much after the operation of the Act as before but under different ownership'. Six judges including Dixon J (Evatt J dissenting) found that the Act as applied by the Order, contravened s92. So, the Act could not stop peanut growers from inter-state trading. Dixon J had been in the 1915 *Wheat* majority,

but in reviewing the facts and in the circumstances of 1932, he did not see a need to directly mention the *Wheat Case* even though it had been relied upon by the Board and the four States.

“In the existing state of authority this compulsory system of collective marketing should ... be held inconsistent with sec 92 ... It is enough that a restriction is attempted upon trade generally ... The protection conferred by sec 92 is not a mere incident of property but is enjoyed by the individual, who may not be deprived of his goods in order to prevent his exercising his freedom of trade among the States.”

Dixon J

Post the *Peanut Board* loss, the States began to word their Marketing Acts more carefully. They seemed to concede that they could order markets within their borders but not inter-state trade – but challenges to State intervention also continued.

The *Marketing of Primary Products Act 1935 (Vic)*, for instance, enabled appointment of marketing boards, vesting of products in boards and collection of levies from producers. Section 16 excluded any product that was to be traded inter-state from the Act. A Mr Matthews had contracted to sell his chicory to a buyer in NSW and objected to a levy of 5s per acre on his 5.5 acres of land planted with chicory (£11). The High Court found the levy to be a tax and an excise and so Constitutionally invalid at State level. A number of judges agreed that the Act's s16 exclusion effectively removed the Act from Constitution s92, and that a levy on chicory production – even if it raised costs and reduced competitiveness – would not itself breach s92.⁴⁹

Rules raise costs 1938

“It is contended that a tax upon the land to be used for the purpose of growing chicory is necessarily an interference with inter-State dealing in chicory because it places a burden upon the producer and therefore renders less profitable to the producer and sale of chicory, including inter-State sales ... The increase of costs of production or the diminution of disposable profit is a common and often inevitable result of taxation. But this fact does not show there has been any interference with ‘freedom at the frontier’ [*James v The Commonwealth*]. The imposition of a levy upon land used for growing chicory has no more relation to inter-State trade than any legislation which has the effect of increasing the costs of production – and a great deal of legalisation has that effect.”

After the *Peanut Board* case, the Queensland Government had amended their *Primary Producers Organizations Act*. A new s1A said the Act should be construed in the context

of limits on power in the Australian Constitution. The High Court heard s92 complaints against Boards formed under that Act in 1951 (potatoes), 1962 (eggs) and in 1985 when a Victorian growers' company seeking to fill malting barley contracts collided with acquisition and control powers of the Queensland Barley Marketing Board – an entity formed by order under the Act in 1930 and still operating 50 years later.⁵⁰

The Board claimed that grain standing in the field and sold by growers to Victorian buyers under harvest contracts for shipment to Victoria, should have been acquired by and delivered to the Barley Board. In contrast with earlier cases, the costly 1985 litigation received no judicial support. Rather, in systematic analysis of the facts and s92 cases (suggesting irritation with the total control wanted by the Board and with s92 litigation) Gibbs CJ and Mason, Brennan, Wilson and Dawson JJ found that those barley contracts were in fact inter-state trade and so not in the scope of the Board's compulsory acquisition power because of the effect of s1A (and of s92 of the Constitution).

The fact and mystery of 'science' entered the s92 regulatory equation and judicial deliberations as early as 1939, bringing new dimensions to control and contest. In *Milk Board (NSW) v Metropolitan Cream Pty Ltd*, Counsel for the Board explained the *Milk Act 1931–36 (NSW)* with amusing simplicity when compared to the de-regulated era of 2003.⁵¹

Complete control of some milk 1931

"The aims [of the Act] are the complete regulation and control of milk distribution in Sydney and its suburbs for (a) hygienic purposes, (b) social purposes, (c) economic purposes, that is, fixation of process. ... This is a health Act. The provisions ... cover cleanliness of dairies and stores; the objective ... to safeguard health. Price fixing is equally important from this point of view because (a) there is an intention to give cheap milk for consumption, and (b) higher prices enable dairies to keep hygienic appliances. These objectives are carried out by (a) complete regulation of the dairying industry, and (b) vesting all milk supplied for consumption or use in the board."

Metropolitan Cream PL had been importing cream from Victoria for sale in Sydney. The company argued that the Act was, in substance, marketing legislation for regulating and controlling supply of milk to consumers, and that health was regulated by the *Dairies Supervision Act 1901* and the *Pure Food Act 1908*. Also the hygienic provisions in the *Milk Act* could be separated and should not entitle interference with trade from other States, and, the quality of the imported milk/cream had not been challenged and if it were inferior, then sale could be stopped under a number of statutes. Latham CJ worked

systematically through the arguments and s92 precedents, seemingly influenced by multiple aims, and by policy and fact circumstances.

It is true that the Act is a collective marketing Act [as in *Peanut Board*]... [but] here the distinction is between an Act which merely organizes the marketing of a product and an Act which organizes such marketing and also provides for satisfaction of the needs of the people of the State in relation to that product. The Milk Act is an Act which makes provisions relating to the satisfaction of such needs.

Latham CJ also identified and distinguished the *Milk Act* as one which expropriates property for the purpose of controlling trade, plus a price-fixing Act, with 'plainly valid' provisions empowering the Board to secure hygienic conditions in production and sale of milk (cautioning that those provisions should not be used to suppress inter-state trade). Evatt J too differentiated this Act from those past that had contravened s92. Evatt J emphasised that the Act regulated 'only two milk distributing districts in the State' [Sydney, Newcastle] and that:

... consumers were to be protected in two important respects: first, by ensuring purity, quality and reliability in the milk and cream – an absolute essential of health, particularly [for] children; and ... by preventing their exploitation in the shape of unreasonable prices. Under the Act, the interests of dairymen are also protected, for they are guaranteed a reasonable reward for providing so necessary a commodity.

In contrast, Starke J aligned the control provisions with those in the *Peanut Board Case* and decided that the NSW *Milk Act* breached Constitution s92. The majority, however, declared the Milk Act valid. Latham CJ emphasised that "trade and commerce involves orderly dealing" and application of laws:

If any sensible meaning is to be given to sec. 92, the words 'absolutely free' simply cannot be interpreted as meaning that inter-State trade and commerce is to be exempt from all law ... then [we need to] define what type of [legislated] control can be regarded as consistent with freedom in inter-State trade and commerce.

Why would the majority support this NSW scheme and not others before it? While legal texts work through the law in such cases, it is unrealistic to discuss the High Court's May 1939 deliberations and outcomes without reference to vivid external events. In this context, the 'scientific elements' linked to the almost undebatable 'good' of food safety, may have provided an extra 'order and security hook' for the lead group of judges in the changing and challenging world circumstances.

The news from Europe became even more alarming

“On 15 March 1939 Hitler seized the Czechoslovakian capital, Prague. Lyons’ reaction mirrored that of the British prime minister. After a few days delay Chamberlain abandoned appeasement. ... Although Britain did not consult Australia before making this radical change of policy, Lyons promptly accepted it. Towards the end of March he declared his new belief that appeasement would not bring peace; security required that the aggressor nations be halted. ... On 1 September German troops invaded Poland. ... Britain declared war on Germany. On the evening of Sunday 3 September Australia entered the conflict. ‘Great Britain has declared war’, said the prime minister, and ‘as a result, Australia is also at war’. ... Little exception was taken to Menzies’ terminology because its constitutional implications were swamped with the wider issues of policy.”¹²

That Dixon had not been involved in the *Milk Board Case* is notable. Perhaps surprisingly given his arms’ length legalistic reputation “with the arrival of war in 1939, Dixon became heavily involved in the executive government”, including appointment in 1942 as wartime ambassador to Washington.⁵²

By the end of 1939, notions of ‘individual rights’ or ‘free trade’ were curtailed by the stark reality of world war. *National Security (Prices) Regulations* established under the *National Security Act 1939-1943* took control of among other things, the price of milk. Yet war arrangements too, were challenged, at times by those protected under earlier schemes.⁵³

Wartime had diverted attention from the ordering of production and marketing, but the development of clever schemes and associated court challenges under s92 and other points of law, resumed apace in the late 1940s and into the 50s – high war and post-war prices for most products notwithstanding.

Australian wealth and the sheep's back, 1950s

“Australia was about to enjoy a quarter-century of prosperity rivalling, and perhaps surpassing, the long boom of the later nineteenth century. Between 1945 and 1950 the roots of this prosperity lay still, as in the past, in good export prices for primary products. Europe, its economy dislocated by war, had to be fed and clothed from overseas. Wheatgrowers enjoyed a period of unnaturally keen demand for their harvests. ... At the outbreak of the war in 1939, a Wheat Board was set up to stabilise prices, and during the war wheatgrowers received a guaranteed minimum price for their output. In 1948, the Board was made permanent and reconstituted for peacetime purposes. The guaranteed minimum price continued [and production expanded]. ...

Most primary producers benefited in these years from preferential trade agreements with Britain ... The dairy-farming industry, further fortified by government subsidies on the production of butter and cheese, kept its place on the British market ... In return for secure prices, the sugar industry submitted to ... more detailed ... regulation than any other. Not only prices, but the areas to go under cane and the types of cane to be preferred were laid down by consultation between the Australian government, the Queensland government and the major refining company. The justification for the sugar subsidises as for dairying and the dried fruits industry ... was that they prompted decentralisation and settlement of rural districts. In the years of European shortage after 1945 this policy looked more than usually plausible. Wool nevertheless remained the most important of Australia's staples. ... Wool and wheat seemed to most minds to offer more for the future than mining."⁵⁴

With the return of prosperity and some peace, the forces pushing and pulling agricultural marketing schemes escalated both within Australia and in a world trade context. Constitution s92 provided a fast track to the High Court for those disputing regulation of their entrepreneurship and enterprise. Under the 'doctrine of precedent',⁵⁵ the cases from 1909 provided a body of s92 law that had to be taken into account one way or the other. In many ensuing actions, lawyers and judges stepped through major and lesser cases, dissecting some, agreeing with others, dismissing still more. Then, High Court judges would decide, the matter as they saw fit in the circumstances, assiduously crafting the useful cases and law towards their conclusion.⁵⁶

Fields of Peas, Tasmania 1947

The *Marketing of Primary Products (Field Peas) Act 1945* (Tas) empowered a Board to do all such acts necessary for the orderly marketing of field peas including acquisition of all production. Clements and Marshall Pty Ltd had 'for many years carried on an extensive business as a merchant buying field peas in Tasmania and the exporting such peas to various States'. The company objected to the Board notifying growers that all blue and grey peas [were to] become its property and all contracts for sales to merchants were cancelled. The Board, with lingering reference to war pricing regulations, argued that at least half of the crop would be sold for export, with higher returns for producers. An injunction based on breach of s92 by the Tasmanian Act of s92, was *upheld* by the High Court in 1948 including Latham CJ and Starke, Dixon (returned) and McTiernan JJ.⁵⁷

It seems here that the High Court was reflecting, for a while, a post-war upturn in spirit, business and social independence in the Australian community – the times were good as seen many fronts. Over 1947-48, for instance, Chifley's Labor Government, "pursuing a strongly-held objective in the party's platform" enacted legislation with the potential effect of giving the Commonwealth Bank a monopoly. Chifley met well-planned resistance and "misjudged the extent to which the Australian community was prepared to accept socialisation of a major factor in the economic organisation of the country" and that "many swinging voters ... were tired of government regulation with its over-tones of wartime". The Government was rebuffed in major cases in the High Court and Privy Council – the legislation was held to be unconstitutional.^{34, 54}

The 1948 *Bank Nationalisation Case* was fought, in part, on the basis that Commonwealth prohibitions in the *Banking Act 1947* (Cth) infringed s92 freedom of interstate trade.⁵⁸ Dixon J promulgated a formula for s92 assessments. The key test was whether the law in question worked to restrict interstate trade in a direct way rather than with consequential or indirect 'regulation' effect. As Zines notes the formula was not always followed by Dixon or the High Court, but into the comfortable 1950s and beyond "other judges applied it without regard to the effects it had on one of the prime motives for federation" (free interstate trade). The High Court itself upheld as 'indirect' a "number of laws that had a considerable economic or practical effect on interstate trade",²⁶ such as limits disputed unsuccessfully in the margarine cases.

On making margarine in 1955 and 1966

The constitutionality of s22A of the NSW *Dairy Industry Act 1915-1951* was challenged by Marrickville Margarine Pty Ltd in 1955. As set out in the lead judgment (Dixon CJ, McTiernan, Webb and Kitto, JJ) s22A required manufacturers to hold a licence to make "a substance called table margarine which is, of course, not a product of the dairy industry but is ... a substitute for butter". The Minister ... had discretion to grant an annual licence which could set margarine quantities within a yearly margarine total. The judgment notes that the "reason for limiting the production of table margarine is not stated by the Act but it is of course evident that it is lest the Australian market for butter should be prejudiced by the competition of margarine".⁵⁹

The judges said that the power to issue or not issue a licence to a manufacturer that would reduce output of product for sale to any market was *not* a law that interfered with interstate trade. They expressed concern with attempts to extend

the ambit of s92 “beyond the subject matter of trade, commerce and intercourse among the States so that it denies to the legislatures of this country the power to impose any prohibition, restriction or burden”.

Licensing for table margarine production and restrictions on quantities were continuing in 1964. Marrickville Margarine had been granted a licence, but was marketing and receiving orders from interstate and filling them above its allocated quota. The High Court found the company guilty of breach of licence and on the s92 defence, confirmed that the manufacture of a product (and restrictions thereon) could not be seen as part of the interstate trade of finished product.⁶⁰

A further factor, seen in case texts and mentioned by analysts (but also little countenanced in judicial convention) is the mix of ‘ideological leanings’ of each judge – whether legalist or radically active; socially conservative, leftist, Christian and so on.⁶¹ Carrigan, for instance, sees themes in Dixon’s judgments, cleverly developed in the context of the high level ‘game’ underway in the Parliaments, Courts and the streets of the still new nation.

Politics, Dixon and s92

“Dixon J’s judicial philosophy is explicitly on parade in his constitutional adjudication [which also] exhibits the inseparable nature of the craft tradition, politics and ideology. For example, Dixon J’s laissez-faire [free market] economic ideology is the keystone of his interpretation of s 92 ... in a manner that guaranteed that the private sector was safe from any government nationalisation program. ... One admires the skill exhibited by Dixon J in cloaking his economic and political values. ... Labor supporters on the bench, such as Evatt and McTiernan JJ, had waged a vigorous struggle to strengthen state and federal legislative powers ... [and] promote state ownership ... Dixon J turned the tables on the social democratic High Court judges and spearheaded a deregulatory drive to protect individual business rights in inter-state trade at the cost of restricting state and federal government regulation. Business groups and the main-stream press were vocal in their praise for the free enterprise reading of s92 and decisions that cemented this position.”³⁰

This review of some key agricultural cases involving Dixon over the decades suggests that trying to reconcile Dixon’s decision-making with his fiercely legalistic, by-the-book reputation or his political leanings is likely of ‘ivory tower’ significance only. It is more

evident that case facts and each set of socio-economic circumstances influenced the decisions of Dixon as they do judges at all levels.

Nineteen hundred and sixty four saw major change with Sir Garfield Barwick taking over from Dixon as Chief Justice. Blackshield and Williams confirm personal philosophy as a factor of influence: "A convenient way to approach [s92] cases is to see them as reflecting the influence of three dominant individuals: Sir Isaac Isaacs, Sir Owen Dixon and Sir Garfield Barwick" – each with his own distinctive view.⁶² Zines also ties interpretation of the Constitution with judicial personality in recording that: "Barwick ... rejected the Dixon formula", (although he did seem to align with Dixon's earlier 'individual right to trade' line).²⁶

[Barwick] argued that s92 invalidated any law that had the practical effect of burdening the individual's interstate trade ... free trade in the traditional economic sense could be preserved only by preserving free markets. This was because governments, particularly State governments, are always anxious to further the interests of their people at the expense of those elsewhere, often under the guise of dealing with matters such as health, safety, conservation or consumer protection. ... He tended to confine the social interests ... to matters of safety, health, fraud and restrictive trade practices. Although most judges did not fully accept the views of Barwick CJ, movement away from the Dixon formula occurred.

Although these potential sources of variability in case decisions (the facts, the law, external influences, judicial philosophy) are recognised to varying degrees by citizens they do not ease the reasonable expectations on Australian judges at all levels to provide "an account which adequately explains ... their activities".

This expectation, it is suggested, is generally not met by the lengthy judgments reviewed for this paper, in which judges 'explain' a decision mainly in terms of differences from a series of old cases (precedents). Interested citizens, while supporting objectivity and rigour, must wonder at times on the usefulness of reasons where a sensible result in the circumstances is cloaked in complex lines of past debate (itself influenced by politics and economics). The more sceptical might also question the foibles of a 'craft tradition' and seeming make-work tactics of lawyers (who are 'in business' too).

Returning to 1960s and 1970s, Federal activity was expanding in most arenas – often matched, refined or counter-acted by State governments. The relative wealth and balance of the Australian economy in the 1970s encouraged extension of agricultural industry marketing schemes in part to offset pressures in and from global marketplaces.

Reluctantly off the sheep's back, 1960s, 1970s

"The primary industries' difficulties stemmed principally from limitations imposed by over-supplied world markets, [and for] wool, ... competition from synthetic products. At last, and reluctantly, Australia in the 1960s came off the sheep's back. ... By 1970 ... a government-backed commission was buying wool to sustain the market. ... Wheat, Australia's major crop, remained buoyant but met the problem of static or chancy markets. As with wool, advances in agricultural science increased yield and acreage ... Production, stable in the 1950s at around 200 million bushels, then soared, reaching 530 million in 1968-9. With annual domestic demand for less than 100 million bushels, the export surplus was great and export markets did not grow at the same rate. ... Under a national stabilisation scheme, growers were well protected, receiving a guaranteed price for locally sold wheat and part of the export crop, and sharing the export remainder according to the Wheat Board success in selling it. ... production quotas were introduced in 1969. ... wheat [was] another industry [also sugar, dairy, fruit] where efficiency and technology allowed much greater production potential than the international market could absorb."¹²

Challenges to regulated marketing schemes continued through the 1970s. The tone, however, of s92 decisions was changing again in response to wider circumstances including rural struggles and then ideological shifts away from business entrepreneurship and enterprise.

Overall, case facts and the economic and policy climate, still seem to explain more of the variability of s92 reasoning than past written law and shifting legal principles.

