

The appeals were heard together.

HOME BENEFITS PTY. LTD. v. CRAFTER

*Ligertwood, K.C., and Ward* for the appellants.*Hannan, K.C., and Gillespie* for the respondents.*Cur. adv. vult.*

The following written judgments were delivered:—

LATHAM, C.J.—This is an appeal from a conviction of the appellant, under the Trading Stamp Act Amendment Act 1935 (South Australia), sec. 5A (3). The offence charged was that the defendant, on or about 3rd May, 1938, at Hyde Park, in the State of South Australia, by means of a printed circular dated 1st March, 1938, encouraged one Thomas Packman to despatch in South Australia, in exchange for goods, numbers of portions of packages delivered about goods, namely Bushell's tea, which on the said 3rd day of May, 1938, had been, were being, and were intended to be sold and distributed in South Australia.

It was proved that Packman, a constable of police, found in a letter-box at his residence a circular headed by the name and the address in Sydney of the defendant, and that the same name and address were at the foot of the circular. This circular referred to photographs which were printed upon paper packages in which Bushell's tea was sold in South Australia. The circular, which was introduced by the words "Dear Madam," but which was not addressed to any specific person, invited the recipient to tell her friends who regularly used Bushell's tea that they could offer to buy from the defendant Company in Sydney certain articles. The persons who wished to make such an offer were directed to send their name and postal address to the defendant, to identify the article which they wanted, and to send postage stamps of specified amount in each case. The relevant list of articles described and illustrated butter-knives, towels and many other articles which were offered at prices (in postage stamps) which were much less than the value of the goods.

The list also stated the number of photos which would be required in order to procure consideration of the offer to purchase the butter-knives, &c. The circular did not require the photos to be sent to Sydney, but stated that it would be sufficient for the person who wished to buy the butter-knives, &c., to satisfy the Company, "by enclosing photos or otherwise that they have used a sufficient quantity of "Bushell's tea, coffee or cocoa to have the number of "photos stated under the article they required." The circular then stated that, "if this is done it will be "an offer to buy from us in Sydney the article named "at the stated price, which we may accept or refuse, "and a request to us to deliver the article at the "Post Office at Sydney for them, and for the Post "Office to take delivery on their behalf at Sydney as "their agent."

The circular added that the photos would remain the property of the sender, and that, if forwarded, they would be returned if desired if an extra 2d. in stamps for postage were enclosed with the photos. The

circular added that if an offer were not accepted the postage stamps and photos would be returned to the sender.

The questions which arise are whether the evidence establishes encouragement by any person; whether it establishes encouragement of Packman; whether the defendant was a person who (or which) so encouraged; whether the encouragement, if any, was an encouragement to despatch the photographs in exchange for the butter-knives, &c.; and whether the Act is not invalid by reason of sec. 92 of the Constitution. It is by reason of this last contention that the matter comes before this Court upon appeal.

The Trading Stamp Act 1924 prohibited the issue and delivery of "trading stamps," which are defined as including stamps, coupons, packages, &c., which entitle the holder thereof to receive any money or goods from a trading stamp company. "Trading "stamp company" is defined to mean any person, firm or company issuing trading stamps to traders, and directly or by implication promising to redeem the stamps by delivering money or goods. The contest between the Legislature and the coupon trading system was evidently not decided in favour of the Legislature by the Act of 1924, and accordingly the Act of 1935 was passed. This Act is plainly intended to meet devices which had been lawfully used for the purpose of evading the Act of 1924. The circular which was put in evidence in this case was equally plainly devised for the purpose of lawfully evading the application of the later Act.

The Act of 1935 creates in sec. 5A a number of offences. Its operation depends upon sub-sec. (4), which defines the "articles or things" referred to in other sub-sections. These articles or things are any of the following or any portion of the following, namely—"... any stamp coupon docket cover wrapper "package paper photograph document means or device "which has been is or is intended to be issued or "delivered with about concerning relating to or in "connection with any goods which have been are being "or are intended to be sold or distributed in South "Australia" by any person. Sub-section (1) provides that no person shall in South Australia directly or indirectly give or deliver or promise any money, goods, or advantage whatsoever in exchange for any of the articles or things mentioned. Sub-section (2) prohibits any person from inviting or encouraging any other person to commit a breach of sub-sec. (1), or to tender or despatch or offer to tender or despatch any of the articles or things mentioned in exchange as aforesaid.

Sub-section (3) is the provision under which the defendant was prosecuted. It is as follows:—"No "person shall in or from South Australia tender or "despatch or offer to tender or despatch any article "or thing described in sub-section (4) of this section "or any number or combination of any of such articles

"or things in exchange for any money goods reward benefit valuable consideration or advantage whatsoever whether the actual exchange shall be effected or become effective in South Australia or elsewhere." Sub-section (5) provides that no trader shall sell or distribute any goods if any of the said articles or things are issued or delivered with, about, concerning, or relating to such goods. This sub-section also contains a rather remarkable provision, that no trader shall sell any goods, not only if in respect of such articles or things any of the offences mentioned in other sub-sections are being committed, but also if such offences "will or may be committed." It is, perhaps fortunately, not necessary for the Court to attempt to construe or to apply the latter portion of this provision.

The evidence plainly establishes encouragement to despatch photos to the defendant. The readers of the circular are told that if they send a sufficient number of photos with postage stamps they will be regarded as making an offer to purchase butter-knives, &c., for the amount of the postage stamps. This is an encouragement to people to send the photos—that is "the articles or things" mentioned in the section—to the defendant.

It is urged that, as Packman did not send for any butter-knives, &c., or even think of sending for them, he was not encouraged. But there can be encouragement which fails as well as encouragement which succeeds. It is true that the circular was not addressed to Packman, but it is quite obvious that it was intended to influence and might influence the mind of any person into whose hands it should fall.

The next question is whether the defendant can properly be held to be responsible for any encouragement constituted by the circular. In my opinion the defendant's contention upon this point is met by the provisions of sec. 5A (8). Under that sub-section any circular which appears to the Court to be relevant to the charge, and to have been issued or delivered by the person whose name appears thereon, may be given in evidence without formal proof of the issue or delivery thereof, or of the authentication by the person whose name it bears. The sub-section also provides that the circular shall be *prima facie* evidence that any encouragement therein contained was actually made, was in force at the date of the alleged offence, and that it was made by the person whose name appears thereon as making or authenticating the document. In this case, therefore, the production of the circular (which is plainly relevant to the charge) is *prima facie* evidence that the encouragement contained in it was made and that it was made by the defendant.

The next question is whether the encouragement constituted by the circular was an encouragement to do what is prohibited by sub-sec. (3), namely, in this

case, to despatch the articles or things in exchange for goods, namely, butter-knives, &c.

