

OUTLINE OF SUBMISSIONS FOR THE RESPONDENTS

A fundamental reconsideration of Section 92 may not be necessary to decide this case.

Whether the Court approaches Section 92 on the basis of "received doctrine" or formulates a new approach we submit that the Regulation in question should not be held to apply to the possession of these crayfish by these Respondents in the circumstances of this case. The crayfish were legitimate articles of commerce. The Respondents were introducing them into Tasmania having purchased them in South Australia for ordinary commercial reasons as part of their trade in exporting live crayfish.

It matters not that some were to be exported overseas.

Ferguson v Stevenson (1951) 84 C.L.R. 421 at 433.

Pilkington v Frank Hammond Pty. Ltd. (1974) 131 C.L.R. 124 at 135, 136 and 152.

What the Respondents were doing was of the essence of trade commerce and intercourse among the States whatever view one takes of the authorities. These crayfish had not become involved in any sale or subsequent transaction since being purchased and introduced into Tasmania and no question of "antecedent" protection is involved.

Grannall v Marrickville Margarine Pty. Ltd. (1955) 93 C.L.R.

55.

The transaction in which the Respondent company engaged was essentially one of interstate trade and the possession which is the ground of the prosecution is an inseparable concomitant or consequence of that transaction.

(Compare Ferguson v Stevenson (1951) 84 C.L.R. 421 at 435).

There are many areas of uncertainty in the application of Section 92 which need not be addressed as relevant to the decision of this case:

- no question of administrative discretion to grant a licence is relevant;
- no question arises as to whether a first sale is part of interstate trade commerce and intercourse;
- the facts of this case do not involve lunatics, infants, bankrupts, diseased crayfish or noxious drugs - creatures or things calculated to injure.

(Compare Commonwealth v Bank of New South Wales (1940) 79 C.L.R. 497 at 641).

On the basis of the strong joint judgment in Ferguson v Stevenson (1951) 84 C.L.R. 421 and the subsequent decision of Ackroyd v McKechnie (1986) 66 A.L.R. 287 where there were no dissenting judgements it is open to the Court to dismiss this Appeal without creating new doctrine. Very strong reasons would be needed to justify a reversal of those cases.

Chapman v Suttie (1963) 110 C.L.R. 321 is a case dealing with sale rather than possession but is another case without any relevant dissent which illustrates that "protectionism" and "discrimination" are not the only criteria for Section 92 invalidity.

This Court may have to decide on the validity of the argument that it is necessary for the regulation to apply to the possession of "interstate" crayfish in order to enable Tasmania to police the Tasmanian fisheries.

This will involve a consideration of Ferguson v Stevenson (1951) 84 C.L.R. 421 and Ackroyd v McKechnie (1986) 66 A.L.R. 287) and the Tasmanian Legislation.

We submit that a defence of "interstate trade" possession is totally compatible with protection of Tasmanian fishery resources. The Act or regulations can validly allow the defendants the "excuse" - Tasmanian Evidence Act Section 110, Commonwealth Crimes Act Section 14 - of "interstateness", and in any event should be read down so as not to apply in breach of Section 92 - Tasmanian Acts Interpretation Act 1931 Sections 3 and 5(2).

The Queensland Full Court in Horne v Tweed River Transport Pty. Ltd. ex parte Horne (1967) 61 Q.J.P.R. 114 held that the onus of proof of the facts necessary to establish the protection of Section 92 is on the Defendant so no policing problem is involved.

The burden of imposing Tasmanian size standards on catches of crayfish legally taken in South Australia or elsewhere is both significant and direct.

If this Court intends to re-examine "discrimination", "protectionism" or "regulation" as touchstones of validity it would be helpful to look at the proposition

"No person shall have (possess) X in Tasmania"

(which necessarily prohibits bringing into Tasmania from interstate)

applied to commodities which are the subject of interstate trade commerce

or intercourse, with various predicates viz

- South Australian crayfish
- undersized interstate crayfish
- diseased crayfish
- old crayfish
- any crayfish not bought from a licensed fisherman
- undersized crayfish
- crayfish caught in October

(Compare Regulation 40A of the Sea Fisheries Regulations 1962 (page 38).

It will be apparent that some of these clearly do not infringe Section 92 while others do.

The sort of law which was referred to by Stephen J. in Permewan Wright Consolidated Pty. Ltd. v Trewitt 145 C.L.R. 1 at 24-27 - what might to be described as regulation of activities of the community as a whole, - or the examples in James v Commonwealth (1936) 55 C.L.R. 1 at 57 and 58 are valid.

Other laws when applied to interstate trade are prima facie an infringement of freedom. A simple prohibition is the best example. A qualified prohibition may not be regulation, although a qualified prohibition may be justified as regulation by the circumstances in some cases

Commonwealth v Bank of New South Wales (1949) 79 C.L.R. 497 at 640.

The law must be looked at in its context of possible application to the interstate situation.

The onus to establish facts which bring a defendant within Section 92 protection is on the defendant.

The onus of showing that a law which impinges on or derogates from interstate freedom of trade commerce or intercourse operates compatibly with Section 92 should be on the supporter of that law.

Otherwise the freedom becomes unreasonably difficult to establish in a forensic situation.

The sort of facts required are either clear (prohibition on drug dealing for example) or difficult for a defendant to establish in a court of trial - for example many of the agreed facts in this case.

To justify a diminution of freedom the law must be demonstrably relevant to a recognized community interest and must be a reasonable enactment in that context. Regulation of the conduct of interstate trade may be one such interest. It is irrelevant here. This law prohibits imports. The comments of the Court in Ferguson v Stevenson at the top of page 435 are directly applicable.

With reference to the Commonwealth argument (category B - "discrimination"):

Laws which have in their context a different effect on or operate in a different way in relation to "out of state" transactions should be regarded as discriminatory. Section 113 of the Constitution would otherwise be unnecessary. It expressly allows some "out of state" goods to be treated as if they were intra-state goods. If Section 113 read "crayfish" instead of "intoxicating liquor" it would be a complete justification for the Fisheries Act and Regulations applying to the crayfish in this case.