For instance, in *North Eastern Dairy Co Ltd v Dairy Industry Authority of NSW* (1975), another turning point decision, a High Court majority of five judges indicated that the practical effect of the law or regulation under question would be the key to s92.

Churning point: Barriers to milk sale in NSW 1975

Through regulations under the *Pure Food Act 1908* and *Dairy Industry Authority Act 1970*, the NSW Government had implemented a system to milk production and to exclude Victorian milk from sale in NSW for human use. The Dairy Industry Authority was empowered to require pasteurisation of and acquire on fixed terms all milk needed for human consumption in NSW. Registration of dairymen, pasteurisers and milk sellers was compulsory. The NSW Authority had broad discretion on rules and certification plus 'sweeping protection from

civil action'. Victorian manufacturers were not certified, so in practice they could not sell into NSW except for animal markets. The North Eastern Dairy Co challenged these barriers.⁶³

"[T]he Act on its proper interpretation cannot be confined to operations in relation to milk produced in New South Wales. It clearly operates ... to make illegal ... possession and sale in [NSW] of milk produced in Victoria and brought from that State for sale in NSW. ... the generality of its operation will not save it from invalidity in respect of interstate trade ... [Its] purpose includes and is intended to include the sale and supply of the milk in the course of interstate trade and commerce. It is ... quite apparent that the sole purpose of any attempt by expropriation or by prohibition of sale to prevent the entry into NSW from Victoria of milk and milk products is the protection of the monopoly of supply which the producers in NSW ... and the Authority itself would consequently enjoy: in other words, the grounds of the exclusion are economic. ... so far as concerns milk produced and pasteurized outside NSW is a "cordon economique". No question of a "cordon sanitaire" arises ... Nothing in the Act ... suggests that the expropriation is designed as a means and particularly as the only practical means of protecting the public of New South Wales from the dangers of an impure commodity. ... It cannot properly be said ... that expropriation of wholesome and uncontaminated milk or a prohibition on its sale are reasonably necessary to ensure that what is sold is wholesome and uncontaminated."

Barwick CJ

Justice Mason, later to be Chief Justice, identified a public good intention behind s92, with stress on an 'evolving society' view of public good. He concluded also that the NSW scheme conflicted with s92.

... s92 has a predominant public character and ... the protection which it gives to the rights of the individual is incidental to and consequential upon the protection which is given to the entire concept of interstate trade. ... The freedom guaranteed by s92 is not a concept of freedom to be ascertained by reference to the doctrines of political economy which prevailed in 1900; it is a concept of freedom which should be related to a developing society and to its needs as they evolve from time to time. Section 92 finds its place in a Constitution which was intended to operate beyond the limits of then fore-seeable time – it would be a serious mistake to read the guarantee or immunity which it offers as one which necessarily and rigidly reflects ideas accepted almost a century ago. Instead, the section should be seen as a provision whose operation may fluctuate as the community develops and as the need for new and different modes of regulation of trade and commerce become apparent.

Notably, in some 1970s cases, the High Court began to look beyond the laws and rules to the impact on interstate trade of decisions to be made by administrators under

discretions in regulations. In *Buck v Barone* (1976), for example, Stephen J indicated although the registration of producers (wherever located) growing potatoes for sale in SA as required under the *Potato Marketing Act 1948-1973* (SA), did not in itself breach s92, but there was potential for subsidiary rules and decisions made to do so – although not in this case (the Act was found by the majority not to breach s92).⁶⁴

The requirement that the Board must be “satisfied” in certain respects before registration can be attained means, says the respondent, that registration, far from being a matter of right, lies very much in the discretion of the Board and may quite arbitrarily be denied to an applicant. Were this so the law would clearly enough offend against s. 92 ...

Similarly in the 1976 challenge to the *Citrus Industry Organization Act 1965-1972* (SA), Justice Gibbs (also later to be Chief Justice) discussed the making of day-to-day decisions under the rules:⁶⁵

The Committee has a very wide discretion to refuse an application for a licence. It may do so “if it is satisfied that in the interests of the citrus industry it is undesirable that the licence should be granted” ... A person whose application ... has been refused may appeal to the Supreme Court, which may allow the appeal “if it is of the opinion that the application was refused without good and sufficient cause” ... Notwithstanding this provision for appeal, the matters which the Committee may properly consider are so wide and vague that it cannot be said that the refusal of a licence depends upon “considerations all of which are defined with sufficient particularity, precision and intelligibility to make it possible to pronounce the prohibition of unlicensed” packing “to be nothing but a regulation of that description of interstate trade involving no inconsistency with its freedom” Nor is it possible ... (in the words of Menzies J in *Harper v. Victoria* (1966) ...), as “standard-fixing legislation of a general character which has no special features which burden interstate trade” [eg. fungicide treatment requirements under the *Citrus Industry (Fruit Quality Grades – Oranges) Regulations 1968*].

But then in 1977, the Clark King company took a challenge to the *Wheat Industry Stabilization Act 1974* (NSW) to the High Court. The Stabilization Scheme was national; built on State laws and a Commonwealth Act that established the Australian Wheat Board with a monopoly on acquisition and sale of wheat to domestic and export markets. Prices to growers were averaged over years and regions. In good years higher income was held in a fund to stabilise returns in poorer years. A majority (Mason, Jacobs and Murphy JJ; Barwick CJ and Stephen J dissenting) decided the scheme did not breach Constitution s92 – the first decision since the 50s (but not the last),⁶⁶ to uphold a marketing scheme that prohibited an individual from trading interstate.⁶⁷ Zines summarised the dynamics:¹²

Mason and Jacobs JJ found that the wheat scheme came within the [Privy Council 1949] qualification, having regard to the social need to prevent 'calamitous conditions of the past' caused by the wide fluctuations in home and overseas prices that had produced great hardship to farmers. ... [Barwick CJ however] found difficulty in thinking of any situation where monopoly would be the only practical form of regulation.

Both the strict regulation of wheat commerce and the division of views among High Court judges in *Clark King* would have encouraged the next challenge to the wheat scheme in 1980. Indeed, Barwick CJ opened in *Uebergang v AWB* (1980) with the sharp retort that Murphy J in *Clark King* had taken "a ground which has never been accepted by any Justice of the Court in any case and ... is ... insupportable on a reading of the Constitution ... [and] is inconsistent with every decision of the Privy Council and of this Court upon the meaning and operation of s. 92 ...".⁶⁸

Again, the High Court judges diverged on meaning of s92, with their reasoning reflecting more their ideology and the conditions of the time, than any legalistic interpretation. In long judgments each quoted lines of argument in prior cases to support their position, with Stephen and Mason JJ (here agreeing) supported a 'public interest' test based on external aims and circumstances.

The evidence which we would regard as relevant in determining the validity of the present legislation would be such material as would enable the Court to determine whether or not the restrictions which the legislation imposes upon interstate trade are no greater than are reasonably necessary in all the circumstances. For example, it would be relevant to establish what are the goals sought to be attained by the restrictions; how these may be weighed against those restrictions and whether they can be attained by other means which do not involve such onerous restraints upon traders. ... the criterion of permissible regulation of interstate trade is that the legislation should be no more restrictive than is reasonable in all the circumstances, due regard being had to the public interest. The importance of this matter of the public interest must never be lost sight of: as Mason J. has said in *Permewan Wright*, s. 92 is to be 'understood as presupposing a society in which conduct is regulated in the interests of the community'.

Permewan Wright, the year before, challenged the validity of the *Marketing of Primary Products Act 1958* (Vic) and subsidiary regulations requiring all poultry eggs sold in Victoria (whether from Victoria or elsewhere) to be submitted to the Victoria Egg Marketing Board for inspection and grading for a fee, even when they had been inspected and graded already in NSW. "That the requirement to submit eggs not suspected to be a danger to the health of consumers, and to pay the fees set by the Board is a burden on the appellant's trade, can scarce be denied," said Barwick CJ but overall, the Court (four to two) found that the arrangement was not in conflict with s92.

Of note is the acknowledging of circumstantial influences on judicial decision-making (either by 'judicial notice' or 'absorption') including and community acceptance of certain legislation.⁶⁹

Trading eggs. Public health and science as regulation

"The reason why public health has had such ready judicial acceptance as a proper area for valid legislative intervention, despite s 92, is, perhaps, because with it is associated a relatively long history of legislative intervention in the past, the fruits of which have led to a general acceptance by the community of the need for such legislation. Whether by a conscious use of judicial notice or by some less conscious absorption of community acceptance, there has at all events been a quite general judicial recognition of such laws as ones which may validly bear upon and restrict interstate trade. ... Throughout the present century all Australian States have legislated extensively upon food standards and weights and measures. It is not only by reference to the cases and to history that I have concluded that the present law is concerned with a topic which is a proper subject matter for permissible regulation, consistently with s 92. Interstate trade and those engaged in it cannot in my view be treated in total isolation from the activities of the community as a whole."

Stephen J

These decades also saw a series of s92 appeals to the High Court on road and rail transport protection issues, often involving agricultural produce. The frequency of s92 cases reached absurd proportions – though this matched the width and depth of regulation by various governments of marketplaces. In practicality, being required to hear in detail this constant stream of arguments because of the Constitutional elements, surely must have tried the patience of High Court judges – although the advocacy lawyers must have delighted in these lucrative, high profile commissions. The uncertain outcome of s92 decisions likely protected lawyers and barristers from criticism – there was always a chance of success and that could be related to case facts, circumstances and persuasive argument.

Transporting frozen lamb in an unlicensed vehicle 1974

The Full High Court heard an appeal from a decision by a Tasmanian magistrate to dismiss a charge under the *Traffic Act 1925 (Tas)* against a company for using a truck and unlicensed trailer to transport 750 sides of frozen lamb, en-route via Melbourne to London. The magistrate had dismissed the charge on the basis that s92 of The Constitution made the licence provision inoperative with respect to

interstate trade and this leg of transport was interstate trade. Amazingly it seems, with painstaking reference to many past cases, five of the seven judges supported the use of s92 as an immunity against the vehicle licencing requirement.⁷⁰

During the 1980s and particularly from the early 1990s, whether regulation of business contributed to the interests of the Australian community came increasingly under review. The 'milkbar economy' - one "preoccupied with having enough domestic custom to keep the cash registers ticking over but ... little concerned with international competitiveness",⁷¹ was becoming a relic, and all forms of protection were up for question.

The 1980s had delivered a global imperative to Australian business operations. Enterprises, large and small, were being urged to innovate, invest and trade. Exporting was happening in agricultural and resource industries. Now Australian manufacturers and service industries were being pressured to expand exports to new and different Asian markets. In this context plus the torrid s92 history, the matter of *Cole v Whitfield (The Crayfish Case)* reached the High Court in June 1987, with the Commonwealth and the States as interveners. Here, a Tasmanian Fisheries inspector had charged Whitfield and another (who farmed, sold interstate and exported crayfish) with holding undersize crayfish in breach of Tasmanian *Fisheries Act 1959* regulations.

Eleven months later, the seven judges of the Mason Court provided a single unanimous decision, which Zines describes as "a triumph of the free trade theory". In considering whether the Tasmanian rules breached s92, the Court turned-on-its-heel and gave us analysis, concessions and a new, limiting test.⁷²

The depth of examination and comment on documents leading into and surrounding the formation of The Constitution set a new precedent in itself. The Court returned to first principles and declared that s92 prohibited in Commonwealth or State laws ...

... measures which burden inter-State trade and commerce and which also have the effect of conferring protection on intra-State trade and commerce of the same kind. The general hallmark of measures which contravene s.92 in this way is their effect as discriminatory against inter-State trade and commerce in that protectionist sense ... [noting that] protection against inter-State trade and commerce can be secured by non-fiscal measures.

One case on crayfish re-sets legal principles 1988

"No provision of the Constitution has been the source of greater judicial concern or the subject of greater judicial effort than s92. [Yet] judicial exegesis ... has yielded neither clarity of meaning nor certainty of operation. 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. ...

In the case of a State law, the resolution of the case must start with a consideration of the nature of the law impugned. If it applies to all trade and commerce, inter-State and intra-State ..., it is less likely to be protectionist than if there is discrimination appearing on the face of the law. But where the law in effect, if not in form, discriminates in favour of intra-State trade, it will nevertheless offend against s92 if the discrimination is of a protectionist character. A law which has as its real object the prescription of a standard for a product or a service or a norm of commercial conduct will not ordinarily be grounded in protectionism and will not be prohibited by s92. But if a law, which may be otherwise justified by reference to an object which is not protectionist, discriminates against inter-State trade or commerce in pursuit of that object in a way or to an extent which warrants characterization of the law as protectionist, a court will be justified in concluding that it nonetheless offends s92.”

So, looking at the facts and the circumstances, the Tasmanian rules on crayfish size were found not to discriminate for or against crayfish sold in Tasmania from different locations, and so were compatible with s92. Nor (interestingly, noting the ‘triumph for free trade’ view), might a national scheme among Commonwealth and States for grain stabilisation breach the test. Indeed, in 1990, the Mason Court again in unison, found that a barley marketing scheme under the *Marketing of Primary Products Act 1927* (NSW) although requiring the acquisition of all malting barley and the effect of raising prices for NSW barley growers did not discriminate among buyers of barley in NSW or other states.⁷³

It can be readily seen that “the legalistic approach of previous courts [before *Whitfield*] was tortured, not to say artificial” but it is less clear on scrutiny that “what the Mason court did was to say that the historic purpose of the provision was to provide a free trade zone throughout Australia”,⁷⁴ and then developed a test to secure this Federation object.

In reality, a scheme that is ‘discriminatory and protectionist’ on the basis of the law and decisions made by regulators whatever its position in markets, science or consumer views could be incompatible with s92. Or conversely, a law or decision could be both discriminatory and protectionist but valid under s92 if based – in the eyes of judges – on a combination of ‘protection of citizens’ and the commonsense territorial management of state borders. Again this has current and potential impact on agricultural businesses – for

instance laws ostensibly against the introduction into a State of animal or plant diseases, noxious drugs, gambling materials and even pornography.⁷⁵

This latitude notwithstanding, from 1988 the number of section 92 cases dropped dramatically, and one has to wonder whether this was one of the judicial objects in presenting a determinedly united front in both the *Cole v Whitfield* and *Barley Marketing* cases at a time of stark policy change on business regulation and emergence of issues of greater scale and interest to judicial intellectuals.

Pragmatically, the High Court noted that “the adoption of an interpretation prohibiting the discriminatory burdening of inter-State trade will not of course resolve all problems”. And for those seeking doctrines, formulas and legalistic consistency in the face of different fact situations, the Court in *Whitfield* also clearly confirmed the role of some intuition in decision-making.

Whether such a law is discriminatory in effect and whether the discrimination is of a protectionist character are questions raising issues of fact and degree. The answer to those questions may, in the ultimate, depend upon judicial impression.

Judicial Impression!

Judicial Impression? Clearly, the High Court, even working in unison as in *Cole v Whitfield* and then the *Barley Marketing* case, will not diminish debate among academics about vagaries of judicial reasoning and process. Zines sees *Cole v Whitfield* as an interpretation of s92 ‘accepted by all the judges’ and a useful returning of many issues glancing on interstate trade and regulatory aims such as competition, efficiency, protection and benefit to consumers, back to politicians.¹² Yet to Blackshield and Williams the pivotal decision “incorporated one enduring legacy of ‘the Barwick view’... that the question of whether the law has infringed s92 must be judged by its actual economic effects and not merely by its formal legal effects”, with these assessments made by judicial officers.⁷⁶

During the early 1990s, Australian socio-economic circumstances were recessionary and difficult. Unemployment was an enduring issue. Traditional export products were facing greater competition. Political and community expectations of the business sector escalated and became more complex, with much emphasis on performance.⁷⁷ There appeared to be political consensus on socio-economic and business directions. Governments, oppositions and commentators, stressed business innovation, investment, entrepreneurship, international competitiveness and Asian export orientation,⁷⁸ aiming to achieve vigorous growth and associated employment and social benefits. “Australia will become a creative, innovative, manufacturing nation in the front rank of trading nations and the front rank of social democracies,” promised the Prime Minister in 1993.⁷⁹

At the same time, globalisation trends including new regional marketing blocs were strengthening, as was their potential impact on Australian competitiveness and trade, and by extension living standards and community welfare into the future.

... the government has to foster a competitive culture in Australia ... to create and encourage an environment in which enterprise and initiative flourish. If we can do that, we can build on these advantages and cement into place a competitive and dynamic economy which is much better placed to meet the challenges of the next century.

*Opposition Leader Howard 1995*⁸⁰

In parallel, as mentioned previously, the nearing of the centenary of Federation in 2000 spurred academic dispute about the judicial role in interpreting The Constitution and on acceptable degrees of judicial proactivity over legalism. Analysts turned often to the *Cole v Whitfield* decision where a full body of Constitutional law was overturned. To some the High Court's 'officialising' of the use of 'extraneous materials' next to The Constitution (as distinct from informal references) was the major *Whitfield* outcome,⁸¹ and the key advance: "The pretence that constitutional interpretation required nothing but a close and prolonged study of the text of the *Constitution* was abandoned."⁸²

To others, today's "frequency and frankness" of debate on judicial activity "can probably be traced to *Cole v Whitfield* and the mortal blow it delivered to literalism" (reading only the words of the law).⁸³

However, for those in the real-world of business risk and advantage, especially in agricultural industries, the *Cole v Whitfield* decision changed the dynamics of regulatory challenge significantly. As the *Barley Marketing* case confirmed, the s92 fast path to the High Court and possibility of success was closing. This reflected unified judicial firmness, and progressive implementation from 1995 of the Federal/State National Competition Policy (NCP) Agreement, which saw the dismantling of many State protectionist marketing schemes, some of which harked back to the 1920s (but not without consternation and a number of major industry adjustment packages).⁸⁴

More broadly, the sometimes painful NCP reforms in Australian agricultural industries echoed the growing realisation that a nation producing many times more rural products than it could consume had to achieve greater access to world markets. To do this, logic said, Australia's own protections and uncompetitive charges had to be removed – from the detailed (double fees for egg inspection in the *Permewan case*) to the sweeping (major statutory marketing schemes). The harsh message – with its contrasts to decades past - began to spread.

**Global markets, protections and Australian farmers. Ian Donges,
President National Farmers' Federation, 2000**

"I understand the struggle involved in making a living in a global market place where the rich and powerful players in Europe and America are setting the pace. ... Australia depends upon exports [but] there are plenty of competing eager suppliers ... so we have to market hard, sell aggressively and produce competitively. ... We would neither succeed, nor could we afford to try to retreat to the 'good old days' ... when our produce enjoyed captive markets in Europe, and protectionist policies cast an unrealistic glow over country Australia. ...