The circular has plainly been drafted in order, if possible, to escape the application of this provision. The circular, it is argued, does not contemplate or suggest any exchange of articles for goods. If the transaction contemplated by the circular is carried out, what happens is that an offer is made to the Company to give postage stamps in return for goods, that is, in substance, to buy the goods for the price represented by the postage stamps. The photos or coupons, if forwarded, do not become the property of the Company. The possession of them is merely required as a qualification for making an offer which the Company will consider, but which it may accept or reject as it thinks proper. It is not even necessary to send any "articles" (photos) in order to procure consideration of the offer. It is sufficient to satisfy the Company that the proposing offeror has the articles. Thus, it is said, there is no encouragement to exchange "articles" for goods.

This argument depends upon the proposition that the phrase "in exchange for" necessarily means that the property in the "articles" or coupons shall be transferred to the person who provides the goods. But it is not necessary to limit the words "in exchange for" in this manner. One of the transactions into which persons are invited and encouraged to enter involves the sending to the Company of coupons and the delivery of goods by the Company after receipt of the coupons. The invitation is: "Send the coupons and we will, if we so decide, send you goods." Such an invitation may properly be described as an encouragement to despatch coupons in exchange for goods.

Finally, it is contended that the Act is unconstitutional, because it infringes sec. 92 of the Constitution. Section 92 provides as follows:—" . . . trade commerce and intercourse among the States whether by means of internal carriage or ocean navigation shall be absolutely free. . . "

The objection which is raised on behalf of the Company is that it wishes to conduct trade in butter-knives, &c., with South Australia by the method described in the circular, that is, by accepting in New South Wales an offer to purchase the butter-knives, which offer is forwarded from South Australia, and by sending them to South Australia. The despatch from South Australia of the particular form of offer contemplated is prevented by the Act. Another objection to the Act is that it limits the methods in which, for example, Bushell's tea, may be sold in South Australia, because sec. 5 prohibits the selling of any goods if coupons are sold with them. This provision applies to all sales, whether they are sales to persons in South Australia or to persons in other States, and it is contended that the Legislature of South Australia has no

HOME BENEFITS PTY. LTD. v. CRAFTY

power to restrict sales to other States in this manner.

In my opinion the answer to these objections is to be found in the fact that the Act does not prevent trade in any goods. It is possible to comply with the Act and to trade in tea and in butter-knives, &c., in the ordinary way. What is prohibited is trading in goods by a particular method. If the Act is applied to the particular facts of this case, trading in butter-knives, &c., as accessory to trading (in this case) in tea is prohibited, and trading in tea under a coupon system is also prohibited. But these provisions constitute a regulation of trade applying generally and applying equally to intrastate and interstate trade. The Act does not stop trading in goods, but regulates trading by excluding a certain manner or method of trading.

According to *James v. The Commonwealth*, [1936] A.C. 578 (1936) 55 C.L.R. 1, [1936] A.L.R. 333, such regulation of interstate trade, not amounting to a mere prohibition of trade, is not excluded by sec. 92. In my opinion there are many difficulties in stating and applying the principle of the decision in *James v. The Commonwealth*. But it is clear that, according to that decision, sec. 92, applying (as it was held to apply) equally to the Commonwealth and the State Parliaments, does not exclude interstate trade from the sphere of legislative action. Any other view would result in legal incoherence. The judgment in *James v. The Commonwealth* provides many examples of regulation of trade which were regarded by their Lordships of the Privy Council as not inconsistent with sec. 92. Among such examples are to be found in Commonwealth legislation the Post and Telegraph Act 1901-1923, Wireless Telegraphy Act 1905, Secret Commission Act 1905, Commerce (Trade Description) Act 1905-1933, Australian Industries Preservation Act 1906-1930, Sea Carriage of Goods Act 1924, the Transport Workers Act 1928-1929—see *James v. The Commonwealth*, 55 C.L.R. at pp. 54-55. State legislation which is not prevented by sec. 92 includes the Sale of Goods Act, Transport Co-ordination statutes (pp. 50, 51), marketing regulations (p. 51), sanitary and health provisions (p. 53), and possibly price-fixing laws (p. 49), [1936] A.L.R. 342.

One of these Acts is said to be justified as being legislation which "forbids irrespective of any State 'boundary objectionable trade practices in interstate trade'" (p. 54). Similarly another Act is justified because it is "aimed at preventing illegitimate methods 'of trade'" (p. 55). The Acts to which reference was made—Secret Commissions Act 1905, Australian Industries Preservation Act 1906-1930—were Federal Acts. A State "has the same power as the Commonwealth 'to legislate for the peace order and good government 'of the State with respect to interstate trade commerce and intercourse,'" subject to territorial limitations and to sec. 109 of the Constitution (p. 41). Thus

if the Commonwealth Parliament can forbid objectionable practices in trade, so also (subject to the conditions mentioned) can a State Parliament—[1936] A.L.R. 337.

If, however, the Federal and State Parliaments are at liberty simply to determine that a particular trade is objectionable, and then to pass a statute to prohibit it, sec. 92 will have no practical effect. Accordingly what has been said in *James v. The Commonwealth* should not be construed as entitling any Parliament to select any trade of which it disapproves and then to prohibit it, interstate as well as intrastate. This conclusion can be avoided by recognising the distinction between prohibition of a trade and the prohibition of a practice in trade. A mere prohibition of any interstate trade cannot be supported as against sec. 92. Thus if legislation involves "a 'burden hindrance or restriction based merely on 'the fact' that people come from another State, such legislation would be an infringement of the provision of sec. 92, that intercourse among the States should be free—*James v. The Commonwealth*, at p. 58. So also, if a special burden is placed on goods in the State to which they have come, 'simply because they 'have come from (another) State,' the legislation would be invalid (p. 59), [1936] A.L.R. 344. But it is consistent with *James v. The Commonwealth* to hold that the prohibition of a particular practice in trading in articles which does not prevent trade in those articles if the prohibited practice is not adopted, does not constitute an infringement of sec. 92. Such a provision may fairly be regarded as a regulation of trade and not a prohibition of it.

I appreciate the difficulties of basing decisions as to the constitutional validity of statutes upon the distinction between regulation and prohibition. Any regulation which creates offences necessarily involves some degree of prohibition. It is difficult to state the distinction logically, but the distinction has been recognised on innumerable occasions in the Courts of the United Kingdom, of Australia and of the United States of America. The result in a particular case may depend upon a preliminary postulate as to the extent of the subject-matter involved—upon an assumption as to the universe of discourse. A law penalising trading in meat which has not been inspected is a regulation when it is viewed in relation to buying and selling meat, or in relation to buying and selling generally; but it is a prohibition of the sale of uninspected meat. If a case is doubtful, it may be remembered that, when the validity of a statute is in question, a court applies a counsel of prudence in abstaining from declaring a statute to be invalid where the matter is left in doubt. Whatever the difficulties may be, it appears to me, as at present advised, that *James v. The Commonwealth* involves the proposition that the distinction between

regulation and prohibition, unsatisfactory and vague as it sometimes proves to be, is relevant in considering the application of sec. 92.

In this case I do not think it necessary to examine other aspects of the decision in *James v. The Commonwealth*, for example, the extent to which problems arising under sec. 92 may properly be solved by referring a challenged statute to some particular category of legislative power other than a power to legislate with respect to trade, commerce or intercourse.

In the present case the prohibition of what I may call coupon trading is not a prohibition of trading in any goods. It is a regulation of the trade in all goods. The South Australian Parliament evidently regards the coupon system as being parasitical upon legitimate trade. "For our purposes we must assume that, if a state of facts could exist that would justify such legislation, it actually did exist when the statute now under consideration was passed. For us the question is one of power, not of expediency. If no state of circumstances could exist to justify such a statute, then we may declare this one void, because in excess of the legislative power of the State. But if it could, we must presume it did. Of the propriety of legislative interference within the scope of legislative power, the Legislature is the exclusive judge"—*Munn v. Illinois*, (1876) 94 U.S. 113 at p. 132, 24 Law. Ed. at p. 86. If either the Commonwealth Parliament or the State Parliament can prohibit monopolies and penalise the taking of secret commissions—see *James v. The Commonwealth* (*supra*) pp. 54-55, [1936] A.L.R. 342, it is, I think, impossible to deny to a State Parliament the power of prohibiting the offering of discounts upon prices of goods by a method which it is reasonably open to any Parliament to regard as a disturbance of legitimate trade. In my opinion the objections to the Act based upon constitutional grounds have failed.

For the reasons stated the appeal should be dismissed.

#### HOUSEHOLD HELPS PTY. LTD. v. CRAFTER.

LATHAM, C.J.—The determination of this appeal depends upon the same considerations as those which arise in *Home Benefits Pty. Ltd. v. Cramer*. This appeal should be dismissed for the same reasons.

RICH, J.—These cases were heard together, and the second one stands or falls with the decision of the first. The main question is concerned with the constitutional validity of sec. 5A of the Trading Stamp Act 1924-1935 (South Australia). Other questions which, standing alone, would not be the subject of an appeal to this Court, are so involved in the Federal matter as to require decision—*Duncan v. Vizzard*, (1935) 53 C.L.R. 493 at pp. 501, 504. The first of these questions relied upon as a defence to the offence alleged under sec. 5A (2) (b) of the South Australian

Act relates to the delivery of the circular the subject of the information. In my opinion the presumptive proof provided by sub-sec. (8) of sec. 5A, combined with the fact that the copy of the circular was found in the informant's letter-box, is sufficient proof of delivery. It was next contended that the circular did not amount to an encouragement within the meaning of sec. 5A (2). The offence is not concerned with the subjective effects, but is founded on what the particular defendant says or does. Judged by this standard, I think that the circular did encourage the informant to despatch certain parts of tea packages to the defendant in exchange for goods. And I am of opinion that the proposal contained in the circular, when carried to completion, is not a sale of goods, but is included within the words of sec. 5A (2) (b), and the charge laid in the information is duly laid.

On the question of the constitutional validity of the legislation I incline to the view that the particular transaction evidenced in this case is not forbidden by sec. 92 of the Constitution.

In my opinion both appeals should be dismissed.

STARKE, J.—Appeals from the decision of a Special Magistrate sitting as a Court of summary jurisdiction in Adelaide, convicting the appellants of offences under the Trading Stamp Act Amendment Act 1935, 26 Geo. V. (No. 2255).

The Act provides, by sec. 5, that no person shall, directly or indirectly, either in writing or otherwise howsoever, invite or encourage any other person to or suggest that any other person should tender or despatch or offer to tender or despatch in or from South Australia any article or thing described in sub-sec. (4) of the section, or any number or combination of any such articles or things in exchange for any money, goods, reward, benefit, valuable consideration or advantage whatsoever, whether the actual exchange shall be effected or become effective in South Australia or elsewhere. The articles mentioned in sub-sec. (4) are any of the following, namely: any stamp, coupon, ticket, cover, wrapper, package, paper, photograph, document, means or device which has been, is or is intended to be issued or delivered, with, about, concerning, relating to or in connection with any goods which have been, are being or are intended to be sold or distributed in South Australia, whether by the person inviting, encouraging or suggesting as before mentioned, or any other person whomsoever.

Home Benefits Pty. Ltd. was charged under this section, that it by means of a circular encouraged one Packman to despatch in South Australia in exchange for goods, numbers of portions of packages delivered about goods, namely, Bushell's tea, which had been, were being and were intended to be sold and distributed in South Australia.

Household Helps Pty. Ltd. was charged under the same section, that it by means of an advertisement

HOME BENEFITS PTY. LTD. v. CRAFTER

encouraged other persons to despatch in South Australia in exchange for goods numbers of wrappers delivered about goods which had been, were being and were intended to be sold and distributed in South Australia, namely, Velvet soap.

The facts laid before the Special Magistrate satisfied him that the appellants encouraged the despatch in or from South Australia of photographs or wrappers on Bushell's tea or Velvet soap respectively in exchange for various articles. If this were done the appellants intimated that it would be regarded as an offer to buy from them in Sydney, New South Wales, the article named at the stated price mentioned in the lists of the appellants. The facts disclosed are but a variation of the coupon system of trading.

It is now contended that the South Australian Act contravenes the provisions of sec. 92 of the Constitution. The device or means adopted by the appellants for trading among the States is restricted and hindered, and indeed prevented, in South Australia. *James v. Commonwealth of Australia*, [1936] A.C. 578, [1936] A.L.R. 333, has now established that the freedom prescribed by sec. 92 is "freedom at the frontier, "or to use the words of sec. 112, in respect of goods "passing into or out of the State." "The actual "restraint or burden, however, may operate while the "goods are still in the State of origin . . . or it may "operate after they have arrived in the other State." "In every case it must be a question of fact whether "there is an interference with this freedom of "passage." It is, however, no contravention of the freedom so prescribed to legislate for the repression of destructive monopolies or illegitimate means of trading—see at p. 626, [1936] A.L.R. 342.

It is no contravention, so it appears, of the freedom so prescribed to legislate for the licensing of transport within a State, although transport is an essential element of trade and commerce—*R. v. Vizzard*, 50 C.L.R. 30, [1934] A.L.R. 16; *O. Gilpin Ltd. v. Commissioner for Road Transport and Tramways (N.S.W.)*, 52 C.L.R. 189, [1935] A.L.R. 138; *Bessell v. Dayman*, 52 C.L.R. 215, [1935] A.L.R. 145; *Duncan and Green Star Trading Co. Pty. Ltd. v. Vizzard*, (1935) 53 C.L.R. 493; *Riverina Transport Pty. Ltd. v. Victoria*, 57 C.L.R. 327, [1937] A.L.R. 374. And, according to the decision in *Hartley v. Walsh*, 57 C.L.R. 372, [1937] A.L.R. 480, it is no infringement of sec. 92 to legislate against persons selling commodities unless packed in a registered shed or unless prepared or treated in a certain way. It was said that a law directed towards procuring standards of quality, condition and grade of articles of commerce is not in contravention of sec. 92—*ibid* at p. 383; and *cf. Ex parte Nelson*, 42 C.L.R. 209, [1929] A.L.R. 21; *Tasmania v. Victoria*, 52 C.L.R. 157, [1935] A.L.R. 157.