We, as farm organisations and members, must retain our sense of urgency about the need for comprehensive liberalisation in world agricultural trade. ... what should fuel it is the enormous unfairness and waste represented by protectionist policies around the world. For every day that leaders of the protectionist countries of the world postpone the hard decision to let the market finally, rule - new jobs will not be created, businesses will not open, opportunities will pass by, and economic growth will be hindered. ... [Yet] despite 21 years of [NFF] work there are many that cling to the tariff myths: - that tariffs protect us from 'unfair' foreign competition; ... - that tariffs protect jobs; - that tariffs give local industry a necessary 'breathing space' to become internationally competitive; and - that we shouldn't reduce our tariffs unless our trading partners 'reciprocate'.

... the NFF's strong view [is] that: it defies logic that [farmers] should be anything other than ardent believers in international free trade. To earn our living we must export ... 70 per cent of all the food and fibre we produce. We are more reliant on international trade than any other group of farmers in the world."⁸⁵

So, increased external and marketplace pressures focussed policy-makers on the diverse impacts of regulations that protect, subsidise, limit, tax, or add costs to Australian trade and commerce. Or, some might point out, to achieve what the Constitutional architects expected s92 to secure for the new nation - unfettered trade across state borders at the least by removal of—'cordons economique'.

Given the usefulness of regulatory manoeuvring as a trade and commercial tactic wherever policy allows, it is clear that artful or scientific barriers will expand along with clever entrenchment techniques.⁸⁶

Regulations and the emerging 'cordon scientifique'

'Cordons sanitaire', obvious or subtle, are difficult to assail. Hard-nosed analysis and scepticism at the interface of science, business economics and law is needed. Australia believes such barriers exist at international levels, and there is a degree of feeling that Australia sets up such barriers as well.

Domestically, the legislative and regulatory systems are complex with many types of interests involved. In the end, Australia and its States will be judged on actions and effects rather than promises, and the inevitable disputes are likely to be seen in both the High Court and on the international judicial plane.

"There isn't many more telling indicator of what our outlook on trade really is than our attitude to quarantine and the way we use it. We can't demand objective quarantine systems in other countries and at the same time have our own distorted system. We can't use quarantine as an unscientific barrier against other countries' products and, at the same time, expect a clear run for our own. Quarantine is ... about managed risk. ... the organisation responsible for quarantine - AQIS - is caught in a difficult balancing act; the line between our conservative quarantine policy and the necessity to abide by WTO standards that prevent other countries from abusing quarantine to block trade."

Ian Donges 2000

This mix of factors – the reduced economic and social positioning of agriculture in Australia, the long-agricultural-about-turn on protection, plus the demise of the s92 pathway – have reduced the visibility of agricultural cases in the High Court.

Yet, as Australian agriculture continues to involve big commercial dealings, returns and risks, new and important interface issues still make it to the High Court from time to time. Some cases have a Constitutional basis, such as the 1999 challenge to the *Plant Breeder's Rights Act 1994* (Commonwealth).⁸⁷ Others test ongoing tensions between regulatory control through rules 'for the common good' and the business entrepreneurialism also expected by Governments and the community.

For instance, the NEAT Domestic Trading Pty Ltd attempts over recent years to achieve support for its enterprising wheat market development along with judicial censure of antagonistic decisions by AWB Limited and the Wheat Export Authority (WEA).

Unable to parallel, say, the dramatic s92 tactics in *Pilkington* (frozen lamb), NEAT's barristers turned to administrative law to challenge decision-making under the *Wheat*

Marketing Act 1989. The 'wheat single desk' is one major lingering statutory export acquisition and marketing scheme, needed, the Federal Government argues, because:

The international market for wheat is distorted by the interventionist policies of other grain producing countries such as the US and EU which use varying forms of domestic support and export subsidy ...

Explanatory Memorandum to the
Wheat Marketing Legislation Amendment Act 1998

NEAT's protest was unsuccessful (Gleeson CJ and three, Kirby J dissenting). Reflecting maybe the now lower policy visibility of issues being tested, the judgments contain few points of colour – except perhaps the glimpse of a sleeping question about delegating public power to private companies that are also responsible for protecting farmers' interests:

The blanket policy of refusal adopted by AWBI amounted, in effect, to the rewriting of the legislation by the decision of a private company.

Kirby J⁸⁸

Overall, there is some irony in reviewing judicial pro-activity debate alongside the unfolding of agricultural s92 cases. Has the Mason High Court – positioned as 'adventurist', 'beyond activist' – through its sweeping verdict in *Cole v Whitfield*, brought to a full stop the s92 era, a period of such creative and dramatic Australian legal history?

More probably it has not. As legal history also bears out, and as we see in the 1933 *Knitting Mills* case, especially in the judgment of the 'great legalistic' Sir Owen Dixon, judicial activity can take many forms – when a senior judge sees a crying need.

* * * * *

Control, resistance and responsibility

Where there are social or economic controls we know there will also be resistance – from the natural to the entrepreneurial to the scurrilous. With challenges to the law-of-the-land come calls on judicial skill to umpire and decide responsibility, plus attempts by the citizenry to understand it all.

“Australians have become more conscious and assertive of their rights” in an “age where people subject institutions to closer scrutiny”, Chief Justice Murray Gleeson observed in 2003. Gleeson considers this trend, plus a growing ‘inclination to sue’ has changed the portfolio of High Court work over the decades, from a focus on property disputes early 19th century, to revenue and contract cases mid century, and “now it is the rights of citizens that dominate the law reports”.⁸⁹

The 1890s saw citizen expectations of their Governments expand from promoting economic development to include regulation of living and working conditions and to ‘accepting responsibility for social problems’,¹² but there was still much room for resistance and debate.

Indeed, it seems unlikely that Australians have ever felt without the right to ‘resist regulation’ – whether made by government or via contract or through millenniums of tradition. Valiant resistance has led to many pivotal High Court statements from 1903 to 2003. Often the court actions have been driven by rural conflicts, reflecting how vital agricultural business and striving initiative of men and women has been to the developing nation.

Land, property and associated rights were and are elemental to agricultural business, large or small. During the 1890s, NSW, Victoria and Tasmania (after SA in 1884) introduced taxes on income and on land (popularly ‘seen as a way of extracting payment from squatters who had locked up large tracts of land for a small outlay’). So, property cases dominated early High Court years, and those cases documented an Aussie propensity to resist controls and to argue at times, and vigorously, about responsibility.⁹⁰

Australia 1906. The protectionist creed evolves

Liberal PM Deakin was committed to a new policy direction. Tariffs enacted to protect fledgling Australian industries would now be applied to also achieve social ends.

“Protective tariffs, and other advantages, given to Australian industrialists by legislation, were to be confined only to those manufacturers who paid wages and provided working conditions which were ‘fair and reasonable’; thus, the policy could well command the support of all good Labor men. And so it did, including those who had previously favoured free trade.”³⁴

Under the *Excise Tariff Act 1906*, the Government imposed, as a starter, a duty of 50 per cent on imported agricultural machines to discourage North Americans from ‘dumping’ on

Australia's growing industry. With the aim of protecting workers in Australian plants, the Act also set an excise that would be refunded to Australian manufacturers who paid fair and reasonable wages. The new Conciliation and Arbitration Commission was to decide what was 'fair and reasonable'. In his famous 'Harvester judgement', Commission President Justice Higgins grappled with views on living and pay standards before determining that top company HV McKay was paying wages below this level.⁹¹

Higgins' formula was to later to found the 'basic wage',⁹² but in 1908 the drama was on a higher plane. McKay (objecting to Higgins' decision) with a Mr Barger (resisting a penalty for making implements without a licence under the Act) pursued their complaints to the still young High Court.

In *Barger's Case*, it is said, the Court three to two, dealt "a great blow to Deakin and the Labor Party and put an end to the ingenious New Protection" device.³⁴

Barger & McKay machine makers, resistance vindicated

The High Court found the Act to be *ultra vires* (outside Commonwealth Constitutional power).⁹³

"In examining the language of the Constitution it is necessary to bear in mind the distinction between means and ends – between the ends that can be attained by exercise of the legislative power and the means that can lawfully be adopted to attain those ends. It is not disputed that the effect of the Act now in question, if valid, is to enable the Commonwealth to exercise a large though indirect influence upon the conditions of labour employed in the manufacture of agricultural implements in the several States." *Griffith CJ, Barton J, O'Connor J*

This judicial majority could see clearly the potential effect of the law, even as they stressed that the question was what the Constitution said, and that their duty was "to declare the law as we find it, not to make new law" or to decide on policy. They looked at the circumstances and effects of the legislation 'no matter its name' ("regard to substance – to things, not mere words") in order to decide that the *Excise Tariff Act* was "an Act to regulate the conditions of manufacture of agricultural implements and not an exercise of the power of taxation".

During that first decade of Federation, Australians also became aware of an 'awakening of the East', especially rapid expansion of Japanese power in the Pacific, and there were also portentous rumblings in Europe. Amid debate in London and at home on building self-defence capacity, in 1909 Alfred Deakin re-emerged as Prime Minister leading a

composite Liberal government, a fusion of protectionists, free traders and 'the Corner group' (most non-Labor members of parliament). This is identified as the start of the two-party political system in Australia. The Federal political arena was tumultuous, with 1910 seeing a landslide return for the Labor Party led by the equally strong Andrew Fisher.⁹⁴

1910-1914. Institutions, laws and social reformers

"During the years 1910-1914 Labor ... made some of its most significant contributions to Australian public life [at national and State level]. ... [An] effect of Labor's sudden rise to office was the realization amongst Labor leaders that parliamentary systems which were tied to written constitutions were imperfect instruments for instituting radical social reforms.

Before the Labor Party's advent to power, its leaders hoped, and its critics feared, that if it captured the Australian parliament it would try to change the whole social order. The least the critics expected was a very rapid extension of municipal and state socialism, and an attempt to nationalise monopolies concerned with the production of coal, sugar and tobacco.

However, the exercise of power and responsibility, and a growing sensitivity to the uncommitted middle class voters, made Labor politicians work out a compromise between their platforms when in opposition and their activities when in office. They also had to learn that federal and state Labor politicians did not always see eye-to-eye on major economic and social issues."

A year later, EW Knox, the general manager of The Colonial Sugar Refining Co. Ltd (now CSR) resisted a summons to attend and produce company books to the Labor Government's tactically important Royal Commission into the Sugar Industry in Australia (scrutinising growers, manufacturers, workers, purchasers, consumers, costs, profits, wages, prices, trade and commerce, and operation of laws).

Knox challenged the validity of the Commission. The High Court (split 2:2 Griffiths CJ and Barton J; Isaacs and Higgins JJ) found the *Royal Commission Act* 1902-1912 to be within Commonwealth power but said that it should be read as being able to require evidence on limited matters only (here, elements of production and manufacture of sugar within the Commonwealth). Griffiths CJ and Barton J emphasised that "the constitution and regulation of trading corporations, are not matters within the area of federal power, any more than the private and domestic affairs of individual citizens".⁹⁵

It is perhaps unsurprising in all the circumstances, including the Sugar Commission's significance to policy, that the Federal Government then appealed to the Privy Council with the concurrence of the High Court.⁹⁶ Their Lordships remarked that the Commission's "questions ... must disclose many details of the mode in which the Company carries on its business" and "to be compelled to answer them is a serious interference with liberty", but technically the PC was, it said, "neither at liberty nor competent to express an opinion" on the policy. That noted, the Law Lords then stepped deftly through the law and Australia's Constitution, to overrule the High Court. There was to be no joy for PM Fisher; the Royal Commission Act was beyond Federal power:

Without redrafting the Royal Commissions Acts ... [to] a different purpose, it is ... impossible to use them as a justification for the steps which the Royal Commission on the sugar industry contemplates in order to make its inquiry effective.

Not all challenges to marketing schemes used s92 and Commonwealth power was not always narrowed by the High Court. At times of defence tension, judicial decision-making seemed to change, regardless of regulatory tangles and impacts, and even when the Constitutional Defence Power was not in question.

Commercial, national security and government interfaces were examined in a 1920 action by a wool scouring company against the Central Wool Committee and its members, the State Wool Committee for Victoria and members (Committees constituted under the *War Precautions (Wool) Regulations 1916*), plus the Prime Minister and the Commonwealth. The company sought damages for breach of duty by the Committees in not appointing appraisers and making sheepskins available, and wanted a court order to compel the defendants to perform their duties. It needed to 'obtain sheep-skins at a price which will not involve it in ruinous loss', and due to 'neglect of duty and breaches of the Regulations', but had been unable to buy skins at viable prices. This led to close down. Economic loss notwithstanding, there was the Court said, no right of action *in the Act* against the Committees, or the Prime Minister or the Commonwealth.⁹⁷

Later in 1920, the Knox High Court was to decide the famous and much debated *Engineers' case*.

An event of capital importance in Australian history ... [that] switched the entire enterprise of Australian federalism onto a diverging track, that carried it to destinations far removed from those intended by the generation that ... brought the Federation into being.⁹⁸

The search for legal doctrines reaches a peak in analysis of the *Engineers* judgment. It has been criticised as "one of the worst written and organised in history", characterised by lack of logic, irrelevancies and vitriol, lacking "any articulated theoretical justification" with no

claim to apolitical objectivity.⁹⁹ Yet, as we have seen, ‘apolitical objectivity’ has not been a consistent feature of High Court decisions up to *Engineers* in 1920, or since.

Looking back to 1920, we find a time of industrial turmoil. Higgins had resigned from the Conciliation and Arbitration Commission over threats to his 44 hour week decisions. Federal Government concern that industrial stoppages would impact on post-war development programs, but also that wages and conditions should be reasonable and fair, was reflected in Federal arbitration changes for workers covered by Federal awards. Quarterly costs of living adjustments using the Harvester formula were to be balanced by higher penalties for striking. This was the essential context to the *Engineers’* decision, not law of the past. In its decision, the High Court acted to extend the ambit of Federal industrial laws to give state employees access to Federal arbitration.

Engineers provided a platform for wider reading of Federal Constitutional powers vis-à-vis the States. This has been used through the Dixon era into recent times, also to the concern of analysts (although judicial use of the platform reflects facts, circumstances, community priorities and judicial concern).

... the bankruptcy of the *Engineers* approach stands out most starkly if one considers how it has been applied in practice. The result is a tableau of what might be called tactical myopia – “myopia” because of the systematic avoidance of any insights into intention, context or history [of The Constitution]; “tactical” because it is plainly serving ends other than the rendering of impartial justice according to law, and because different legal tests are used according to which one will best serve those ends.⁹⁸

Back at the coal-face of ‘control’, ‘resistance’ and deciding ‘responsibility’, it is interesting to see earthy rural questions that arose in early decades of Federation, paralleled in fact, law and effects today.

In 1927, for instance, a stock inspector charged Mr George Nelson with moving 221 cattle into NSW in breach of the *Stock Act* 1901 (NSW). In his costly defence, Nelson’s lawyers called on s92 and other Constitution sections. They argued that the NSW *Stock Act* was a quarantine rule and so was inconsistent with Federal quarantine laws. No, the Court said, the Federal law was specifically for proclaimed emergencies so it did not displace the State rules.¹⁰⁰ In testimony to challenges faced by agriculture and science, 75 years on there are still calls on Governments to continue cattle tick inspections at NSW/Queensland borders.¹⁰¹

Mid-century saw a stream of agri-businesses chafing at collective controls by taking grievances to the High Court. They claimed rules breached various Constitutional

provisions (as well as the s92 minefield). In *Hopper v The Egg and Egg Pulp Marketing Board* (1939), a Victorian farmer had “in obedience to directions delivered to [the Board] nine dozen eggs”. He was paid 8s 9d fixed for the eggs less a grading charge, commission and a ‘pool deduction’ of 1d a dozen used for “stabilization of prices ... in the common interest of all producers”. Hopper – likely in high irritation – argued (among other points) that this last penny was an excise and in breach of s90. The Court was unsympathetic and short (as winds of war freshened?) with some judges debating whether the Court could even hear the matter. Evatt J explained the much-used fast track.

Original jurisdiction is attracted by the reason of the constitutional question, but is not limited to determination of such question. The legal validity or strength of the plaintiff's constitutional point is quite immaterial so long as it is genuinely raised.¹⁰²

1945. War escalates Federal power!

Commonwealth power grew dramatically during the Second World War period. While some industries faced loss of export markets and gluts arising from non-shipments of perishables during the height of war, 1942 saw rationing in Australia extended to basics – tea, sugar, butter, meat and clothing, leading to changes in attitudes, socio-economic structure, and taxation.

“Although the level of hardship never came anywhere near that experienced in Britain or Europe these controls were the most stringent to be introduced in Australia since the early years of the Botany Bay penal colony. The Australian government likewise had greater powers over money and manpower than any other Australian authority since Governor Macquarie. It took over the whole responsibility for collecting income tax in 1942, thereby depriving the state governments of their main source of revenue: there-after they received fixed annual sums which made them dependant on the federal treasury. The government also used the national security regulations to control banking.”¹²

Wartime stringencies notwithstanding, Victoria's Egg and Egg Pulp Marketing Board was again before the High Court in 1942 and facing the ire of businesses it controlled through ‘acquiring’ their production and paying a set price less deductions for handling, manufacture and marketing activities.

The Carter Bothers contested the validity of Victoria's rules on eggs, saying there was conflict with the *National Security Act* and its *Egg Control Regulations 1939*. They also called on the High Court's advance of administrative law by arguing that the Board's regulations were ‘unreasonable’ that is, “so oppressive and capricious that no reasonable

mind can justify it”.¹⁰³ The High Court said there was no inconsistency. If and when the Federal regulations were used they would simply have priority. Justice Starke, however, noted with concern that using the Defence Power to bring marketing of commodities such as wheat, meat or eggs under Federal laws, “goes far toward the destruction of the federal system established by the *Constitution Act*, but perhaps not much farther than the recent decisions of this Court”.¹⁰⁴

Yet, the widening power was not to be absolute, as the High Court at times highlighted. In certain fact situations and circumstances, there would be limits to Federal power even in wartime when almost any “element of economic organisation” could fall within the High Court’s generally broad readings of the s51(vi) Constitutional Defence Power.¹⁰⁵

Mr Tonking is entitled to receive the market value of his excellent fruit - even in wartime

In 1942, Alwyn Tonking from Nashdale NSW, challenged the validity of regulations under the *National Security Act* that required growers to supply all their apples and pears to the Australian Apple and Pear Marketing Board for a set payment. Tonking argued that his fruit was ‘of the highest quality’ especially in the excellent 1940 season and that just compensation under the rules and The Constitution should be ‘the fair and reasonable market price’.¹⁰⁶ His claim was heard first by a single judge of the High Court who reassessed the payment to Tonking, and provided a sharp commentary on prevailing times:

“[The regulation] ... contemplate[s] that claimants will accept the amount of compensation fixed by the Minister; because, obviously, it was never intended that the effect of mass acquisition would be to replace the famine of buyers in the market by a feast of litigation in the courts. ... [Tonking] gave evidence that if he had been allowed to market the crop himself, then, because of its keeping qualities, he would have placed it in a cool store and chosen the most favourable dates on which to sell it. He said he would not have suffered from the glut for this reason, and also because ... there would be sufficient competition to ensure a high price for fruit of its quality.

But, while satisfied that this evidence represents the bona fide opinion of an honest witness, I am not prepared to act upon it because any hypothetical conclusion to which I could come as to its value in such a convulsed state of world and local affairs would represent altogether too dangerous a feat of the imagination.”¹⁰⁷

Williams J awarded Tonking an extra 30% payment, and costs against the Board and Federal Government. Both quickly appealed to the full High Court but lost (two to one). Latham CJ said Tonking was “entitled to receive the value of his fruit. Generally the determination of the value of goods depends upon an estimate of what the goods will bring in the market” or, factually, the amount for which the Board sold Tonkin’s fruit (not some ‘average’).

By 1945, with the World War turning and freedom and independence sentiments building (hastened perhaps by moves to nationalise banks – above), Arthur Bryant, a cattle drover, exercised his down-to-earth rights to resist high government powers by challenging the Federal Tax Commissioner and the wartime *Pay-roll Tax Assessment Act 1941-1942*.¹⁰⁸ Bryant had agreed with Queensland Stations Pty Ltd to move cattle to specified locations, to carry out instructions and “to devote the whole of his time, energy and ability to droving the stock”. To do this Bryant had to employ four men and provide rations, horses and equipment. Faced with commonsense facts and bush get-up-and-go, it is unsurprising that Justice Dixon’s decision in this case is seen by some as characterising his ‘proactivity’ – rather than the legalism Dixon is supposed to symbolise.

Until the middle of the 20th century, the law was settled: an employee was distinguished from an independent contractor by the application of the ‘control test’. ... [As a] Justice and the Chief Justice of the High Court, Dixon J pioneered a novel method of categorising economic relationships between parties. The underlying dynamic of Dixon J’s doctrinal innovation was his understanding that changes in the workplace were posing problems for the classic control test. ... In the 1945 [*Queensland Stations*] case ... Dixon J formulated a test that replaced control as the sole criterion for gauging an employment relationship ... [for a] of a number of indicia ...¹⁰⁹

Many rural ‘control-resist’ actions provided the ingredients for judicial decisions with wider impacts – certainly during the first seven or eight decades of High Court adjudication and still into recent years. *Queensland Stations* was the groundwork for today’s employee relationship test Dixon bluntly explained that there were no ‘wages’ and so no liability to pay Federal tax, with (in deference to his profession) support from five selected authorities (of the likely innumerable cases) going back to a 1849 decision:

There is, of course, nothing to prevent a drover and his client from forming the relation of employee and employer ... whether they do so must depend on the facts. ... it is a mistake to treat as decisive a reservation of control over the manner in which the droving is performed ... in the present case the circumstance that the drover agrees to obey and carry out all lawful instructions cannot outweigh the countervailing considerations which are found in the employment by him of servants of his own, the provision of horses, equipment, plant, rations, and

a remuneration at a rate per head delivered. ... a reservation of a right to direct or superintend the performance of the task cannot transform into a contract of service what in essence is an independent contract ...

Working through the exhilaration of post-war recovery, the High Court adjudicated on 'nationalising socialism' in the late 1940s, and on Communist and anti-Communist influences in the 1950s.¹¹⁰ The Labor Party split in 1954 then escalation of Vietnam as the regional hot-cold war also shaped what, for those not involved in war or agriculture, were the 'swinging sixties'.

1970s. Agricultural shifts, 'emerging national maturity'

By the close of the 1960s, Australia was "revealing – some marked signs of maturity", underpinned still by traditional rural focused, features,³⁴ but those too were changing.

"The commercial cord, if not yet cut by British entry into Europe, certainly became much more thinly stretched. Mutual tariff privileges remained considerable, despite inroads ... [from] the 'Kennedy Round' of international negotiations under the General Agreement on Tariffs and trade, but Anglo-Australia trade as such declined in relative significance. In the twenty years from the late 1940s, the British share of Australian wheat, cheese and dried fruits exports halved; that of mutton and lamb fell from 90 to 12 per cent; that of wool shrank from 40 to 10 per cent. ... Much of this political and commercial change was not actively sought by Australia and, indeed, was mourned, but also reflected a new degree of maturity and the erosion of the old colonial ethos."¹²

Innovation was both needed and readily possible building on great leaps in physical and biomedical science during the Second World War, then embraced on many fronts by revitalised post-war economies. Australia and other nations established National Research Development Corporations (NRDC) to interact with research entities and industry. Agriculture not surprisingly, was a focus in Australia. The scientific buzz of the times permeated traditional institutions as well as entrepreneurial business frontlines.

Science: The new post-war emphasis

"The older universities of Sydney and Melbourne ... were developing graduate schools in some scientific disciplines and establishing contacts not only with the [then] C.S.I.R but also some of the larger industrial concerns". ... In 1949, it became the Commonwealth Scientific and Industrial Research Organisation and, for

the first time, research in secondary industry made substantial progress, aided by greatly increased government grants.

... The range of benefits to secondary industry from this expansion and new emphasis was considerable ... [but] did not ... imply any diminution of research work in primary fields. ... Some of the results were dramatically impressive, as in the early 'fifties when C.S.I.R.O ... myxomatosis in rabbits trace elements ... new species of grasses and legumes and by discovery of means of elimination plants diseases and pests. In both primary and secondary industrial fields the work of C.S.I.R.O. and of scientific researchers in allied institutions thus prepared the path for large-scale development of the 'fifties and 'sixties. The way was also eased by improved prospects of financial stability and by the [High Court] removal of banking policy from the arena of political debate."³⁴

In this setting, in 1959 the High Court, led by Chief Justice Dixon, heard a dispute between Australia's NRDC and Commissioner of Patents about patent protection for 'ingenious methods for control and eradication of weeds from crop areas' achieved by using existing herbicides applied in new ways.

The Court's adventurous, clever *NRDC* judgment is now the bedrock of intellectual property law in Australia and is often cited internationally.¹¹¹

Ingenuity in weed control and managing the law, 1959

The Patents assessor, following the law at the time, decided that "the active substances of the invention were known" herbicides and the weed control methods submitted by the NRDC for patenting were "not directed to any manner of manufacture in that they are claims to the mere use of known substances – which use also does not result in any vendible product", so were not patentable.

The Dixon Court faced a body of precedent, from its own decision only months before that upheld a Commissioner of Patents decision to refuse a patent for a self-propelled-rocket projector, back to Lord Buckmaster's rejection of a patent application in 1915 for being "nothing but a claim for a new use of an old substance".¹¹² By reaching back further, the Dixon bench identified a series of cases that supported a broader reading of Lord Buckmaster's 'nothing but', to ensure that discoveries using existing machines or substances in novel ways of 'appreciable merit', whether 'easy to carry out or not' would become potentially patentable inventions.¹¹³

“No-one reading the specification in the present [NRDC] case can fail to see that what it claims is a new process for ridding crop areas of certain kinds of weeds ... by applying chemicals which formerly were supposed not to be useful for this kind of purpose at all ... a discovery that a useful result can be attained by doing something which the applicant’s research has shown for the first time to be capable of producing that result. This is not a claim which can be put aside as a claim for a new use of an old substance ... the process differs from the previously known processes of its kind ... it employs substances the suggestion of which for the purpose in hand was new, was not obvious, and was to be arrived at only by an exercise of scientific ingenuity, based upon knowledge and applied in experimental research. ... the substances themselves were already known to man affords no valid reason for denying that the suggestion was inventive.”

The Court also dismissed contentions that “agricultural or horticultural processes are, by reason of their nature, outside the limits of patentable inventions” (on the basis that agricultural advance has been occurring since the earliest times and there was no ‘manner of manufacture’). In a rebuff to legalistic norms the Court referred to factors such as ‘remarkable advantage’ and ‘modern times’, as it departed from ‘tendencies’ of past patent decisions.

“Notwithstanding the tendency of these decisions, the view which we think is correct in the present case is that the method ... has as its end result an artificial effect falling squarely within the true concept of what must be produced by a process if it is to be held patentable. This view is, we think, required by a sound understanding of the lines along which patent law has developed and necessarily must develop in a modern society. The effect produced by the ... method exhibits the two essential qualities [of] ‘product’ and ‘vendible’. It is a ‘product’ because it consists in an artificially created state of affairs, discernible by observing over a period the growth of weeds and crops respectively on sown land where on which the method has been put into practice. And the significance of the product is economic; for it provides a remarkable advantage, indeed to the lay mind a sensational advantage, for one of the most elemental activities by which man has served his material needs, the cultivation of the soil for the production of its fruits. ... The method cannot be classed as a variant of ancient procedures. It is additional to the cultivation. It achieves a separate result, and the result possesses its own economic utility consisting in an important improvement in the conditions in which the crop is to grow, whereby it is afforded a better opportunity to flourish and yield a good harvest.”

Even as science improved rural productivity, various marketing, licensing and control schemes continued well into the 1980s and 1990s. Many variations of dispute reached the High Court, often arguing s92 intrusion on interstate trade alongside many other reasons for resisting the instructions of powerful statutory marketing institutions.

Not uncommonly, as seen with Tonking and his fruit in 1942, the farmers and processors who contested controls saw themselves as providing premium or unique products, in entrepreneurial ways with responsive attention to market signals. They used innovative production and marketing to distinguish their products and processes from the 'fair average quality' (FAQ) of the majority.

Take, for instance, Mr Williams and his inventive (for 1953) Canserve business. Canserve sold value-added products (roast seasoned pork, seasoned, rolled and cooked in electric ovens) to small goods shops and delicatessens across Victoria, NSW and into Queensland and Tasmania. Williams, however, lost his fight with the SA licensing system that was blocking his planned expansion into SA.¹¹⁴ See also the NSW dairy and margarine cases of the 1960s and 1970s, plus the challenges to poultry/egg regulations all around the nation, among the many actions that robustly resisted statutory controls.¹¹⁵

For the generalist farmer, however, organised marketing arrangements likely offered some refuge and hope as terms of trade declined. In the 1960s, as prices fell away, the wool that had been so valuable (or costly if you were a buyer) at 'a pound for a pound' during the Korean War – the Federal Government established the Australian Wool Board. In 1962, the Australian Wool Board's wide, industry agreed functions included promoting wool and wool products globally, inquiring into and organising marketing, trade and commerce in wool and ensure availability of wool in stores when there was a danger of war.

These new statutory entities were to be paid for by a two per cent tax on shorn wool under five 'Wool Tax' Acts. It did not take long for a major enterprise, the extensive Queensland based 'Logan Downs', to challenge – unsuccessfully – both the tax and the arrangements on constitutional grounds.¹¹⁶

Indeed, the relationship of woolgrowers as levy payers with their statutory entities has long been turbulent, in part reflecting commercial drivers of a major industry struggling with pronounced market change. Each decade from the 1960s and into the new century has witnessed heated 'wool politics'. Notably, in the early 1970s, woolgrowers (who had once done so well in open world trade), loudly rejected the full acquisition and orderly marketing scheme promoted by the Australian Wool Board led by Sir William Gunn in the early 1970s (despite such statutory systems operating in rural industries all around).

However, growers were happy to fund a Reserve Price Scheme (RPS) to ensure a guaranteed minimum price for all wool by type through the seventies and eighties. By industry and government decision, RPS prices were raised to artificial heights in the late 1980s enticing more farmers to run sheep and requiring the Australian Wool Corporation to buy in wool (at high 'minimum' prices) until its stockpile grew to 4.7 million bales and the scene was well set for dramatic collapse of the whole scheme.

*Government wool policy, market manipulation and sheer commerce
– who pays? 1991*

The High Court was spared by Full Federal Court dexterity from hearing an appeal in negligence against then Federal Minister John Kerin. Wool companies wanted compensation for losses resulting, they claimed, from remarks made by Kerin to the International Wool Textile Organisation in June 1990 indicating the reserve price would continue but at a lower level. Kerin had said:

"In announcing the Government's decision to reduce the reserve price, I also indicated that we would hold an open public inquiry into price policy for the wool industry. Since the current scheme was introduced in the early 1970's there have been enormous changes in the world textile industry and in financial markets. We need to satisfy ourselves that our wool pricing and marketing system is appropriate to the new world of the 1990's – a world of fluctuating exchange rates and an increasing globalisation of international markets. Having said that, let me make it quite clear that the inquiry will not affect the reserve price.

If we are going to make changes, they will be much further down the track. They will be made at a time in the future when we would be considering increasing the reserve price. They will not result in its reduction. I have given a cast-iron guarantee, which I repeat here, that the Australian Government will not contemplate, under any circumstances, any further downward movement in the floor price. We want to see stability and growth in the woolmarket. The one-off decision made realigns the price of our product to make it competitive. Any speculation on a further price drop is doomed to disappointment and would only be counter productive. The floor price ... has been restored to its proper level and purpose... ."

The Minister had identified the realities, but the industry and Government, in hindsight, had clung too long to the idea that global markets could be controlled, bountifully, from Australia. In September 1991, amid much vitriol, the Australian

government suspended then closed the Reserve Price Scheme. The intense pressures and risks in wool trade then, as now, were reflected in daring litigation pursued soon after by angry wool companies.

As the companies may have been advised but still wanted to test, the Full Federal Court, found no foundation for the claim that they had reasonably relied on the Minister's seemingly unequivocal speech. In an intriguing analysis, the Full Federal Court supported Justice Lockhart's conclusion in the first hearing that: "Many considerations including those of a political nature in Australia could have led to a change in attitude by the Australian Government and any person attending the conference should ... have known or assumed that."¹¹⁷

During the 1980s, insular protection and domestic market subsidies became harder to justify on any grounds, especially when agriculture had declined from 30% of GDP at the start of the century to 5%, while still producing far more food and fibre than Australians could use. Governments and industries – rural, manufacturing and services – increasingly recognised the imperative of real rather than artificial competitiveness if they were to develop and keep growing Asian markets. Competition and its innovation-driving forces were becoming pivotal.

In 1995, the Council of Australian Governments (COAG) agreed to implement recommendations of the 1993 Hilmer Committee Report on *National Competition Policy*.¹¹⁸ The National Competition Policy (NCP) Reform Package and Competition Principles Agreement (CPA) were to be applied by each government to all laws within its jurisdiction.

NCP objectives of have been stated in various ways. As set out by the new regulatory body, the National Competition Council (NCC), NCP was to benefit the Australian community by extending anti-competitive conduct laws in the *Trade Practices Act* to almost all private and public sector businesses, by improving performance of essential infrastructure, by improving performance of government businesses through structural reform, and reviewing and, where needed, reforming all laws that restrict competition, and ensuring that any new restrictions provide a net public benefit.¹¹⁹

Regulations restricting competition were to be removed or changed unless the public benefit of keeping the anti-competitive rule was clearly shown and outweighed costs to the community of the restriction. Those wanting to keep the rule had to provide solid and convincing evidence. Review Committees were to ensure full scrutiny using input from

stakeholders plus their own investigation. Benefits projected to arise from NCP reviews and from the implementation of reforms include:

- lower costs for essential services and other input supplies to industries
- better prices to customers
- clearer market signals to support investment and innovation
- higher productivity in industries directly reformed and associated industries
- enhanced competitiveness on local and international markets, and
- conditions for more sustainable economic and employment growth.

In its 1999 report the NCC identified agricultural marketing arrangements as a 'difficult reform area' that would be receiving close attention.¹²⁰ But competition was not to be an end in itself – boosts to economic performance and community benefits were the goals, and were to be verified rigorously.

National Competition Policy ends Dairy regulation 2000

Minister John Kerin had introduced a new Dairy Domestic Marketing Scheme with reducing subsidy, to run from 1995 to 2000. The DMS aimed to balance farm returns, to encourage industry responsiveness to markets and to build international competitiveness in production and manufacturing. With the DMS legislated to finish in 2000 and the key National Competition Policy review in Victoria recommending full deregulation, the industry recognised the forces gathering for dramatic restructure.

Industry leaders sought Federal and State government support for 'orderly national reform' including a \$1.6bn Structural Adjustment package to compensate producers forced to leave their traditional industry. With removal on 1 July 2000, of all production, sale and price regulation, milk prices in supermarkets, and to some farmers, dropped noticeably. Pricing is linked now to world market demand for powdered milk and traded products especially cheese. In June 2002, Australian Dairy Corporation agency trading (single desk) in selected export markets, also ceased.

Competition Policy rolled forward. Only a few notable statutory market controls remain, including wheat export marketing (often in debate especially during trade negotiations), chicken meat committees and the NSW rice single desk (the public benefit of these was again challenged by the NCC in 2003).¹²¹ Yet, it is intriguing that only six legal actions relating to NCP reached the High Court, and even these cases did not test the NCP process or its outcomes.¹²²

Rather, from the 1980s, as competitive pressures escalated, we see agricultural legal battles based more on essentials of business performance – including claims in contract, negligence and using the wide scope of the *Trade Practices Act 1974* (TPA). Overall, fewer rural matters were reaching the High Court, reflecting the lesser economic role of primary rural production in the economy, but those that did at times precipitated new judicial thinking – rooted in the burning practicalities of survival in agricultural business and global trade.

Reform of workplace regulation, for instance, was ‘on the agenda’ during the ‘80s. Business leaders agree that co-operation at the top via ALP/ACTU Accords was successful, with new emphasis on productivity jumps in return for pay rises.¹²³ Most employers had accepted a centralised across-industry award/union system; it was a simpler path while competitive pressures remained low. But as competition intensified in the early 1990s, the costs of labour market inflexibility became critical; as observed by the NSW Industrial Commission Full Bench in the *State Wage Case - March 1992*:¹²⁴

The North Europeans and North Asians, after 45 years of post war reconstruction based explicitly on management /employee consensus models, have ensured a manufacturing culture where quality and productivity are goals, not options. ... Australia’s economic history has left a legacy of antipathy, or at best, complacency ... [and] reliance on blunt economic instruments such as tariffs and occupational demarcations in management and workforce.