I should have thought, with my brother Dixon, that the Act discussed in *Hartley v. Walsh* was a plain contravention of the Constitution.

But the critical question now is, by what method or by what test can it be ascertained whether an Act contravenes the provisions of sec. 92? In the case of the *Peanut Board v. Rockhampton Harbour Board*, 48 C.L.R. at p. 283, [1933] A.L.R. 166, I said that the legislation the subject of attack must be scrutinised in its entirety, and its true character and effect ascertained; all the facts and circumstances, such as the nature of the Act, its operation, the character of the business involved, and its actual effect on the flow of commerce must be examined—*cf. Di Santo v. Pennsylvania*, (1926) 273 U.S. at p. 44. This, as it appears to me, is the result of the decision in *James v. Cowan*, [1932] A.C. 542; and *James v. Commonwealth*, [1936] A.C. 578; and of the recent decisions of this Court in the *Transport Cases* and in *Walsh v. Hartley*.

In my opinion it is not possible, in view of these decisions, to adopt the test stated in *McArthur's Case*, (1920) 28 C.L.R. at pp. 554-5, 27 A.L.R. 140; or that stated by my brother Dixon in *O. Gilpin v. Commissioner for Road Transport and Tramways*, 52 C.L.R. at p. 206, [1935] A.L.R. 141, which, as appears to me, is in line with, if not so extensive as, the test stated in *McArthur's Case*.

It cannot be pretended that the test propounded as the result of the decisions mentioned is very enlightening; it seems a rule of expediency rather than of law, and its application will imperil the freedom of interstate trade and commerce. It also threatens in decisions a wilderness of single instances.

But it is quite plain that the South Australian Act is aimed at preventing what is sometimes regarded as an illegitimate or undesirable method of trade. Such a law does not impede the freedom of trade prescribed by sec. 92.

Some minor points were taken in argument in support of the appeal. One was that there was no encouragement to despatch the photographs and wrappers in exchange for goods, but for the sale of goods in New South Wales. But the word "exchange" in the section is not used in any technical sense; it covers the despatch of coupons to another in order that he will forward goods at an agreed price. Another referred to a matter of evidence; that was sufficiently answered on the argument.

The appeals should be dismissed.

DIXON, J.—This appeal is brought under sec. 39 (2) (b) of the Judiciary Act 1903-1937, from a Court of summary jurisdiction.

The conviction of which the appellant complains is for an offence against sec. 5A (2) (b) of the South Australian Trading Stamp Acts 1924 and 1935. The matter is said to have become one of Federal jurisdiction because, upon the hearing of the information, the question arose whether sec. 92 of the Constitution provided an answer to the charge, whereupon the

information became a matter arising under the Constitution or involving its interpretation.

The appellant is a Company incorporated in New South Wales where, so far as appears, it carries on business. The case which the respondent, the informant, seeks to make against it is that, in order to further the sale in South Australia of a particular brand of tea, coffee and cocoa, the Company caused a circular to be delivered to householders in that State, informing them that they might obtain from the Company in Sydney any of a list of articles at prices stated in the list, prices much below their real selling value, if they sent postage stamps to cover the price and a specified number of labels to be found on or forming part of the outside packages in which tea, coffee and cocoa of that brand is sold by retail.

The general purpose of the Trading Stamps Acts is to suppress the practice of offering or giving to buyers or consumers of vendible articles some reward or rebate in money, goods or other advantages, upon their producing evidence that a fixed number or quantity of such articles has been bought or consumed. The provisions of sec. 5A are expressed in very wide, not to say indefinite, terms, with the evident object of covering, not only the many varying forms in which the practice may be manifested, but also of meeting in advance the ingenuity of traders desiring to defeat the policy, while obeying the letter, of the law, an ingenuity which seems to have proved too much for the earlier provisions contained in the Act of 1924.

In support of his case, the informant respondent relied upon one instance only of a delivery of the circular complained of. A witness proved that he found it in his own letter-box. To establish that it had been placed there by or under the authority of the defendant appellant, the informant depended upon the contents of the circular and presumptions which, he says, arise therefrom under an evidentiary provision, namely, sec. 5A (8). The appellant disputes the sufficiency of the presumptions arising, either from the sub-section or from the circumstances, to fix it with responsibility, and it also denies that the circular, which is cleverly worded, contains enough to support the charge. These are all points which have no Federal element in them. The appellant, however, says that, because one ground upon which it defended itself in the Court below involves Federal jurisdiction, it may rely in support of a direct appeal to this Court upon any ground, whether arising under State or Federal law. In the circumstances of the present case, this view is probably correct. For in the Court of summary jurisdiction the reason why the Federal question arose as one which must be decided in order to dispose of the information was that under State law the defendant's liability to conviction appeared to that Court to be complete. The "matter," that is the defendant's liability to a penalty, therefore neces-

sarily involved the interpretation of sec. 92; for it necessarily involved the question whether sec. 92 applied so as to protect the defendant from conviction.

As the considerations governing the correctness under State law of the conviction form the groundwork upon which the need for invoking sec. 92 rests, they must be dealt with by this Court in its turn.

The point that proof was not given of the delivery to the informant of the copy of the circular should, in my opinion, fail. Sub-section (8) of sec. 5A is, it is true, limited in its relevant operation to providing presumptive evidence that the defendant whose name appears upon the document is responsible for whatever encouragement the document contains, and that the encouragement was actually made, in the sense that the statement amounting to an encouragement was expressed or "published," as that word is used in the law of libel. It does not of itself provide proof that the witness was the person "encouraged," as is alleged in the information.

But when the fact that the circular was found in his letter-box is added to the facts presumptively proved by means of sub-sec. (8), that conclusion may be legitimately drawn from the whole. For the circumstances then in evidence, so to speak, are that a copy of a circular containing an encouragement to possible buyers of the brand of tea, coffee and cocoa is put forth by the defendant, and is found in the letter-box of a householder, T. H. Packman. Conceding the logical possibility of its having been put there by a complete stranger to the defendant, the improbability of this having happened is sufficiently high to allow of the contrary inference from the circumstances.

The offence charged in the information is encouraging Packman to despatch portions of the packages containing the tea to the defendant in exchange for goods. A point taken on this form of charge is that T. H. Packman, who is in fact a detective of police, did not undergo or experience any encouragement of the kind alleged when he read the circular. Elation at such evidence falling into his hands he may have felt, but the circular could not but fail to arouse in him an interest in the tea or the goods. Indeed, the circular was addressed, "Dear Madam." It is clear, however, that the offence consists in the act or words of the defendant, independently altogether of the effect produced upon the person to whom they are addressed.

Another point taken was that, in describing the course recommended by the circular as being to despatch the bits of package "in exchange for goods," the information was badly framed.

It was said that the transaction suggested by the circular would, if completed, amount to a true sale of the goods. Possibly the fact that they were sold at a low price, if the stamps sent in payment or satisfaction of the price were accompanied by portions of



HOME BENEFITS PTY. LTD. v. CRAFTER

tea packages, might support another form of charge under the same sub-section, namely, encouraging the despatch of the portions of packages in exchange for an advantage, the advantage of a very low price. But that charge was not laid. To amend would be difficult, because the consent of the Attorney-General, given under sub-sec. (7), was expressed in the form of the information—*cf. Ellis v. Wing Lee*, (1899) 24 V.L.R. 785, 5 A.L.R. (C.N.) 48; *Thomas v. McEather*, [1920] St. R. Qd. 166.

The point really depends on the meaning of the words "in exchange for any goods," as used in sub-sec. (2). I do not think that the various expressions accumulated in that provision are meant to be mutually exclusive. The words "in exchange for" are intended to be wide in their application, and are equivalent to "in return for." Not without a little hesitation I conclude that a transaction by which goods were obtained in return for a number of wrappers or packages and a low money price satisfied by stamps would fall within the words of the sub-section which have been chosen by the informant. The fact that the circular makes it clear that the portions of the package sent remain the property of the sender, and will be returned, if desired, seem to me to be of no importance. "In exchange for" are words not used in any technical sense, and the production of the wrappers or other tokens as evidence of a number of purchases is the point of the transactions at which the section hits. Nor do I think it matters that the circular professes willingness on the part of the defendant to accept other evidence, or that it ascribes to the sending of the portions of package the character of an offer to buy which the defendant may or may not accept. The wide words "in exchange for" cover the mutual provision of wrappers or other tokens, on one side, and of goods or other advantages, on the other.

I am therefore of opinion that under State law, considered independently of the Federal Constitution, the conviction was warranted.

But I am prepared to concur in the view that sec. 92 ought not to receive an application which would prevent the operation of sec. 5A of the State statute upon the transaction described in the circular. The matter was argued as if we ought to consider whether at any point any of the provisions contained in the section might conceivably interfere with the freedom guaranteed by sec. 92. I think that we ought to restrict ourselves to the actual transaction, or course of dealing, disclosed by the facts, and decide whether it is entitled, under sec. 92, to protection from so much of the provisions as actually strike at it. The transaction consists in a Sydney company, acting doubtless under an arrangement with the suppliers of the particular brand of tea, coffee and cocoa, offering to send to Adelaide by post, or by any means provided by the customer, goods in return for specified quantities of wrappers or packages of that brand of tea, &c., and

postage stamps of a specified amount, being much less than the value of the goods.

Of the interstate character of the transaction there can be no doubt. But its most striking feature is that it forms only a secondary consequence or incident in the sale or distribution of the tea, coffee or cocoa. It is not an independent commercial dealing. It is no part of an independent trade or trafficking in goods. Its essential characteristic is that it is the raising and fulfilment of some expectation created on selling the tea, coffee or cocoa for the purpose of increasing its competitive retail sale. It is altogether an accessory transaction to principal transactions which otherwise are left entirely free. The statute makes no difference between interstate and intrastate transactions, and it forbids only the allowance of rebates in kind of the nature in question, by or for traders, and the various separate steps by which that is, or may be expected to be, done. It is thus a State regulation of an incident of retail selling. It is uniform, and based upon the supposed undesirability of a commercial expedient practised in competitive trade for the purpose of increasing the sale of one man's goods at the expense of another's.

Doing the best I can with the case law upon sec. 92 as it stands at present, I think I should hold that no forbidden interference with interstate trade or commerce is involved in suppressing uniformly the promising or the giving of rebates in kind on the retail sale of commodities as a means of competition.

In my opinion the appeal should be dismissed.

HOUSEHOLD HELPS PTY. LTD. v. CRAFTER.

DIXON, J.—The fate of this appeal is admittedly governed by the decision in *Home Benefits Pty. Ltd. v. Crafter*. The appeal should therefore be dismissed.

EVATT, J.—The appellant Company was convicted before a Magistrate in South Australia of an offence created by sec. 5A (2) of the Trading Stamp Act 1924-1935 of the State of South Australia, for having in writing (by means of a printed circular dated 1st March, 1938) encouraged a person (one Thomas Packman) to despatch in South Australia, in exchange for goods, portions of packages delivered about goods (Bushell's tea), which had been, were being and were intended to be sold in South Australia. An appeal has been brought to this Court.

The appellant has raised questions involving not only the interpretation of sec. 5A of the Act, but also its constitutional validity. It is therefore of advantage to describe the general scheme of the statute.

The Trading Stamp Act, as originally passed in the year 1924, was based on a general principle which has been adopted in five of the six States of Australia—Goods Act 1928 (Vict.), secs. 82-85; Trading Stamps Abolition Act 1900 (Tasmania); Trading Stamps Abolition Act 1902 (Western Australia); the



Trade Coupons Act of 1933 (Queensland). The main object of the South Australian Act was to prohibit, in connection with the sale of goods, the use of trading stamps, coupons or other tokens the production of which would entitle the purchaser to receive either money or goods at a reduced price. It was also forbidden to issue or deliver in connection with goods any writing which represented that the purchaser of the goods would receive any benefit or advantage other than a discount payable in cash.

The method of suppressing what the South Australian Legislature regarded as an undesirable trade practice or system was not proof against avoidance or evasion. Although under the terms of the Act of 1924 a trading stamp included any "stamp coupon" "ticket cover wrapper package paper document means" "or device," the device was prohibited only in cases where possession of the stamps or tokens entitled the person producing them to receive actual or supposed benefit. In cases where a manufacturer marketed goods in a package or form which could be adapted to furnish the ultimate purchaser with the equivalent of a token or counter, but no promise or representation was made to the purchaser that production of such a token or counter would procure him any benefit, the terms of the Act were successfully avoided. To take an example from the facts of the present case: no liability was incurred under the Act of 1924 where all that the trading stamp company did was to represent that if the consumer produced a large number of photograph tokens, one of which was printed upon the wrapper of every packet of tea, it would consider, and might accept, an offer from such consumer to buy certain articles at a very reduced price, but would not bind itself to accept such offer. For in such a case photographs, even though faithfully collected by such a consumer during a considerable period of time, entitled him to nothing.

Yet all the evils considered by the Legislature to be inherent in the trading stamp system were reproduced in schemes of the character I have illustrated. Indeed, such schemes introduced an additional element of danger, because a trading company's invitation to collectors of tokens might be withdrawn at any time, and the consumer who had collected many tokens might ultimately be cheated of a reasonable expectation of getting the reward or advantage suggested but never promised.