Among industrialised nations, Australia’s working environment was highly regulated,¹²⁵ with “labour market institutions [centralised tribunals, awards, unions] atypical in the international context”.¹²⁶ These structural features had long influenced the ‘tone’ and ‘detail’ of employer-employee relations, and limited what regulation was left to the common law. The past held on strongly through restructuring efforts of the 1980s. After five constrained years, Treasurer Keating in 1990 spoke bluntly about the effect of award and union traditions on Australia’s capacity to respond to competitive pressures:¹²⁷

The great pity for Australia (and Britain) was that in the post-war years we were saddled with a nineteenth century craft union structure. The challenge for Australian industrial relations policy is to break the back of the craft structure [in order] to change it. The first thing you’ve got to change is the nature of the award structure. ... There’s a reasonable chance that within three years the top 100 companies in this country will be working under enterprise agreements ... you can’t bargain in a trans-industry [union] structure.

Abattoirs – an industrial frontier into the 1990s

As Government/Union Accord negotiations peaked in 1986, a famous dispute between the meatworkers union and employers at Mudginberri, a Northern Territory abattoir, was threatening the plant's viability as an export and employing enterprise. The union picket line was entrenched in defiance of a Federal Court order to not interfere with "day-to-day activities in the conduct of its business as an export meat processing works and an abattoir licenced to process and export meat from Australia". Fines for contempt of the order, mounting to \$44,000 over 17 days, had not been paid. The picket went on as the Union appealed to the High Court, where it received no judicial support.¹²⁸ Even so, angry disputes continued in the NT,¹²⁹ and nationally. High industrial turmoil characterised the meat industry of the 1980s.

However, Keating's vision and sense of urgency was still some way off in the meat processing industry and, it seems, in the High Court. In the *Aberdeen Beef* case a number of meat enterprise employers had questioned a Federal Industrial Commission decision that an industrial dispute with interstate character existed (thus under the long history of industrial law bringing the action into the jurisdiction of the Federal Commission). The High Court took nine months to deliver its judgment in March 1993. The text records a number of industry realities and signals.

"The dispute which the Commission found to exist was created when the Union served a log of claims ... upon employers who failed to accede to these demands. Those employers owned or operated some thirty meat processing establishments [six in Queensland, one in SA, 20+ in NSW covered by awards of the Industrial Commission of NSW]. It was suggested that the real purpose for serving the log was to bring the NSW establishments under a federal award. Since the service of the log, a number of ... have changed hands or ceased to operate, including one [in] Queensland...and the sole South Australian establishment."

Perhaps the freshening winds of industrial change did not outweigh centralist solutions. This – the *Mabo* period – was not the time for turning point decisions on every-day matters. The Court, in a single judgment steeped in Constitution s51(xxxv) law, citing seven cases from before 1931, five from the 1940s to 1960s and eight industrial matters of the 1980s, confirmed that Federal jurisdiction and awards covered all these meat plants equally.¹³⁰

By the late 1990s much of the picture had changed – better rural industry finances, more flexible work arrangements and less unionism, rise of the Federal Court and restriction by the

High Court on special leave to appeal to matters of public importance.¹³¹ Aside from a series of Native Title questions part affecting farming, only a trickle of agricultural fact cases now reaches the peak bench. Recent years have also seen a part-shift from control and resistance actions, to negligence cases seeking adjudication of responsibility, in which the facts, circumstances and legal principles together raise questions of public importance.

Potato farms, disease and 'economic loss' issues 1999

At issue in *Perre v Apand Pty Ltd* was the careless conduct of a person that caused financial loss to others. There was no physical injury to a person or property. Could the carelessness be classified as negligence and the person liable for damages for 'pure economic loss'?

Apand Pty Ltd introduced bacterial wilt through seed trials on properties in SA. When it was discovered, other properties within 20km although not-diseased lost their access to the important WA potato market for five years (under WA plant disease regulations; the WA government intervened in the case). Perre and other SA potato farmers claimed substantial financial loss. The pivotal question was whether Apand Pty Ltd owed a duty of care to the neighbouring farmers? The primary Federal Court judge in determining the facts had said not, as did the Full Federal Court on appeal.¹³²

As Chief Justice Gleeson pointed out, the 'pure economic loss' arm of negligence law is fluid, in part because "there is no general rule that one person owes to another a duty to take care not to cause reasonably foreseeable financial harm. The consequences of such a rule would be intolerable".¹³³ Gleeson CJ identified three points of principle that "have been, and will remain, influential in restraining acceptance of such a duty of care in particular cases, or categories of case":

- "a duty to avoid any reasonably foreseeable financial harm needs to be constrained by 'some intelligible limits to keep the law of negligence within the bounds of common sense and practicality.
- "to permit recovery of foreseeable economic loss ... for any negligent conduct, may interfere with freedoms, controls and limitations established both by common law and statute in many legal contexts.
- "where the loss occurs in a commercial setting, a third party, C, may suffer financial harm as a result of conduct which is regulated by a contract between A and B."

Gleeson CJ also raised “another matter of concern” being “lack of precision in the concept of financial or economic loss” compared to physical injury to person or property. Other ‘policy considerations’ had been identified by the Full Federal Court in the 1997 Perre appeal including “the law’s concern to avoid the imposition of liability `in an indeterminate amount for an indeterminate time to an indeterminate class’,¹³⁴ plus ‘the perception that’

“in a competitive world where one person’s economic gain is commonly another’s loss, a duty to take reasonable care to avoid causing mere economic loss to another, as distinct from physical injury to another’s person or property may be inconsistent with community standards in relation to what is ordinarily legitimate in the pursuit of personal advantage.”

Nevertheless, faced with the circumstances of this claim by the Perre family and other potato farmers, each of the High Court judges in his or her own way, rebutted the prior case law (that the Federal Court judges has used as precedents) to allow the appeal. Each judge found the key elements of negligence (that Apand PL had ‘a duty of care to prevent economic loss’ and had breached that duty).

Gleeson CJ and colleagues (often described as ‘increasingly conservative’, but here closer to Dixon J’s active approach in *Australian Knitting Mills*), reached into the case facts (for example quoting words in documents), and then construed those facts and the law in past cases quite differently to the Federal Court judges and to provide different judgments each more baffling than ‘legalistic’.

Views on potato farms, disease, care and economic loss

“A decision that a duty of care is owed to some who suffer financial harm as a consequence of negligent conduct, but not to others, is only just if it is capable of being explained on a rational basis. As the judgments of other members of this Court show, to an extent the Federal Court’s conclusion was based upon a view of the facts, and in particular of the critical aspect of the negligent conduct, which cast the net of potential liability too wide. Furthermore, the combination of circumstances involving the use and ownership or enjoyment of land, the physical propinquity of such land to the Sparnons’ land, the known vulnerability of people in the position of the appellants, and the control exercised by the respondent over the relevant activity on the Sparnons’ land, is unlikely to apply to an extent sufficient to warrant an apprehension of indeterminate liability.”

Gleeson CJ

“The question ... is whether the salient features of the matter gave rise to a duty of care owed by Apand. In determining whether the relationship is so close that the duty of care arises, attention is to be paid to the particular connections between the parties. Hence what McHugh J has called the “inherent indeterminacy” of the law of negligence in relation to the recovery of damages for purely economic loss. There is no simple formula which can mask the necessity for examination of the particular facts. That this is so is not a problem to be solved; rather ... ‘a situation to be recognised’. The case law will advance from one precedent to the next. Yet the making of a new precedent will not be determined merely by seeking the comfort of an earlier decision of which the case at bar may be seen as an incremental development, with an analogy to an established category. ... The emergence of a coherent body of precedents will be impeded, not assisted, by the imposition of a fixed system of categories in which damages in negligence for economic loss may be recovered.”

Gummow J

Justice Kirby provided some ‘judicial lawmaking’ context in his *Perre v Apand* judgment. The *Perre* appeal, he said, took the High Court “once again to the vexed question of the liability of an alleged tort-feasor in negligence for financial loss, unconnected with any injury done by the tortfeasor to the person or property of the plaintiff”. Kirby J pointed out that:

[Economic loss] decisions have been castigated as illogical, unjustifiable and historically suspect, ‘hopelessly deficient’, resulting from persistence with ‘formulaic’ or ‘empty labels of no content’ and designed to ‘mask’ a judicial need for ‘control devices’ which are not fully expressed.

In *Perre v Apand*, each judge saw the need, or the opportunity, to provide (mostly) lengthy judgments built on ‘elegant analysis’ reaching back to basics of tort. Yet, even with a common foundation of ‘legal principles and precedents’ and although they came to the same conclusion, there was not much useful agreement.¹³⁵ Their Honours showed elements of being ‘only human’ as they revelled in advancing ‘the most controversial area of our law of tort’, an arena so much the province of the judiciary over centuries. Understandably the ensuing debate has been loud and perplexed, in academic,¹³⁶ and practical circles,¹³⁷ even though new avenues for ‘pure economic loss’ claims now seem available.

Perhaps the ‘it’s the vibe’ criticism influenced the High Court in deciding an appeal in 2003 by oilseed importer Dovuro Pty Ltd against a Full Federal Court decision in 2000 (that noted *Apand*). Dovuro had been found negligent for legally distributing canola seed

in WA that contained tiny proportions of then non-prohibited weed seeds in bags labelled '99% purity'. The WA authorities later regulated to declare these species illegal and to require eradication by the canola growers. The duty of care and negligence finding was part-based on Doruvo PL's public apology to its clients for ensuing events. The High Court majority concluded that Doruvo had not been negligent - because the train of events had not been reasonably foreseeable:¹³⁸

Whether the steps taken by AgWest and the Agriculture Protection Board after the importation of these seeds were reasonably foreseeable had to be judged according to what Doruvo knew or ought reasonably to have known when it was importing and distributing the seed. It also had to be judged according to whether the steps that were taken by these governmental authorities were to be expected or foreseen.

Hayne and Callinan JJ

So, the 'legalistic' tags tied to the Gleeson High Court notwithstanding, at least at the economic loss front-line we see signs of the adventurism often criticised in the Mason High Court.

On the constitutional and government-interface front however, it does appear, at least when looking at agricultural fact cases, that the High Court has become drier – as seen in the austere *NEAT* decision,¹³⁹ and to an extent in *Grain Pool of WA v The Commonwealth*.¹⁴⁰ However, there were more conservative analyses of law and decisions in the Mason era too.¹⁴¹

* * * * *

Stories told as the High Court chews the grass

The historian of any period is always in danger of suffering from the wisdom that comes from hind-sight. It is easy to interpret the past in the light of the present including current day debates.

*F Alexander*¹⁴²

This exploration started with the idea of telling a tale of interaction of Australian agricultural and economic expansion with the development of Australian law over 10 decades since Federation. While the main aim was to mark the opening of the Australian Centre for Agriculture and Law at The University of New England, during the dig for this story, the High Court formally celebrated its 100th year – and sparked a rash of new comment to extend the forceful debate underway in law journals about judicial 'legalism', 'originalism', 'liberalism' and 'proactivity' in the High Court (see 'Down-to-earthiness').

For good or ill the High Court has shaped Australia, yet it is little changed since it first met one hundred years ago this week. ... [Deakin's] 1902 definition of the court's place and function in Australia's federal system still holds: 'The federation is constituted by distribution of powers and it is this court which decides the orbit and boundary of every power.' Yet while the High Court has changed little, time has transformed Australia – and much of that change has flowed from the way the court has made law over the past century.

Editorial, *The Australian* 7 October 2003

The High Court has produced ... distinguished judges, though none stands out like Owen Dixon, chief justice from 1952-64. Dixon's 'strict legalism' is today [unfashionable] ... but he remains the only Australian chief justice to enjoy a major, long-term international reputation. ... the court has not been an outstandingly intellectual body. It is peopled by barristers, practical souls with tidy minds. Generally, they have been uncomfortable with theory and prefer to approach cases as matters to be decided rather than battle-grounds for legal principle.

Craven, *A Financial Review* 4 October 2003

While judicial activity is an important side-theme in this paper, the main interest has been to explore these cases from a non-law, 'get-real' perspective, well away from the ivory tower. To take a look at issues, actions and decisions while standing in the shoes of the iconic 'man on the land'. What stories and messages have been generated by the facts and fights of Australian agricultural enterprise in the cases people felt they had to pursue to the end, and in the decisions made then by our leading judges?

First, it is clear the law is an enduring frontier for agricultural industries and people. The legal system is bewildering like the weather, and is not it seems to be conquered by technology, productivity, business acumen or sweat. It is the facts and outcomes of each dispute and flow-on consequences of each decision that are important to participants and observers. Any principles or doctrines that might be gleaned by industrious legal analysts are a by-product of the action, financed by the participants.

As constitutional challenges could go near directly to the High Court in its original jurisdiction this path has been well-used, as we have seen, by enterprises with a gripe and their advisers – although still at solid expense. Many matters have also worked their way up the costly hierarchy of local, State or Federal courts, driven by stalwart citizens determined to check a right, resist a control, define responsibility or simply to seek justice.

(That said, eagerness of legal advisers and other parties to test a question, and to appear in, the High Court or the Privy Council has also likely influenced some cases. It is difficult to see a number of these actions being funded by litigants alone, even if the key party was most concerned to achieve justice. In 1928, for instance, when George Nelson disputed the

charge of taking cattle across the NSW border, he was represented by HV Evatt, eminent Sydney barrister who at age 36 was appointed to the High Court only two years later.)¹⁴³

Another key story, is that of entrepreneurs and those who see their product or process as superior, more actively resisting centralised controls. Those who felt their competitive advantage in production or marketing was being subsumed by 'fair average quality' schemes, have actively fought the regulatory system – often enough aided by others keen to test their own agenda in a judicial forum.¹⁴⁴

Eventually in the 1990s most of the nation swung to their view – on market controls at least. Global realities and competition policy unpicked old and fusty schemes one by one, even while large 'middle' groups of farmers seemed to hope acquisition and 'certain' prices would keep on. Larger scale producers, often industry leaders if not always the innovators, could generally see advantage in dismantling protections and the restructuring that followed. The mid 20th century dairy industry, for instance, has been described as 'small-scale, low-tech, inward looking and producing a narrow range of low value products' for sale under schemes at fixed prices.

Since then the interventions have been progressively removed, albeit gradually and not without a vigorously contested political debate. The transformation has been dramatic. ... More than 80 per cent of dairy farmers have left the industry, but those that remain produce much more milk per cow, run many more cows and produce considerably more milk in total ... Today's dairy farmers are at the cutting edge of pastures and genetics technology. The industry has gone from near basket case to star performer.

*Trebeck, 2002*¹⁴⁵

Yet, compulsion did not leave rural industries with closure of statutory authorities and departure of smaller-scale or less-efficient producers. Industries are still characterised by mandatory levies for research and at times product promotion, and increasingly by science and policy based industry codes and rules that regulate operating costs, out-put, elements of distribution and even innovation.

A rural industry's evolution then is driven by a mix of global and local market-place dynamics, short and longer term production realities, government policies, and the technologies, programs and rules developed by the industry using levy funds, all within a framework of statute and case 'law of the land'.

Looking forward, as pressures on rural industries intensify, farmer majorities may re-question statute based, blanket industry levies. Challenges through the courts, perhaps

using class actions, could test imposition of levies or the outcomes of decisions by industry leaders and boards. Recent formation of agricultural industry companies owned by levy payers brings a new dimension to performance and accountability,¹⁴⁶ especially where investments in research, promotion or policy development may lead to industry restructuring and advantage to some rather than many, or all levy payers.¹⁴⁷

[I am] a long time critic of the single desk policy – because I think it is contrary to the interests of Australian wheatgrowers ... Victorian growers realise that the sun still rises ... despite the “loss” of the[ir] single desk for barley. ... Growers now have more risk transfer options and specific marketing products. They are clearly ahead of their counterparts in [SA]. The less said about the single desk previously operated by the NSW Grains Board the better.¹⁴⁸

Tenuous positioning of entrepreneurs is a third tale arising from a century of agricultural fact cases reaching the High Court. The end of the Court’s first century contrasts with early decades of support for initiative, with regard to the risks and rewards for investors, employees, government and community in building employing industries and enterprises.¹⁴⁹

It is ironic that, in an era of general market place deregulation (although not less regulation), and of governments urging innovation and investment through diverse schemes, that the top Australian courts seem to be increasing risks associated with the entrepreneurship the Australian community says it wants and needs to encourage. In *Perre v Apand*, for instance, High Court judges identified and acknowledged business imperatives:

... the need to avoid imposing indeterminate liability and the need to avoid imposing unreasonable burdens on the freedom of individuals to protect or pursue their own legitimate social and business interests without the need to be concerned with other persons’ interests ...

*McHugh J*¹⁵⁰

The determination of what, as an aspect of the economic organisation of society, is ... acceptable commercial dealing, is for the common law and statute. The debate ... [on] the role of negligence, may turn upon an often unarticulated major premise that the common law values competitive conduct. ... The question is how far the law of negligence may develop without cutting too deeply into that common law value which favours competition” [where one entity succeeds ahead of another].

Gummow J

but the true signals to business come from the decision and its effects, not from the words.

Shadowing 'unconscionability' developments in equity law, in their *Apand* decision the High Court judges variously stressed the need to identify 'vulnerability' to economic loss or a 'powerlessness' in a specific person (rather than an indeterminate group). McHugh J forecast a change in the law through his decision, even as he bore witness to the busy enterprise of Apand Pty Ltd:

In light of its [Apand's] knowledge and the vulnerability of the Perres, the case for holding that Apand owed them a duty to take reasonable care to protect them from economic loss is overpowering. The law of negligence, as an instrument of corrective justice, would be in a sorry state if it did not require Apand to have regard to the interests of the Perres when it supplied the seed to Virgara Bros for planting by the Sparnons [who farmed next to the Perres].

Yet, McHugh J also observed at some length on the need for less confusion, to assist "practitioners and trial judges who must apply the law to concrete facts arising from real life activities". Cases "take longer, are more expensive to try" due to undefined terms such as 'fair' or 'unconscionable' and "settlement of cases is more difficult [as] practitioners often having widely differing views as to the result of cases if they are litigated". That said, McHugh's comments also part-confirm how such varying judgments could come forth from seven judges of an allegedly 'legalistic' court (ie individual 'ideas of justice' backed by personal choice of supporting precedents and principles as seen in many cases above):

Whatever formula be used, the outcome in a grey area case has to be determined by judicial judgment ... But if negligence doctrine is to escape the charge of being riddled with indeterminacy, ideas of justice and morality should be invoked only as criteria of last resort when more concrete reasons, rules or principles fail to provide a persuasive answer to the problem.