Accordingly in 1935 sec. 5A was inserted in the statute, and it directly attacked, not the issue or delivery of trading stamps, but the outstanding feature of the coupon or stamp system, viz., the giving of money, goods or some other advantage in exchange for or in redemption of any coupons or stamps, &c., which had previously been issued in connection with the purchase of goods by consumers—sec. 5A (1). As a part of the Legislature's direct attack upon the

system consumers were prohibited from despatching or offering to despatch coupons or tokens in exchange for any benefit—sec. 5A (3). Traders were prevented from distributing goods with stamps or coupons on them or attached to them if such traders had reason to believe that such coupons or tokens were being used in connection with any scheme for their exchange or redemption—sec. 5A (5). Not only did the Legislature attack the system by this direct method, but in order to prevent any publicity from being given to any coupon scheme, it penalised those who invited or encouraged persons to send or offer to send coupons, &c., in exchange for any advantage—sec. 5A (2) (b). It was under the lastnamed provision of sec. 5A that the present appellant was convicted.

The general purpose of the new section is thus apparent. Whereas previously what was prohibited was merely the issue of trading stamps or coupons or writings containing promises or representations as to benefits, &c., the new section aimed at the suppression of the chief attraction of the coupon system, viz., the exchange transaction by which counters were handed over or produced in return for some pecuniary advantage, and the Legislature thought it advisable to suppress all encouragement to the consumer to commence saving up stamps or counters with the object of exchanging or redeeming them and obtaining his reward.

I now deal in order with the objections to the conviction.

1. It was argued that the document containing the encouragement was not shown to have been delivered to Packman by the appellant. Packman gave evidence that the document was in his letter-box at his address. It had the get-up of a circular intended for extensive distribution. It purported to be a business advertisement issued by the appellant. It was printed and elaborately illustrated with coloured representations of the articles which those interested in saving coupons, &c., might ultimately hope to acquire. It was headed, "Keep This New Circular for Reference." I am of opinion that there was *prima facie* evidence that the circular reached Packman in the ordinary course of the appellant's trade. Any other hypothesis is, though possible, extremely unlikely.

But sec. 5A (8) removes any doubt as to this point. Plainly the circular was "relevant to the charge," because it corresponded in date and other respects with the document referred to in the charge, and indeed was identical with such document. Further, the Magistrate was of opinion that the circular had been issued or delivered by some person, for he was quite entitled to reject the hypothesis that it had found its way into Packman's letter-box other than by delivery as a business circular. In these circumstances sec. 5A (2) expressly provides that the circular may be given in evidence and constitutes *prima facie* evidence that the encouragement con-

HOME BENEFITS PTY. LTD. v. CRAFTER

tained therein was made on the date charged and by the person whose name appeared on the document as its maker. The name which so appeared was that of the defendant.

This objection must therefore be overruled.

2. It was suggested that there was no evidence that the appellant "encouraged" Packman by means of the circular. It is true that, so far as appears, Packman's mind was not influenced either favourably or at all by the glowing solicitations of the appellant. None the less the circular was intended to encourage every person into whose hands it might come to set about the task of qualifying himself to obtain the "home benefits" illustrated and described. It was worded, "Dear Madam," but this feminine reference was seriously qualified by the inclusion in the list of "home benefits" of such articles as "one gent's military hair brush," "one Sheffield steel stock knife, two blades, pricker and tweezer," and "one leather crocodile grained tobacco pouch." I think it is fair to say that this point was not really pressed.

3. Next the appellant contended that the circular referred to in the complaint did not encourage other persons to do any act which amounted to a despatch of wrappers in South Australia, "in exchange" for goods.

In my opinion the circular encouraged the recipient thereof to qualify himself according to its terms, so that he might ultimately become the recipient of the advertised article or articles. The qualification required by the appellant was proof by the recipient that he had purchased sufficient tea, &c., to become possessed of the stated number of photographs supplied with each package. As the recipient was empowered to furnish such proof "by enclosing photos" or otherwise, the first alternative and the obvious and easy alternative (despatching the tokens) was certainly encouraged by the circular. Upon the recipient's despatch of such tokens and of postage stamps, the appellant might, and usually would, accept the recipient's offer and forward the selected article. It is true that the recipient's offer might not be accepted, but the circular encouraged the recipient to suppose that it probably would be accepted, in which case the article would be forwarded by the appellant.

Why was the circular not an encouragement to despatch photographs, &c., "in exchange for" goods? If the proposed transaction was carried through to its normal business completion (on the assumption of the appellant's *bona fides*) the recipient of the circular would send tokens to the appellant, and the appellant would subsequently send goods to the recipient. The circular offered to return the tokens to the recipient upon request and payment of an extra 2d. in stamps, and it also asserted that in other cases it would retain the tokens on the recipient's behalf. By its indifference to the question of the passing of the property in the tokens, the appellant indicated

that their production (no doubt for the purpose of cancellation) was the only thing which mattered. But in my opinion the Legislature was equally indifferent to the question of the passing of property in the tokens; and the words in sec. 5A (2) (b), "in exchange for," are not intended to describe a mutual passing of the legal title to the tokens and goods. The sub-section is directed to the transaction of despatching the tokens in exchange for money, goods or any other advantage. It is satisfied if, for instance, the consumer procures any advantage from the despatch of the tokens or if the consumer despatches such tokens so as to obtain any advantage. I do not see how the language of sec. 5A (2) (b) could be improved if it was intended to describe all transactions of the general character foreshadowed by the appellant's circular. The facts that in the terms of the appellant's circular postage stamps would accompany the token photographs, and that the property in the photographs would not pass to the appellant, do not alter the fact that the sub-section penalised the main transaction by which the trading tokens were to be sent to the appellant, and in return the appellant was to hand back goods to the recipient of its circular. To assert that the transaction may also be regarded as a straightout sale and purchase of the article selected by the recipient at the very small or nominal price indicated in the circular is not entirely inaccurate. But if a recipient merely sent to the appellant the postage stamps mentioned in the circular it is obvious that he would never receive the article he desired. In short the transaction included as an essential part of it the sending of the tokens in exchange for the article selected, and that is enough to attract the statutory prohibition. To say that there was merely a sale and purchase of the article and to ignore the despatch of the tokens is to forget the chief part of the transaction, the very part which the Legislature was endeavouring to suppress.

4. It was also contended that as, according to the circular, no binding contract would be entered into until after the appellant's receipt of the token photographs, the despatch of such photographs could not be "in exchange for" the article to be forwarded only after the making of the contract. This contention has in principle been dealt with under 3. In my opinion sec. 5A (2) (b) is not concerned with the time at which the contract between the collector of tokens and the trading stamp company comes into existence, or, indeed, whether such a contract ever comes into existence. It is enough that money or goods are being given in exchange for or in redemption of tokens irrespective of any binding agreement between those concerned in such transactions. Indeed, the tokens may be compared to a spurious currency which is accorded recognition by some persons only, and which the Legislature, for reasons deemed good, wishes to

suppress. It may be said to have penalised all attempts to give value in return for the spurious currency. It seems to be very difficult to suppose that in legislation of such a character the mere making of a contract, still less the time of the making of a contract, between the person handing over the tokens and the person giving value for them is of the slightest importance or relevance.