This returns us to the statement at the start of this AgLaw paper ...

Surely if anything matters in our attempts to understand law, it matters how judges do and/or should decide cases, and that we have an account which adequately explains ... their activities.¹⁵¹

... and to fourth dimension emerging from this exploration of this series of agricultural fact cases over the High Court's first century. That is, the extent by which judicial decisions are apparently influenced by factors wider than the dispute and the existing statute and case law on the issue.

Litigants enmeshed in realities of Australian rural businesses seek, in the main, a fair decision in all the circumstances. Efforts by academics to pin down legal doctrines behind each decision, and to explain variations in terms of 'law' or 'judicial personality', are

meaningless or nonsense, as are laments by analysts that judges are focusing on facts and circumstances, 'policy', or ideas of justice or morality ahead of legal principle.¹⁵²

Rarely, it seems, do analysts look to the detail of surrounding events to try to explain a judicial decision (for instance, why Starke and Dixon JJ handled matters they way they did in *Knitting Mills*).

This survey of agricultural fact cases in historical and legal contexts, suggests that 'circumstances' or 'realities' (perhaps called 'values' or 'policy') play a greater role than allowed for in legal theory. Indeed, it is conceivable that use of mathematical regression tools to rank impacts of various factors, would find that 'wider circumstances' may explain more of the variation among these High Court case decisions than any other factor (especially noting the general uniformity of judicial 'type'). When considered against the stark history of these cases, the clever structuring of judgments, and 'fitting' outcomes of most decisions, recent calls for a 'return to legalism' seem wistful and quite remote.

The last 30 years have seen the emergence of the 'hero judge' in Australia ... Freed from the tyranny of the past and tradition, they boldly discover rights, refuse to be bound by 'out of date' precedents, and replace strict rules with flexible standards based on their own notions of reasonableness, fairness and efficiency. ... The impact ... is not limited to public law. ... [in private law] areas such as contract, tort, property and equity judges can be seen as refashioning the law to give effect to judicial perceptions of what is required of a modern, national law and towards developing a national conscience on standards of behaviour in commerce and life ... Rather than being faithful to the underlying principles of the law and developing it with an eye to the past ... The emphasis now appears to be on technique; how can the law be changed to suit the economic and social demands that the judges have identified?

*Gava 2001*¹⁵³

Gava's observations on judges engineering society beyond what the community expects are important. However, this case review indicates that censure based on approval of 'past judicial ways' reflects more what some would like to think occurred than the actuality. Many of Gava's criticisms could be levelled at leading 'legalistic' judges of decades past, including Owen Dixon himself.

Rather than lionising past practices, legal and political analysts should seek new reasons and mechanisms for nudging judicial thinking in desired directions. For instance, is the alleged sharp rise in judicial proactivity over three decades linked to decline in parliamentary function, or to escalation of regulatory detail but not policy depth? Or is this cohort of senior judges just responding to gaps and needs in the manner of common law judges over millennia past?

I think every judge, though he does not say so explicitly, regards himself as free to get round a precedent if it is going to produce injustice in a particular case. I do not think most judges would create this stark distinction between precedent and justice. Every judge, by definition, is seeking justice.

*Lord Wilberforce, on judicial activity by Lord Denning*¹⁵⁴

Instead, various Australian analysts, with evident relief, point to signs of ‘re-ascendancy of legalism’ in the High Court. “Both the judicial method and many of the substantive doctrines espoused by Sir Owen Dixon have been rejuvenated.”¹⁵⁵ Some see the Court “distancing itself from the methodologies and orientations of the Mason era” and “a renewed preoccupation with doctrinal scholarship”; with these impressions “reinforced by a number of public pronouncements of Chief Justice Gleeson in which the concept of ‘legalism’ has once again been given eulogistic flavour and Sir Owen Dixon’s remarks have been resurrected as a model to be followed”.¹⁵⁶

Is it important that there be a factual foundation to the Dixon legend and for the hoped for changes in High Court style? Or is this truly an academic debate providing bountiful drama for publishable articles, and some diversion for judges? The question would mean little to most Australians, who would have difficulty anyway discerning a shift to ‘legalism’ in High Court approach. The Gleeson Court was austere in the face of harsh circumstances in the *Neat Case*, just as Mason’s bench had been in *Aberdeen Beef* 10 years before. The Mason Court has been accused of high proactivity in contract and tort matters, but the Gleeson Court’s handling of *Perre v Apand*, would fit the same description. Again, facts and external circumstances could explain as much or as little of the variation here, as the ‘style of the court, the ideology of individual judges, or legal precedents and principles. Just as in *Knitting Mills* and in many other Dixon decisions.

For most litigants and their advisers, Professor Julius Stone’s “many possible courses each clothed in authoritative garb” would more logically explain judicial process and the way judgments are framed to secure the end a judge wants to achieve.

For [Stone], the doctrine of precedent – that like cases should be decided alike – did not make the law more predictable but, rather the reverse. Each new case added to the mountain of material with which judges had to work to come up with their favoured result. There was no predictable course; there were many possible courses. Each of them could be taken with the same degree of acceptability, each of them was clothed in the authoritative garb of the law by reference to precedent.¹⁵⁴

Truth in short – a textbook summary of our High Court

Most analysts are realistic about judicial activity, and even expect clever judicial creativity in Australian and other peak courts. See for instance, *Judging the World*,¹⁵⁴ and Crawford's distillation for *Australian Courts of Law*.

"If the balance between [High Court] judicial activism changes, this may be due in part to changes in the rules (eg the Court's increased control over its own case-load) but it is much more due to the judges' own assessments of the needs of the community and of their own role. The shifting balance between restraint and activism is a perennial feature of common law appellate decision-making, dependent principally upon the temper of the court at the time, which rules can only marginally affect."¹⁵⁷

A fifth point is that litigants, although likely accepting that judges are inclined towards heroism (hoping this will apply to them), can also be vexed and potentially devastated by the time and cost involved in each barrister and each judge labouring to locate and combine case precedents and materials needed to support (or garb) their 'favoured result', including at times, a 'policy' outcome.

Dixon's intellect, dexterity and persuasive elegance in selecting, discussing and positioning past cases to support his assessment of the facts, law and circumstances of each dispute, made his apparent 'legalism' as pro-active as the wave of hero-judges.

In *NRDC* in 1959, for instance, Dixon put forward an intriguing collection of cases some from the 1700s and a number from Britain and the USA, but not the High Court's decision in *Willmann v Petersen* (patents and cane transport 1905), to support his interpretation and advance of the law and his (unsurprising) conclusion that the method of weed control (with its 'remarkable advantage') did meet the case law tests for patenting.¹⁵⁸

Indeed, as these rural cases illustrate, 'conservative judging' may be more a matter of technique and patience, than achieving less dramatic outcomes.

As was the case with Sir Owen Dixon, legalism has not prevented judges making large inferences.¹⁵⁶

Even strict legalism's greatest advocate, Sir Owen Dixon, allowed for judges to have recourse to "deeper, more ordered, more philosophical and perhaps more enduring conceptions of justice" and accepted this could be consistent with legal reasoning as "a system of fixed concepts, logical categories and prescribed principles of reasoning."¹⁵⁹

More overtly activist judges may feel compelled to provide lengthy expositions of past cases to support their decided direction.¹⁶⁰ One such, Sir Anthony Mason, criticised and praised for activist leadership, sees 'legalism' as clever camouflage for judicial activity: "Under the cloak of legalism, has been a hiding of certain value choices made by judges":¹⁵⁴

The pursuit of legalism has been undertaken in good faith and an abiding belief that it is possible to determine legal choices in a vacuum, that is, removed from conscious value choices. ... [but] I don't think that is possible ... [that is not] to convey that legal decisions should be made by reference to the personal choice values of a judge ... [rather] that judges are concerned to decide questions by reference to values which they perceive to be desirable, accepted community values.

In contrast, Sir Harry Gibbs, Chief Justice 1981-87, while agreeing that "judging involves making law to a greater or lesser extent ... every time you choose between two interpretations," considers sociological or economic material should not be introduced, at least in 95% of cases, and that doing so would "not necessarily bring any better or fairer result".¹⁵⁴

Yet, as we from these agricultural fact cases, social and economic (and other) contextual material is 'always there'. It is admitted to evidence directly or indirectly, by judicial notice or impression, and it is quite often influential one way or the other.

So, what makes an activist or conservative judge and a proper judgment? Perhaps it is just the level of dissent about the outcome, because most judges today, whether called activist or not, meet the 'legalism test' of rigorous reference to past cases (authorities). An exception, was the activist Lionel Murphy, whose brevity over 1975 to 1986 was much criticised, confirming the now embedded expectation that legal argument and judgments be lengthy, detailed and loaded with case authorities.

[Murphy] did not respond to the deep-seated need of judges and the legal profession for judgments that displayed detailed arguments based on cases and statutes. Even those sympathetic to his views noted that Murphy failed to clothe his judgments in a legally appropriate manner ... Today's hero judges come from within the profession and are much more able and inclined to engage in legal reasoning that is more institutionally and jurisprudentially satisfying.¹⁵³

Murphy may not have the interest or feel the pressure to appropriately 'cloak', 'garb' or 'clothe' his 'favoured result'. Others confirm that Murphy "did not have much time for principles" seeing them as output of 18th and 19th century judges, made "because they thought those were the principles which were best suited to their society – now society has changed". Clashes of Murphy and conservatives on the High Court were legendary.

These included Garfield Barwick, who was “in his own mind a strict legalist ... a perception that caused great controversy in his interpretation of tax law” – but “both in their ways were great activists”.¹⁵⁴ Notably, Justice Mason also crossed with Murphy, not on the position that underlying values should be revealed and their relevance checked, but over Mason’s emphasis at key times on systematic judicial process:¹⁶¹

One must remember that judges are extremely conscious of the need to provide orderly development in the law. Consistency, coherence and continuity are strong traditions. Judges are very mindful of the expectation of the community that the law should be ascertainable and predictable.

On that note, we return to the high risk agri-legal frontier with the Mengels of the Northern Territory. It would surely be interesting to collect the Mengels’ opinions on judicial process, legal principles and orderly development of law. In 1995, Chief Justice Mason led a decision that over-turned the Mengels’ two successful earlier actions, leaving the cattle family well out-of-pocket and likely most perturbed about ‘consistency, coherence and continuity’ of law. They may have welcomed some of Murphy’s directness in explaining what values, principles, policy or other influences lay behind the upshot of their years marching through Australia’s courts.¹⁶²

A costly Northern cattle saga – Acts 1, 2 and 3

The Mengels owned Northern Territory cattle stations, Neutral Junction (NJ) from 1962 and Banka Banka (BB), 200km further north. BB was purchased in 1987 as back-up for cattle during drought. They borrowed \$3m and planned to repay \$1m at end 1988 from sale of cattle. As stated in the lead High Court judgment, the Mengels ‘were not able to fully realize their selling plans and suffered loss because of action taken by a stock inspector, and the Acting Chief Veterinary Officer and Chief Inspector of Stock ... employees of the Northern Territory Department of Primary Industry and Fisheries (the Department)‘.

It was conceded during the second court action that “there was no statutory or other authority for the acts of the Inspectors notwithstanding that they were furthering the aims of a government-sponsored campaign to eradicate bovine brucellosis and tuberculosis”. The campaign was backed by the NT Stock Diseases Act 1954 and regulations including that ‘a person shall not move, sell or purchase stock in contravention of the restrictions specified in a notice’ on penalty of \$1000 or imprisonment for 6 months.

The Mengels had been involved in the campaign at NJ, and the property was classified negative for brucellosis and tuberculosis, as BB had been before its

purchase. NJ had a dry 1987/88 season and 2,500 head of cattle were moved to BB but conditions were not much better so they were returned to NJ. In August 1988, they began to muster both with the aim of selling 4,400 head as conditions dried, some to abattoirs some cows for breeding, and to pay off part of their large loan. The Mengels thought they needed a brucellosis test for sale to southern markets. The inspectors took blood from 95 heifers that had been at BB and were now at NJ. One test had a positive reaction, meaning a further 'culture test' with a 30 day wait. The inspectors felt brucellosis was unlikely and knew the problems facing the Mengels, but considered they should, and did, tell the Mengels that the cattle could go only to an abattoir and not be sold as breeders. Failure to comply would be an offence under the Act. The inspectors did not check the legal basis for their statements or the cattle restriction.

As a result of complying with the restrictions until lifted in November (they had approached the inspectors and local member for resolution), meant the Mengels did not sell their breeders as planned and had to import feed and agist more cattle due to the dry. They also had to sell other steers early to meet their commitments to the bank.

The Mengels started legal action in the NT Supreme Court claiming damages against the Northern Territory Department and the Inspectors, based on unauthorized acts of the inspectors. As stated in the High Court lead decision, the Mengels "formulated their claim against the Inspectors and the Territory in several different ways, relying on various causes of action". All were dismissed by Asche CJ, except the 'action on the case' based on a 1996 High Court decision, *Beaudesert Shire Council*. On this basis, Asche CJ found for the Mengels and awarded \$305,371 in damages plus interest. The NT and in 1993 the Inspectors appealed to the Northern Territory Court of Appeal and the Mengels cross-appealed. Angel, Thomas and Priestley JJ, also referring strongly to the High Court *Beaudesert* case, dismissed the appeal and allowed the cross-appeal lifting damages to \$425,125 plus interest. The NT was to pay costs, although this would have been unlikely to cover the Mengels' expenses.

From 1988 to 1993, noting the damages award, the Mengels had lost then expected to recover over \$500,000. This was money they were never to see.

The Northern Territory and the inspectors appealed and by the time the matter reached the High Court in August 1994, the dynamic had clearly shifted.

Although such altered 'external circumstances' would rarely elicit comment from legal analysts, to a participant or observer, the first obvious change was that – in light of the claim that Crown officers had been the cause of loss – the Commonwealth (represented by Rose QC) and the States of NSW (Mason QC), Victoria (Graham QC) and South Australia (Crown Solicitor) had joined the action and were now lined up alongside the NT Queen's Counsel. The Mengels and their advisers clearly felt this new pressure and were now represented by two Queen's Counsel (the second QC, alone had taken them successfully through the two prior hearings).

Clearly, there were now issues much wider than the Mengels' loss. The expression 'misfeasance in public office' (the mental element being a public officer who knows or ought to know that he or she is acting without authority), had been used twice in the NT Supreme Court appeal judgment, but in the High Court judgment 'misfeasance' received a full section and over 40 references.

The NT Court of Appeal had not changed the Asche finding that the inspectors "were not motivated to harm the plaintiffs [and] at all times acted bona fide in the sense they were honestly doing what they considered to be their duty and in the public interest", and so there had been 'no misfeasance'. But the Appeal Court had also concluded (in a manner doubtless unattractive to the governments not keen on being held accountable for past or future 'innocent' errors of their employees) that:

... it was the [inspectors & NT] who were acting tortiously throughout the period between the imposition of the quarantine and restrictions and their "lifting". What in law happened when the quarantine and restrictions were "lifted" was not that they were "lifted" (because they never had any legal effect and there was nothing to "lift") but that the tortious conduct came to an end. From beginning to end, the [inspectors & NT] were committing a tort and the [Mengels] were doing nothing wrong.

Asche CJ and the NT Court of Appeal had referred strongly to the High Court's 1966 *Beaudesert* principle. That principle was to be 'up for review' it seems, when the matter reached the High Court.

The principle in *Beaudesert* ... independently of trespass, negligence or nuisance but by an action for damages upon the case, a person who suffers harm or loss as the inevitable consequence of the unlawful, intentional and positive acts of another is entitled to recover damages from that other.¹⁶³

The Mengels' and perhaps their lawyers, expecting the law to be 'ascertainable and predictable' must have been dismayed and stunned by what emerged in and from the lead High Court judgment.

Saga Act 4. Removing the legal principle in *Beaudesert*

In the *Beaudesert* case, a local government officer had removed gravel from a creek, which had then changed its waterway causing loss to the licenced irrigator, Smith.

The Mason High Court, assisted by four top QCs, queried the *Beaudesert* decision on a number of fronts, including no evidence of the foreseeability of the consequence. They noted that *Beaudesert* had been considerably criticised and had not been applied (until this case, where *Beaudesert* had been supported by four NT judges and was the remaining platform for the Mengels' claim).¹⁶²

The Court's arguments and analysis to overturn a legal principle generally and *Beaudesert* in particular included:

" ... if *Beaudesert* does ... involve an error of principle, it is appropriate for this Court either to reformulate the principle or to indicate that it is no longer good law. ... it is sufficient to note that, apart from the fact that it was a unanimous decision and, perhaps, has not led to any great inconvenience, *Beaudesert* is a case which satisfies the criteria which determine whether this Court should review or depart from an earlier decision ... These are:

1. the earlier decision does not rest upon a principle carefully worked out in a significant succession of cases
2. there is a difference between the reasons of the majority judges in the earlier decision
3. the earlier decision has achieved no useful result, but has rather led to considerable inconvenience
4. the earlier decision has not been acted on in a manner militating against its reconsideration."

"*Beaudesert* should not be followed. The lack of authoritative support for the principle ... the difficulties associated with the notions of unlawful act and 'inevitable consequence', and the further difficulty of reconciling liability under that principle with the limitations upon liability for negligence and for breach of statutory duty and with the general trend of legal development confining liability to intentional or negligent infliction of harm compel the conclusion that *Beaudesert* should no longer be followed. The *Beaudesert* principle should be overruled, not reformulated."

The High Court allowed the appeal by the Northern Territory and the inspectors. The Mengels would receive no compensation, would recover part of their costs from the lower cases and would pay *only* their own costs for the final appeal. Their losses from a saga in which they had 'done nothing wrong', had obeyed instructions from an A/Chief Veterinary Officer and Chief Inspector of Stock, and had based much of their claim on legal precedent, would have been about \$750,000. It would be small recompense that Deane J (agreeing with the orders) suggested the Mengels might 'be extended the opportunity' of reformulating their case as an action in negligence (although he could see difficulties), because they had mainly based their claim on Beaudesert, "which they were then entitled to assume was good law".