5. Finally, it was contended that sec. 5A of the South Australian Act is invalidated because such section is inconsistent with the freedom of interstate marketing of goods guaranteed by sec. 92 of the Federal Constitution.

In this connection one further point of statutory construction should be referred to. Mr. Ligertwood argued that the list of tokens in sec. 5A (4) included articles which might in themselves be of considerable value, so that, for instance, sec. 5A made it unlawful even to sell in the course of trade any articles which had been used as containers of commodities previously sold. Section 5A (5), as has already been noticed, prevents a trader from selling any of the tokens mentioned in sec. 5A (4), wherever such tokens are or may be used for the purpose of committing any of the offences penalised elsewhere in sec. 5A. It is important to observe that in no other respect is the sale of any of the tokens, &c., prohibited. It seems to follow that the sale of containers is permitted, provided that they are not associated with any coupon scheme. It was argued, however, that as sec. 5A (1) prohibits the giving of money or goods "in exchange for or in redemption of" the tokens specified in sec. 5A (4), all sales of containers are prohibited. I am unable to agree. If the Legislature had desired to prohibit the ordinary commercial sales in the course of trade of containers not associated with coupon or stamp schemes, it would undoubtedly have expressed such prohibition in direct language and in another statute. But nothing of the kind is intended, and the general scheme of the Act shows clearly, in my view, that the Legislature is endeavouring to suppress the handing over of money or goods, not as the *bonâ fide* purchase price of the stamps, coupons, tokens, packages, &c., but as a collateral reward or advantage for having purchased the commodities in relation to which purchases the stamps, coupons, packages, tokens, &c., have been "issued or "delivered" for the purpose of evidencing the fact of such purchases.

If this is right there is nothing whatever in sec. 5A which prohibits the *bonâ fide* sale of containers of commodities considered merely as containers. Indeed, to sell a barrel or a bottle for a purchase price would never be described as despatching the barrel or the bottle "in exchange for" money.

The question of constitutional validity must therefore be considered upon the footing that the Legislature of South Australia is suppressing within its

borders the trading stamp or coupon system, whether in connection with local or interstate transactions. The statute is to be regarded as regulating the marketing in South Australia of commodities whether such commodities have come to be sold in the course of interstate trade or purely local trade. The Legislature has considered it is against the best interests of trading and trade to allow the sale of commodities to be pushed and puffed by collateral schemes and devices which may induce retail purchase, but on grounds quite unrelated to the price or quality of the goods. Section 5A in particular attempts to prevent the establishment of any token scheme by which purchasers may be induced to collect wrappers or tickets issued on or with each article purchased in the hope or expectation that they will at some distant time be exchanged for money or goods. Such a token scheme can never operate as a true system of discount or rebate, even assuming that a discount or rebate is regarded as applicable between manufacturer and ultimate consumer. For it is notorious that in relation to coupon schemes many retail consumers will never collect at all, many will commence to collect but will subsequently discontinue; and some, faint but pursuing, will collect until they can satisfy the condition required for redemption, even although they purchase more commodities than they really need. The element of inequality or chance is quite inconsistent with a genuine system of discount or rebate, and may itself be regarded by the Legislature as a very undesirable feature of the coupon system. And if, as usually happens, the manufacturer of the commodities does not exchange or redeem the coupons, and a third party intervenes between manufacturer and consumer to perform the function of a trading stamp company, the additional costs thereby incurred tend to bear heavily upon manufacturer, retailer and consumer alike—or so the Legislature might think. So far as the system of trading stamps is concerned, the objections to it have been stated as follow:—

"(1) That the customer of a stamp trading shop is misled by the inducements held out into believing that he is getting something for nothing, whereas in fact he may be paying very heavily for his purchase.

"(2) That many trading stamp companies offer poor value in the gifts which they themselves provide.

"(3) That the retailer is frequently unable to escape from the trading stamp system even though he may wish to do so.

"(4) That trading stamp companies are essentially parasitic, providing no useful service to the community in return for the profit which they make.

"(5) That the system offers special temptations to fraud by ephemeral trading stamp companies."

(Report of Committee of Board of Trade (England) on Gift Coupons and Trading Stamps, 1933, Cmd. 4385.)

HOME BENEFITS PTY. LTD. v. CRAFTER

In fairness it should be added that, in the report from which I have quoted, such objections were not accepted as valid by a Committee of the Board of Trade in England. But the Legislature of South Australia is not bound to accept the reasoning which appealed to such committee or to determine that in South Australia the coupon system must inevitably operate for the best of all possible worlds. Indeed, the great majority of the State Legislatures of Australia have accepted the view that the system of trading stamps should be suppressed as being opposed to the best interests of trade.

It follows that it is erroneous to approach the question of constitutional validity by regarding the exchange for value of trading coupons issued with each package of (say) tea as constituting a separate and independent integer of trade. The Legislature of South Australia is prohibiting the adoption of the coupon system in relation to the marketing of the tea itself, and it is only in the course of regulating such marketing that it has decided to eliminate an excrescence upon such marketing, viz., the exchange of coupons for value.

Section 92 certainly does not embody the economic or political policy of *laissez faire*, as distinct from the policy of interstate free trade. As a general rule both the States and the Commonwealth may suppress trade practices and methods deemed improper, unfair, or immoral. It is true that the judgment of this Court in *McArthur's Case*, (1920) 28 C.L.R. 530, 27 A.L.R. 130, holding that the Commonwealth is immune from the guarantee of sec. 92, was based in part upon the theory that under a contrary holding certain Commonwealth statutes which regulated interstate trade by suppressing improper practices in relation to such trade would have to be adjudged invalid. In *James v. The Commonwealth*, (1935) 52 C.L.R. 570, in this Court, the theory was expressly rejected in the judgment of my brother McTiernan and myself—at pp. 598-600, [1935] A.L.R. 282. We examined each of the Commonwealth statutes, and pointed out that they should be deemed valid although the Commonwealth was bound by sec. 92. On appeal to the Privy Council, Lord Wright adopted a similar method of approach, and decided that the statutes in question merely forbade "objectionable trade practices in interstate trade"—[1936] A.C. at p. 626—or "illegitimate methods of trading"—*ibid.* As Gavan Duffy, C.J., had pointed out in a passage cited by McTiernan, J., and myself, "no civilised nation has ever tolerated a 'trade or commerce, whether foreign or domestic, which was not subject to regulation and control, both with respect to the method of carrying it on 'and the general conduct of those who carried it on'" —(1935) 52 C.L.R. at p. 599, [1935] A.L.R. 282.

The result of *James' Case* is that, while the Commonwealth and the States are equally bound by sec. 92, none the less the Commonwealth, in relation to

interstate trade and the States in relation to all its trade, including its interstate trade, may lawfully regulate the methods of marketing, and may lawfully control the conduct of traders in order to suppress unfair and improper trading. In other words, sec. 92, although it declares border freedom for the purpose of interstate marketing, has nothing whatsoever to say in prohibition of Commonwealth or State regulations which are directed against unfair trading.