Some parallels in fact and different readings of 'justice' in the *Perre v Apand* economic loss case (potato farmers) decided by the Gleeson Court only four years later are worth reflection. Are expectations of 'thinking forward', checking detail, considering risk, higher for a private sector company than from a government employee? Would this be so routinely or especially when five governments join a legal action?

That there were 'policy considerations' wider than the application of past law to the case facts, was evident from the judicial statements (as well as from the scene in court).

Saga Act 5. Mengels pay for policy development

'Misfeasance of public office', had not been found in the NT courts and little mentioned, but the area was examined closely in the High Court. The Mason led group concluded:

"The cases do not establish that misfeasance in public office is constituted simply by an act of a public officer which he or she knows is beyond power and which results in damage. ... Policy and principle both suggest that liability should be more closely confined"

They did suggest misfeasance could arise when 'a public officer recklessly disregards the means of ascertaining the extent of his or her power' but the Mengels had not raised that! Brennan J, separately, made the 'policy elements' quite clear.

"A public officer is appointed to his or her office in order to perform functions in the public interest. If liability were imposed upon public officers who, though honestly assuming the availability of powers to perform their functions, were found to fall short of curial standards of reasonable care in ascertaining the existence of those powers, there would be a chilling effect on the performance of their

functions by public officers. The avoidance of damage to persons who might be affected by the exercise of the authority or powers of the office rather than the advancing of the public interest would be the focus of concern.”

If the principle in *Beaudesert* had to be removed ‘to head off mischief’ (as said in a 2003 sheep loss case, quoting Brennan),¹⁶⁴ at the least the Mengels’ substantial contribution to the public benefit and evolution of ‘good law’, should be compensated.¹⁶⁵ The contrast of result for the Mengels with that for the equally innocent Perres and neighbours is stark – tempting one to concur, agriculturally speaking, that, at times, ‘Yes, the law is an ass’.

Learned treatises on *Mengels* or on *Beaudesert*, emanating from on high would be as meaningless to the Mengels and those hands-on agriculturalists around them, as the case outcome. Similarly, the academic debate about whether judicial decision-making is active or conservative, legalistic or not, seems to add little to knowledge or to general understanding.

In the main, that debate belongs in the ivory tower from whence it comes. This review of High Court cases thematically linked by fact and circumstance suggests that the desire to doctrinise and so ‘explain’ the law, adds little to certainty but much to the time and resources needed to resolve an issue in light of “the concatenation of factors which may be relevant to it”,¹⁶⁶ which is what Australia’s senior judges, legalistic or activist, repeatedly say they do, and are expected to do.¹⁶⁷

To accept this, up to a point, would help our ‘understanding on how judges do or should decide cases’. Much faster, it is suggested, than piled up articles in electronic law journals or haughty debate in newspapers that unfortunately just reinforces to general readers that “the ‘artificial reason’ of the law is a craft tradition, one that is internal to the legal profession”,¹⁵³

No one doubts that certainty, consistency and coherence of the law and the legal system are important social and legal values. They are not achieved by ignoring the factors which the law ... invites, or rather compels, the courts to consider. This is not to argue that judicial policy-making is desirable; it merely at times is necessary.

*Professor Zines 2002*¹⁶⁸

Or put another way, we support certainty in the law, until we are in trouble; then we seek justice.

Endnotes

- ¹ Dickson J, 2001, *Stanford Encyclopedia of Philosophy*.
- ² MacPherson v Buick Motor Co., 217 NY 382, 111 NE 1050 (1916).
- ³ Prosser WL, 1960, "The assault upon the citadel (Strict liability to the consumer)", 69 *The Yale LJ* 1099.
- ⁴ *Donoghue v Stevenson* (1932), AC 562.
- ⁵ "The only justification for a second appeal is that some questions of law are of such fundamental importance that they require consideration by the highest court in the land." Mason A, 2000, *The High Court as Gatekeeper*, MULR 31.
- ⁶ Toohey J, 1992, "Still silvery on its diamond jubilee? On the trail of that elusive snail", 66 *Law Institute J* 379 at 382. "It took extremely sophisticated powers of legal reasoning to work a 'legal revolution' without appearing to be illogical or show complete disregard for the doctrine of precedent."
- ⁷ *Donoghue v Stevenson* (1932), AC 562 at 583, Lord Atkin.
- ⁸ *Australian Knitting Mills Ltd v Grant* (1933), 50 CLR 387.
- ⁹ The majority, Starke, Dixon and McTiernan JJ, found Grant's claim failed against the retailer and the manufacturer, Evatt J dissented. Extracts Starke J, pp 400-409; Dixon J, pp 419-427.
- ¹⁰ Zines L, 1997, *The High Court and the Constitution*, 4th ed., Butterworths, Sydney, p 424, quoting Chief Justice Dixon 1952.
- ¹¹ From Heydon D, 2003, "Judicial activism and the death of the rule of law", *Quadrant*, quoting a Dixon speech of 1955.
- ¹² Crowley F (ed.), 1974, *A New History of Australia*, William Heinemann Australia, Melbourne. Chapters by different authors are quoted through this paper – see references to footnote 12.
- ¹³ Bennett S (ed.), 1971, *The Making of the Commonwealth*, Cassell Australia, Melbourne. Appeals to the Privy Council ceased in 1986.
- ¹⁴ MacPherson v Buick Motor Co. (1916), "If the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made, it is then a thing of danger".
- ¹⁵ *Grant v Australian Knitting Mills* (1935), AC 85 at 107.
- ¹⁶ Judiciary Act 1903, implementing Chapter III, Commonwealth of Australia Constitution Act 1900 (Imp). High Courts by Chief Justices: Griffith 1903-19, Knox 1919-30, Isaacs 1930-31, Duffy 1931-35, Latham 1935-52, Dixon 1952-64, Barwick 1964-81, Gibbs 1981-87, Mason 1987-95, Brennan 1995-98, Gleeson 1998-.
- ¹⁷ Neumann E, 1973, *The High Court of Australia, A Collective Portrait 1930 to 1972*, 2nd ed., University of Sydney. Twelve non-constitutional cases to one constitutional matter up to 1965.
- ¹⁸ Mason A, 2000, *The High Court as Gatekeeper*, MULR 31.
- ¹⁹ Neumann, above, referring to Sawyer G, 1957, "The Supreme Court and the High Court of Australia", *Journal of Public Law VI*, 488.
- ²⁰ Mackay v Davies (1904), 1 CLR 483, 491-496. The Act s15: 'Every inspector may demand and receive the sum of three pence for every head of cattle or skin inspected by him under this Act, to be paid by the keeper of any licensed house ...).

- ²¹ Queensland Wire Industries Pty Ltd v Broken Hill Proprietary Co. Ltd (1989), 167 CLR 177, Mason and Wilson JJ.
- ²² Welsman SJ, 1995, "In Queensland Wire, The High Court has provided an elegant backstop to 'use' of market power.", 2, *Competition and Consumer Law Journal*, 280.
- ²³ Willmann v Petersen (1905), 2 CLR 1 at 15, 21, 26-27.
- ²⁴ Barwick CJ in North Eastern Dairy Co. Ltd. v. Dairy Industry Authority of NSW (1975), 134 CLR 559 referring to Milk Board (N.S.W.) v. Metropolitan Cream Pty. Ltd (1939), 62 CLR 116.
- ²⁵ Kirby Justice M, 2000, "Constitutional Interpretation and Original Intent: A Form of Ancestor Worship", MULR 1. "When an old line of authority is overturned, this may sometimes be explained not by reference to an error in the perception of the Justices who propounded that authority at the time of its invention and first applications, but rather by the fact that the eyes of new generations of Australians inevitably see the unchanged language in a different light. The words remain the same. The meaning and content of the words take colour from the circumstances in which the words must be understood and to which they must be applied." Referring to the 'living force' concept Clark A, *Studies in Australian Constitutional Law*, 1997.
- ²⁶ Zines, 1997, *The High Court and the Constitution*. Various pages.
- ²⁷ For instance in the Melbourne University Law Review – references above/ below, among others: Kirby M, Welcome to Law Reviews (2002), MULR 1; Gava J, Law Reviews: Good For Judges, Bad For Law Schools? (2002), MULR 29.
- ²⁸ Goldsworthy J, Interpreting the Constitution in its Second Century (2000), MULR 27.
- ²⁹ Gava, 2002, above.
- ³⁰ Carrigan F, 2003, *A Blast From The Past: The Resurgence Of Legal Formalism*, MULR 6. From Macquarie University. Also Gava, 2003, *Another Blast From The Past Or Why The Left Should Embrace Strict Legalism*, MULR 7. Adelaide University.
- ³¹ McMillan J, Evans G, Story H, 1983, *Australia's Constitution, Time for Change?*, Law Foundation of NSW, Sydney.
- ³² Heydon Justice D, 2003, "Judicial activism and the death of the rule of law", *Quadrant*, p 9.
- ³³ Basu PK, 2003, *Legacy of a Leader, Asia-Inc*, p 16.
- ³⁴ Alexander F, 1967, *Australia since Federation*, Thomas Nelson Australia, various pages quoted through this AgLaw paper.
- ³⁵ Pearson C, "Marketing a free trade myth", *The Weekend Australian*, 20 September 2003, p 20.
- ³⁶ "The Policy of the Commonwealth Mr Barton's address. A great reception and a great meeting", *Maitland Daily Mercury*, January 1901.
- ³⁷ McCarter v Brodie (1950), 80 CLR 432 at 499, Fullagar J.
- ³⁸ Fox v Robbins (1909), 8 CLR 115
- ³⁹ Lawyerly cleverness in opening 'original jurisdiction' fast tracks has been identified as a factor in multiplication of immigration appeals to the High Court – from 377 in 2001-2002 to 2384 cases in 2002-2003: *The Australian*, 27 December 2003.
- ⁴⁰ From Crowley, Alexander, as above. Under the Paterson scheme, the Federal Government approved price increases on dairy products sold to Australian consumers

- to cover losses on export sales over production costs. Similar arrangements were still operating in some States until dairy deregulation in 2000.
- ⁴¹ Radi R in Crowley, The 'danger of over-production was dismissed as quite groundless' by a NSW Legislative Council inquiry in 1921 – *Conditions and Prospects of the Agricultural Industry and Methods of Improving the Same*.
- ⁴² The State of New South Wales v The Commonwealth (1915) 20 CLR 54-111; Griffith CJ and the Court found the Inter-State Commission was not a Court with judicial power and could not adjudicate on questions such as s92. Part of the *Inter-State Commission Act 1912* was *ultra vires* (beyond power) so invalid.
- ⁴³ James v South Australia (1927), 40 CLR 1.
- ⁴⁴ James v Cowan (1930), 43 CLR 393 High Court; *James v Cowan* (1932) 47 CLR 386 Privy Council.
- ⁴⁵ Zines, 1997, above Chapter 6. Zines suggests Justice Dixon's 'individual right' reading of 'absolutely free' in s92 derives from 19th century 'laissez faire' philosophy, taking freedom of the individual to conduct their life and business as basic with interference to be justified by social necessity (public benefit). The 'free-trade' approach takes Constitution Chapter IV 'Finance and Trade' as context and reads s92 as 'the freedom of entry and exit from one State to another of goods and persons'.
- ⁴⁶ Bank of New South Wales v Commonwealth (1948), 76 CLR 1.
- ⁴⁷ James v Commonwealth (1939), 62 CLR 339, Privy Council.
- ⁴⁸ The Peanut Board v The Rockhampton Harbour Board (1932), 48 CLR 266.
- ⁴⁹ Matthews v The Chicory Marketing Board (Victoria) (1937-1938), 60 CLR 263.
- ⁵⁰ The Australian Coarse Grains Pool Pty Ltd v The Barley Marketing Board (1985), 157 CLR 605. Also Carter v Potato Marketing Board (1951), 84 CLR 460; Egg Marketing Board v Bonnie Doone Trading Co (NSW) Pty Ltd (1962), 107 CLR 27.
- ⁵¹ The Milk Board (NSW) v Metropolitan Cream PL (1939), 62 CLR 116
- ⁵² Sexton M, Review of "Owen Dixon by Philip Ayers", *Sydney Morning Herald*, 21 June 2003.
- ⁵³ For instance: The Dairy Farmers Co-operative Milk Company Ltd v The Commonwealth and others (1946) 73 CLR 381. See also section 3 on Control, Resistance and Responsibility, below.
- ⁵⁴ Bolton GC, Chapter 11 in Crowley F (ed.) see footnote 12.
- ⁵⁵ Writes Professor LJM Cooray, in *The Australian Achievement*, 2003. "The doctrine of judicial precedent is at the heart of the common law system of rights and duties. The courts are bound (within prescribed limits) by prior decisions of superior courts. Adherence to precedent helps achieve two objects of the legal order. Firstly it contributes to the maintenance of a regime of stable laws. This stability gives predicability to the law and affords a degree of security for individual rights. Secondly it ensures that the law develops only in accordance with the changing perceptions of the community and therefore more accurately reflects the morals and expectations of the community." (But see Zines on the High Court propensity not to be bound by its own decisions.)
- ⁵⁶ See for instance, Mason J in The Australian Coarse Grains Pool Pty Ltd v The Barley Marketing Board (1985), 157 CLR 605.

- ⁵⁷ Clements and Marshall Pty. Ltd v. Field Peas Marketing Board (Tas) (1947), 76 CLR 401. Field Peas Marketing Board (Tas) v Clements and Marshall Pty Ltd (1948), 76 CLR 414.
- ⁵⁸ Bank of NSW v The Commonwealth (1948), 76 CLR 1. Notable too for the clash of Attorney General HV Evatt (previously of the High Court, judge turned politician) and King's Counsel Garfield Barwick who in 1958 entered Federal Parliament, became Attorney General, and then in 1964 Chief Justice of the High Court.
- ⁵⁹ Grannall v Marrickville Margarine Pty Ltd (1955), 93 CLR 55. Dixon CJ, McTiernan, Webb, Fullagar and Kitto JJ.
- ⁶⁰ Beal v Marrickville Margarine Pty Ltd (1966), 114 CLR 283. McTiernan, Kitto, Menzies, Windeyer and Owen JJ.
- ⁶¹ In a 1995 interview Lord Denning talked about "the underlying Christian principles that inspired Lord Atkin's decision" as well as USA cases: www.thepaisleysnail.com/denning.shtml dl, December 2003.
- ⁶² Blackshield T and Williams G, 2002, *Australian Constitutional Law and Theory*, The Federation Press. Sydney.
- ⁶³ North Eastern Dairy Co Ltd v Dairy Industry Authority of NSW (1975), 134 CLR 559.
- ⁶⁴ Buck v Barone (1976), 135 CLR 110.
- ⁶⁵ Perre v Pollitt (1976), 135 CLR 139.
- ⁶⁶ For example, Bartter's Farms Pty Ltd argued, unsuccessfully, in 1978 that the NSW regulations limiting the number of hens it could keep for production of eggs for sale and delivery from NSW into other States directly impacted on its interstate trade in eggs and egg products. The High Court continued the 'clear principle' that the regulations applied to the 'activity of production' and were remote on impact on trade and interstate trade: *Bartter's Farms Pty Ltd v Todd* (1978), 139 CLR 499, eg Gibbs J at 516 referring to Grannall's case (1955), 93 CLR 55.
- ⁶⁷ Clark King & Co Pty Ltd v Australian Wheat Board (1978), 140 CLR 120.
- ⁶⁸ Uebergang v Australian Wheat Board (1980), 145 CLR 266.
- ⁶⁹ Permewan Wright Consolidated Pty Ltd v Trehwitt (1979), 145 CLR 1
- ⁷⁰ Pilkington v Frank Hammond Pty Ltd (1974), 131 CLR 124. See also: *Russell v Walters* (1957), 96 CLR 177 (wholesale fruit Melbourne to Tasmania); *Bell Bros Pty Ltd v Rathbone* (1963), 109 CLR 225 (timber WA) among others transport cases.
- ⁷¹ Defined by economist Douglas Copeland after the Second World War. In the 1990s a strong private business sector leading forceful growth was emphasised by the main political parties and many commentators. From, Prime Minister Keating: "Nothing is ever going to take the place of entrepreneurship, of investment and of the raw employment that comes with it", Speech, 15 June 1995.
- ⁷² *Cole v Whitfield* (1988) 165 CLR 360.
- ⁷³ *Barley Marketing Board (NSW) v Norman* (1990), 171 CLR 182.
- ⁷⁴ Ackland R, Same gender, same city, same university, same club ... now the same court, *Sydney Morning Herald*, 20 December 2002.
- ⁷⁵ *Nationwide News Pty Ltd v Wills* (1992), 177 CLR 1. See for instance the 2003 debate about cattle tick inspections: "Cattle will be able to be moved across the NSW-

- Queensland border west of Killarney without stopping for cattle-tick inspections ... NSW Agriculture is satisfied that cattle-tick control measures undertaken in Queensland are effective in preventing the spread of ticks into the State." The Farmshed.com.au, 3 October 2003.
- ⁷⁶ Blackshield and Williams, footnote 62, including a quotation from Sir Garfield Barwick on the *Cole v Whitfield* decision, in NSW Bar Association, *Bar News* Summer 1989: "They've got a magnificent remark in it that the Constitution might provide the text but not the test ... the test is whether the law is passed from a protectionist point of view. It's really laughable."
- ⁷⁷ Uren D, 1990, Editor's Note, *Business Review Weekly*, 24 August, p 21.
- ⁷⁸ "Many more opportunities for business expansion will emerge as Asia-Pacific markets are liberalised between now and 2020", Minister for Small Business, Media Release, 29 September 1995. The 'Asian opportunity' was recognised by both major political parties.
- ⁷⁹ Prime Minister to Australian Institute of Directors, 21 April 1993.
- ⁸⁰ Opposition Leader Howard, 1995, *A competitive Australia* -The Government's role in generating the conditions to make Australia a better place to do business and create jobs, p 2.
- ⁸¹ Kirk J, *Constitutional Implications (II), Doctrines Of Equality And Democracy* (2001), MULR 2.
- ⁸² Kirby Justice M, 2000, above. "Nearly 90 years later, legal history came to the rescue of constitutional interpretation."
- ⁸³ Meagher D, 2002, "Guided By Voices? – Constitutional Interpretation On The Gleeson Court", *Deakin Law Review*, 14.
- ⁸⁴ In 1995, the Council of Australian Governments (COAG) agreed to implement the major recommendations of the 1993 Hilmer Committee Report on *National Competition Policy*. The NCP Reform Package and Competition Principles Agreement were to be applied by each government to all laws within its jurisdiction. NCP benefit to the Australian community was to be achieved by: extending the reach of the anti-competitive conduct laws in Part IV of the *Trade Practices Act* to virtually all private and public sector businesses; improving performance of essential infrastructure; improving performance of government businesses through structural reform, reviewing and reforming laws restricting competition, and ensuring that any new restrictions provide a net community benefit. National Competition Council, *National Competition Policy Second Tranche Assessment*, June 1999.
- ⁸⁵ Speech President National Farmers' Federation, 19 July 2000.
- ⁸⁶ Welsman SJ, *Regulations Impact Study – Rules Impacting on Red Meat Industry 1998; Review of Regulatory Environment – Australian Pork Industry*, 1999.
- ⁸⁷ *Grain Pool of WA v The Commonwealth* (2000), 202 CLR 479.
- ⁸⁸ *NEAT Domestic Trading Pty Ltd v AWB Limited* (2003), HCA 35.
- ⁸⁹ *The Sydney Morning Herald*, 13 September 2003, p 10.
- ⁹⁰ In its first year, *The President of the Shire of Arapiles v The Board of Land and Works* (1904), 1 CLR 679. Were the McPhees, (lessees from the Crown under the *Mallee*

Pastoral Leases Act 1883), or the Shire Council, or the State Board of Land and Works responsible for paying £95 for 3 miles of wire netting fence as required under the *Vermin Destruction Act 1890*? (The Board).

- ⁹¹ Ex parte H V McKay (1907), 2 CAR 1.
- ⁹² Higgins determined that to be 'fair and reasonable', wages should meet 'the normal needs of the average employee ... as a human being living in a civilised community' where an 'average employee' was an unskilled labourer with a dependent wife and three children. The wage should keep that family in 'a condition of frugal comfort estimated by current human standards.' 'Those who have acquired a skilled handicraft have to be paid more than the unskilled labourer's minimum.' Creighton B, 2000, "One Hundred Years of the Conciliation and Arbitration Power: A Province Lost?", MULR 33.
- ⁹³ *The Commonwealth v Barger*; *The Commonwealth and AW Smart v McKay* (1908), 6 CLR 41.
- ⁹⁴ Crowley, footnote 12. Alfred Deakin was Prime Minister 1903-1904, 1905-1908, 1909-1910. Andrew Fisher was Labor PM 1908-09, 1910-13, 1914-15. "Although very different in background, these two men share the title of founder of the new nation's statutory structure." William Hughes was Labor Prime Minister 1915-1916 then Nationalist PM 1916-1923. See primeministers.naa.gov.au
- ⁹⁵ *Colonial Sugar Refining Co Ltd v Attorney-General for the Commonwealth* (1912) 15 CLR 182, quote p 197 referring to the High Court decision in *Huddart Parker & Co Proprietary Ltd v Moorehead* (1909), 8 CLR 330.
- ⁹⁶ *Attorney-General for the Commonwealth of Australia v The Colonial Sugar Refining Company Limited* (1913), 17 CLR 644. " ... the High Court has taken the exceptional course of so certifying ... [The PC has] given anxious consideration to the question brought before them under these circumstances, and they have heard arguments of much ability and fullness from learned counsel of the Bars both of England and of Australia."
- ⁹⁷ *The Wool Sliping and Scouring Company Limited v The Central Wool Committee and Others* (1920), 28 CLR 51.
- ⁹⁸ Walker G de Q, 1920, *The Seven Pillars of Centralism: Federalism and the Engineers' Case*, www.nationbuild.com, referring to *The Amalgamated Society of Engineers and The Adelaide Steamship Company Limited*, 28 CLR 129.
- ⁹⁹ Walker, above, referring to Craven G, *The High Court and the States* (1995), 6 UTAC 65, 69-70; also Craven, *The Engineers' Case: Time for a Change?* (1997), 8 UTAC 81; Sawyer G, *Australian Federalism in the Courts*, Melbourne University Press, 1967.
- ¹⁰⁰ *Ex Parte Nelson (No. 1)*, 42 CLR 209.
- ¹⁰¹ NSW Farmers' Association, Moratorium needed on removal of cattle tick inspections, 3 October 2003.
- ¹⁰² *Hopper v The Egg and Egg Pulp Marketing Board* (1939), 61 CLR 665. On Constitution s90 – Exclusive power over customs, excise, and bounties.
- ¹⁰³ *Brunswick Corporation v Stewart* (1941), 65 CLR 88.
- ¹⁰⁴ *Carter v The Egg & Egg Pulp Marketing Board* (1942), 66 CLR 557. Disputing the Marketing of Primary Products Act 1935 (Vic).
- ¹⁰⁵ *The Dairy Farmers' Co-operative Milk Company Limited v The Commonwealth* (1946), 73 CLR 381.

- ¹⁰⁶ The Constitution s52 (xxxi), “The acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws.”
- ¹⁰⁷ Australian Apple and Pear Marketing Board v Tonking (1942), 66 CLR 77.
- ¹⁰⁸ Queensland Stations Pty Ltd v The Federal Commissioner of Taxation (1945), 70 CLR 539.
- ¹⁰⁹ Carrigan, 2003, above, “Dixon J’s test was refined by the Mason Court in *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16 into the current common law test for identifying an employee. It focuses on degree of control, but uses other factors including form of payment, ownership of tools, taxation method, chance of profit or loss, and economic dependence of the party on another to distinguish an employee and an independent contractor.
- ¹¹⁰ The Federal Government did not have power under The Constitution to nationalise banking: *Bank of New South Wales v Commonwealth* (1948), 76 CLR 1, nor the power to outlaw a particular political grouping: *Australian Communist Party v The Commonwealth* (1951), 83 CLR 1.
- ¹¹¹ *National Research Development Corporation v Commissioner of Patents* (1959), 102 CLR 252.
- ¹¹² *Commissioner of Patents v Microcell Ltd* (1959), 102 CLR 232; *Re B.A.’s Application* (1915), 32 RPC 348.
- ¹¹³ The *NRDC decision* referred to, among others, *Lane Fox v Kensington and Knightsbridge Electric Lighting Co* (1892), 3 Chapter 424; *Hickton’s Patent Syndicate v Patents and Machine Improvements Co Ltd* (1909), 26 RPC 339.
- ¹¹⁴ *Williams v Metropolitan and Export Abattoirs Board* (1953), 89 CLR 66.
- ¹¹⁵ *Damjanovic & Sons Pty Ltd v The Commonwealth* (1968), 117 CLR 390 (a federal poultry industry levy); *Butler v Egg and Egg Pulp Marketing Board* (1966), 114 CLR 185 (controlled egg marketing in Victoria – eggs valued at £4,000 when sold through the board would return £2,900 to the farmers - who had sold elsewhere in breach of rules); *Egg Marketing Board v Bonnie Doone Trading Co (NSW) Pty Ltd* (1962), 107 CLR 27 (eggs in Queensland); *Harper v Victoria* (1966), 114 CLR 361 (eggs); *O’Sullivan v Miracle Foods (SA) Pty Ltd* (1966), 115 CLR 177 (margarine control SA); *Bartter’s Farms Pty Ltd v Todd* (1978), 139 CLR 499 (egg industry stabilisation NSW); *Clark King & Co Pty Ltd v Australian Wheat Board* (1978), 140 CLR 120 (restrictions under the NSW Wheat Industry Stabilisation scheme); *Ex parte H. Brazil & Co Pty Ltd* (1978), 138 CLR 194 (protesting the *Hen Quotas Act 1973-1975 Qld*); *Perre v Pollitt* (1976), 135 CLR 139 (SA citrus marketing orders); *Barley Marketing Board (NSW) v Norman* (1990), 171 CLR 182; *Bread Manufacturers of NSW v Evans* (1994), 180 CLR 404 (bread price fixing).
- ¹¹⁶ *Logan Downs Pty Ltd v Federal Commissioner of Taxation* (1965), 112 CLR 177.
- ¹¹⁷ *Unilan Holdings Pty Limited v The Honourable John Charles Kerin* (1993), 44 FCR 481. The wool firms’ attempted claim that Minister Kerin had breached *Trade Practices Act* s52 through misleading and deceptive conduct had been struck out earlier.
- ¹¹⁸ *National Competition Policy*, Report of the Independent (Hilmer) Committee of Inquiry 1993.

- ¹¹⁹ National Competition Council, *National Competition Policy Second Tranche Assessment*, June 1999.
- ¹²⁰ NCC as above, June 1999. Also, Willett, E, NCC, *National Competition Policy and the Rural Sector*, 1999.
- ¹²¹ NCC Assessment of governments' progress in implementing the National Competition Policy and related reforms, August 2003.
- ¹²² NEAT Domestic Trading Pty Limited v AWB Limited (2003), HCA 35. The only direct questioning of NCP interpretation appears to be Hamersley Iron Pty Ltd v National Competition Council (1999), FCA 867 in the Federal Court.
- ¹²³ Robert White, former MD Westpac (1992) *The Cure, ABM*, February, p 29. Business Council of Australia (1992), *The invisible barriers to change in Australia's industrial relations, Business Council Bulletin No.91*.
- ¹²⁴ *State Wage Case – March 1992* (1992) 41 IR 239.
- ¹²⁵ Sloan J (1994-95), "Understanding Australia's industrial relations system", 10(4) *Policy* 59 at 60.
- ¹²⁶ Borland J, Chapman BJ, Rimmer M, "Microeconomic reform in the Australian labour market", in Forsyth P (ed.), 1992, *Micro-economic Reform in Australia*, Allen & Unwin, Sydney.
- ¹²⁷ Interview, Micro Reform – Keating's 'Big Agenda' for the 90s, *Decisions*, NAB February 1990.
- ¹²⁸ *AMIEU v Mudginberri Station Pty Ltd* (1986), 161 CLR 98.
- ¹²⁹ *Mudginberri Station Pty Ltd v Australasian Meat Industry Employees Union* (1987), 74 ALR 7. A reduced order of \$1.5m was made against the union by the Full Federal Court on appeal.
- ¹³⁰ *Re Australasian Meat Industry Employees' Union ex parte Aberdeen Beef Co Pty Limited and Others* (1993), 176 CLR 154.
- ¹³¹ Mason A, 2000, *The High Court as Gatekeeper*, MULR 31. "Generally speaking, a question of law of public importance will arise if the case involves a question of legal principle rather than a question of the application of legal principle. There may ... be exceptional situations in which the application of legal principle will generate a question of public importance. A question of statutory interpretation, if sufficiently important, will also generate such a question."
- ¹³² *Frank Perre & Others v Apand Pty Ltd* (1997), 1275 FCA.
- ¹³³ *Perre v Apand Pty Ltd* (1999), HCA 36. Full Court. Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ.
- ¹³⁴ *From In San Sebastian Pty Ltd v The Minister* (1986), 162 CLR 340 quoting Cardozo CJ in *Ultramares Corporation v Touche* (1931), 174 NE 441.
- ¹³⁵ See for instance analysis by Peter Underwood, 2003, www.law.uts.edu.au/~peteru/torts/f12210.htm dl 7.11.03.
- ¹³⁶ Examples, Cane P, 2000, "Blight of economic loss: is there life after Perre v Apand?", *Torts Law Journal*, 8:3, 246; Feldthusen B, 2000, "Pure economic loss in the High Court of Australia: reinventing the square wheel?", *Tort Law Review* 8:1, 33-52.
- ¹³⁷ Allens Arthur Robinson, May 2002, "Pure economic loss in Qld – new case, same news; or Gadens Lawyers", 1999, "High Court rules on pure economic loss - it's the vibe", www.gadens.com.au

- ¹³⁸ Dovuro Pty Limited v Wilkins (2003), HCA 51. Gleeson CJ and Kirby J felt that had Dovuro checked it may have been advised the seeds were 'of concern'.
- ¹³⁹ NEAT Domestic Trading Pty Limited v AWB Limited (2003), HCA 35 (refer above).
- ¹⁴⁰ The Grain Pool of WA v The Commonwealth (2000) 202 CLR 479. Handled as a challenge to the validity of *Plant Breeder's Rights Act 1994* (Cth) The High Court found that the *Plant Breeder's Rights Act* was valid.
- ¹⁴¹ See *Re AMIEU ex parte Aberdeen Beef*, 1993 (above) and the 1995 Mengel case, below.
- ¹⁴² Alexander, above, footnote 34.
- ¹⁴³ *Ex Parte Nelson* (No. 1) (1928), 42 CLR 209 The Donoghue v Stevenson case was supported by members of the Scottish bar keen to see the issue tested.
- ¹⁴⁴ In this paper for example: *Willmann v Petersen* (1905); *North Eastern Dairy v Dairy Industry Authority NSW* (1975); *Apple & Pear Marketing Board v Tonking* (1942); *NEAT v AWB* (2003).
- ¹⁴⁵ Trebeck D, 2002, "Must the good guys always lose?" Speech, Australian/Cairns Group perspective on the future of agriculture.
- ¹⁴⁶ For instance, from 1998 to 2003, red meat, pork, wool, horticultural and dairy industry owned companies.
- ¹⁴⁷ Some insight is provided by a series of cases on director responsibility and NRMA Limited (also a company with a large base of shareholders holding expectations wider than company profitability): *NRMA Ltd v Morgan* (1999), NSWSC 407; *National Roads and Motorists' Association v Gleeson* (2001), 39 ACSR 401.
- ¹⁴⁸ Trebeck D, 2003, *The Policy Slide, Agribusiness perspectives*, paper 57. See also: Hickman S, Andrews C, 2003, *Rethinking Australian Agriculture*, The Reid Group report.
- ¹⁴⁹ In this paper: *Barger's 1908, Rockhampton Harbour Board* (1932), *Australian Knitting Mills* (1933), the *NRDC case 1959*.
- ¹⁵⁰ *Perre v Apand Pty Ltd* (1999), HCA 36.
- ¹⁵¹ Dickson J, Interpretation and Coherence in Legal Reasoning, *The Stanford Encyclopedia of Philosophy* (Fall 2001 edition).
- ¹⁵² "Policy is executive decision-making based on popular mandate. Principle, with which the judicial function is directly involved, is the body of legal rules and principles having their roots in human rights and respect for individual dignity that form the moral foundation of a particular society ... [and] inextricably tied in with the continuity that forms the basis of the rule of law." Einfield J in *Re: Premalal and Minister for Immigration, Local Government and Ethnic Affairs* (1993), 41 FCR 117.
- ¹⁵³ Gava J, 2001, "The rise of the hero judge", UNSWLJ 60.
- ¹⁵⁴ Sturgess G, Chubb P, 1988, *Judging the world – Law and politics in the world's leading courts*, Butterworths, Sydney.
- ¹⁵⁵ Wait M, 2001, "The Slumbering Sovereign: Sir Owen Dixon's Common Law Constitution Revisited", *Federal Law Review* 2, referring to Gleeson AM, 2000, "Judicial Legitimacy", *20 Australian Bar Review* 4.
- ¹⁵⁶ Zines L, "Legalism, realism and judicial rhetoric in constitutional law, 2002-2003", *Bar News*, referring to views of Justice Paul Finn.
- ¹⁵⁷ Crawford J, 1993, *Australian Courts of Law*, 3rd ed., Oxford University Press.

- ¹⁵⁸ Cases referenced included: Re BA's Application (1915), 32 RPC 348, In Re Rau Gesellschaft's Application (1935), 52 RPC 362, Re Hamilton-Adam's Application (1918), 35 RPC 90, Re RHF's Application (1944), 61 RPC 49, Re Application by Standard Oil Development Co. (1951), 68 RPC 114, Commissioner of Patents v Microcell Ltd. (1959), 102 CLR 232, Elias v Grovesend Tinsplate Co. (1890), 7 RPC 455, Moser v Marsden (1893), 10 RPC 350, Pirrie v York Street Flax Spinning Co. Ltd. (1894), 11 RPC 429, Hickton's Patent Syndicate v Patents and Machine Improvements Co. Ltd. (1909), 26 RPC 339, Lane Fox v Kensington and Knightsbridge Electric Lighting Co. (1892), 3 Ch 424, Hickton's Patent Syndicate v Patents and Machine Improvements Co. Ltd. (1909), 26 RPC 339, Boulton v Bull (1795), 1 H Bl 463, Hornblower v Boulton (1799), 8 TR 95, R. v Wheeler (1819), 2 B & Ald 345 (106 ER 392), Hall v Jarvis (1822), 1 Web PC 100, Re Virginia-Carolina Chemical Corporation's Application (1958), RPC 35.
- ¹⁵⁹ Horrihan B, 2000, *Applied Jurisprudence in the High Court, Legal Education, and Legal Practice*.
- ¹⁶⁰ For instance, Mason J at length in *The Australian Coarse Grains Pool Pty Ltd v The Barley Marketing Board* (1985), 157 CLR 605, but contrast the more succinct, unanimous and single Bench decision in *Cole v Whitfield* (1988), 165 CLR 360.
- ¹⁶¹ Sturgess and Chubb, footnote 154, quoting Mason A, The role of a Constitutional Court in a Federation' (1986), *Federal Law Review* 16, 5.
- ¹⁶² In the High Court, Northern Territory and others v Mengel and others (1995), 129 ALR 1 (Mason CJ with Dawson, Toohey, Gaudron and McHugh JJ, two dissenting). In the NT Supreme Court on first appeal, Northern Territory, Tabrett and Baker v Mengel and others (1994), 95 NTR 8. References: Beaudesert Shire Council v Smith (1966), 120 CLR 145; James v The Commonwealth (1939), 62 CLR 339; John v Federal Commissioner of Taxation (1989), 166 CLR 417 (on reviewing earlier decisions).
- ¹⁶³ As set out in the lead judgment NT and Others v Mengel (1995).
- ¹⁶⁴ Perrett v Williams (2003), NSWSC 381 Wood CJ at Common Law. Also Sunraysia Natural Beverage Company Pty Ltd v NSW (2003), NSWSC 190, referring specifically to Deane J.
- ¹⁶⁵ Welsman SJ, 1995, "Seeing (some) litigation as national investment", 33(6), *NSW Law Society Journal*.
- ¹⁶⁶ Mason A, 1998, "Constitutional Interpretation: Some Thoughts", 20, *Adelaide Law Review*, 49.
- ¹⁶⁷ Also Meagher D, 2002, "Guided By Voices ? – Constitutional Interpretation On The Gleeson Court", *Deakin Law Review* 14.
- ¹⁶⁸ Zines, Sir Maurice Byers, 2002, address to a more seasoned audience than his 1997 book and some years on.