The application of these principles to the present case causes no difficulty. The marketing in South Australia of New South Wales commodities is completely unaffected by the fact that to the extent of its jurisdiction the State of South Australia has forbidden a very special, and in its opinion a very undesirable, method of promoting the sales of such commodities by coupon or token systems.

In my opinion all grounds of appeal fail, and the appeal should be dismissed.

The appeal in the case of *Household Helps Pty. Ltd. v. Crafter* is also governed by this decision. That appeal should also be dismissed.

McTIERNAN, J.—The more important question is whether sec. 92 of the Constitution is infringed by sec. 5A (2) of the Trading Stamp Act 1924-1935 of South Australia. The provisions of this sub-section plainly interfere with the freedom of a trader to promote his trade within the State or with other States by resorting to the practices forbidden by the sub-section. But not any practice to which a trader may wish to resort in order to maintain or increase the volume of his trade, even if that trade extends beyond the limits of a State, is shielded by sec. 92 from Commonwealth or State interference. The interference of the Commonwealth or a State with the freedom of such trade is not a violation of sec. 92, unless there is opposition between the action constituting the interference and the idea of freedom to which sec. 92 compels obedience. The relevant ideas of freedom to which the section commands obedience is "freedom 'as at the frontier.'" In *James v. The Commonwealth*, [1936] A.C. 518, that is explained at pp. 613-1. The regulation by a State in that State of the trade flowing into it from or out of it to another State is not necessarily inconsistent with this freedom. In the present case the legislation which is impugned as a violation of sec. 92 regulates in South Australia, both its internal trade and the trade flowing into it from or out of it to the other States by suppressing the practice of attaching to the distribution of goods the collateral benefit of prizes to persons who collect either coupons issued upon the purchase of goods or the containers or wrappers used in their distribution. Section 5A (2) prohibits traders from encouraging the collectors of the coupons or wrappers or containers to tender or despatch them in exchange for money or goods. What is aimed at is the suppression of the

exchange of goods as prizes for collecting the coupons or wrappers or containers which the statute treats as mere counters, the value of which, if any, as articles of commerce is not taken into consideration in the prize-giving transactions.

The provisions of the legislation of which the subsection now in question forms part are fully explained in the judgment of my brother Evatt, with which I agree. It is clear that the Act does not overtly or by any device or subterfuge interfere with the free passage "as at the frontier" of the goods which a trader would seek to popularise by resorting to the practices forbidden by the legislation. It is not the trade in the goods itself, but things made incident to the trade, that are within the scope and operation of the Act. I agree that sec. 5A (2) does not violate sec. 92.

The remaining question is whether the evidence, assisted by the evidentiary sections of the Act, is sufficient to support the conviction. I agree that it is sufficient. In my opinion the appeal should be dismissed.

#### HOUSEHOLD HELPS PTY. LTD. v. CRAFTER.

The dismissal of this appeal should follow from the dismissal of the appeal in *Home Benefits Pty. Ltd.* The same questions of law are involved in the two cases.

#### *Appeals dismissed.*

[Solicitors—For the appellants, Baker, McEwin, Ligertwood and Millhouse; for the respondent, Hannan, Crown Solicitor.] O. J. G.

FULL COURT — (Rich, Starke,  
Evatt and McTiernan, JJ.)  
(Sydney and Melbourne.)

April 3,  
May 22.

#### CARRIER AUSTRALASIA LTD. v. HUNT.

*Company—Managing director—Contract appointing for term of years — Change of articles — Directorship ended during term—Dismissal from managing directorship—Breach of contract.*

A company agreed to employ *H* as managing director for five years, and *H* agreed to serve it in that capacity for that term subject to the company's articles of association, the company to be at liberty to end the term by notice if he ceased to be a director of the company.

The articles of association of the company provided that a managing director should not whilst he continued to hold that office be subject to retirement by rotation, but if he ceased to hold the office of director then he should *ipso facto* and immediately cease to be managing director. A further article provided that, "subject to the provisions of any agreement for the time being subsisting, the Company may by extraordinary resolution remove any director before the expiration of his period of office. . ." and that upon such removal his office as director should be *ipso facto* vacated. During *H*'s term of office as managing director the company amended the last mentioned article by deleting the words referring to the agreement, and the company afterwards by extraordinary resolution removed *H* from the board of directors of the company,

and thereupon gave notice of the termination of the agreement. *H* sued for damages for wrongful dismissal.

Upon demurrer the Supreme Court of New South Wales held that, although the company had power to alter the article as stated, the contract conferred upon it no right, by virtue of that alteration, to dismiss *H* during his term of office as managing director.

On appeal to the High Court, the Court being equally divided in opinion (Rich and Starke, JJ., for allowing the appeal, Evatt and McTiernan, JJ., *contra*), the appeal was dismissed, pursuant to section 23 (2) (a) of the Judiciary Act 1903-1937.

*Shirlaw v. Southern Foundries Ltd.*, [1939] 2 All E.R. 113, referred to.

Decision of the Supreme Court of New South Wales, 56 W.N. (N.S.W.) 5, 39 S.R. (N.S.W.) 12, affirmed.

#### APPEAL.

Noel Percy Hunt commenced an action in the Supreme Court of New South Wales to recover damages from Carrier Australasia Limited for wrongful dismissal, alleging that, in consideration that he would enter into the service of the Company and serve it for five years in the capacity of managing director, at a salary of £3000 per annum, the Company promised to retain him in that service during that period. The plaintiff claimed £20,000 damages for breach of the agreement.

By its fourth plea to the declaration the Company set out the agreement at length. A term of this agreement was that "the Company agrees to employ the "managing director, who in turn agrees to serve the "Company as managing director for the term and "subject to the Company's articles of association and "the provisions hereinafter contained." The plaintiff was to devote the whole of his time to the business of the Company, and not during the term or for five years thereafter to be interested in any competitive business. By clause 7 it was provided that—"Notwithstanding anything hereinbefore contained, the Company shall be at liberty to terminate the term by "notice to that effect if the managing director ceases "to be a director of the Company [or in certain other "events, such as absence or incapacity]."

The articles of association authorised the directors to appoint one of their body to be managing director and, subject to the provisions of any contract, to remove him. They also provided that a managing director should not whilst he continued to hold that office be subject to retirement by rotation, but if he ceased to hold the office of director then he should, *ipso facto* and immediately, cease to be managing director. Article 91 was in these words—"Subject "to the provisions of any agreement for the time being "subsisting the Company may by extraordinary resolution remove any director before the expiration "of his period of office, and may by ordinary resolution appoint another qualified person in his stead."

The Company, by special resolution, amended Article 91 by deleting the words "subject to the provisions of any agreement for the time being subsisting." The Company thereafter by extraordinary